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ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

ALL DIVISIONS OF THE SUPREME COURT

AND

COURTS OF SPECIAL JURISDICTION

1943

VOLUME 1

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Recorder of Cambridge.

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Published by the Proprietors of

THE LAW JOURNAL, 37-39 ESSEX STREET, LONDON, W.C.2

ALL ENGLAND LAW REPORTS ANNOTATED

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CORRIGENDA

- P. 103. *Joss v. Joss.* In the first line on this read: "... settlement and objection was taken on the ground that the settlement was not within ..."
- P. 234. *GEORGE v. MITCHELL AND KING.* This appeal was from a judgment of His Honour Judge J. H. D. HURST given at the Windsor County Court, and not as stated in the report.
- P. 316. *WILES v. MADDISON.* In the last line (F3) of the quotation from the Meat (Maximum Retail Prices) Order, 1940, for "reasonable" read "unreasonable."
- P. 463. *MELLOWS v. BUXTON PALACE HOTEL.* At conclusion of case for *Appeals dismissed with costs* read *Appeals allowed with costs.*

THE ALL ENGLAND LAW REPORTS ANNOTATED

SPARKS *v.* EDWARD ASH, LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), **December 3, 1942.**]

Street Traffic—Pedestrian crossing—Accident—Failure of motorist to stop before reaching crossing—Contributory negligence—Whether duty of pedestrian altered by reason of black-out—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4, 7.

The plaintiff was injured on an uncontrolled pedestrian crossing during the black-out by a motor vehicle owned by the appellants. It was contended that the decision in *Bailey v. Geddes* (1) excluded the defence of contributory negligence :—

HELD : the action was for a breach of statutory duty and in such an action the defence of contributory negligence is available.

Decision of CROOM-JOHNSON, J. ([1942] 2 All E.R. 214) reversed.

[EDITORIAL NOTE. There is no doubt that at the time *Bailey v. Geddes* (1) was decided it was thought that that decision placed severe limitations, if it did not actually exclude, the defence of contributory negligence when a pedestrian was injured on a pedestrian crossing. The decision in *Caswell's* case (6) has settled the question of the availability of that defence where the action is for breach of statutory duty and it seems now clearly settled that the defence is available in all such cases. Unless the decision herein is overruled in the House of Lords, it is clear that contributory negligence is a defence to a claim for injuries sustained on a pedestrian crossing. SCOTT, L.J., differs only on the point whether the case should go back to the judge for re-trial. He takes the view that all the available evidence had been tendered and that there was no evidence of contributory negligence. Incidentally in his judgment he offers suggestions for the amendment of the law on this subject which, no doubt, as soon as normal conditions prevail again, will receive the attention of the legislature.

AS TO PEDESTRIAN CROSSINGS, see HALSBURY, *Hailsham Edn.*, Vol. 16, p. 492, para. 724; and FOR CASES, see DIGEST, *Supp.*, *Street and Aerial Traffic*, Nos. 31c.-31f.]

Cases referred to :

- (1) *Bailey v. Geddes*, [1938] 1 K.B. 156; [1937] 3 All E.R. 671; Digest *Supp.*; 107 L.J.K.B. 38; 157 L.T. 364.
- (2) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 13 Digest 326, 631; 67 L.J.K.B. 782; 78 L.T. 647.
- (3) *Edmonds v. Watermen & Lightermen Co. (Master & Senior Warden)* (1855), 24 L.J.M.C. 124; 13 Digest 329, 664.
- (4) *Bailey v. Williamson* (1873), L.R. 8 Q.B. 118; 36 Digest 252, 43; 42 L.J.M.C. 49; 28 L.T. 28.
- (5) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; [1939] 3 All E.R. 722; Digest *Supp.*; 108 L.J.K.B. 779; 161 L.T. 374.
- (6) *Radley v. London & North Western Ry. Co.* (1876), 1 App. Cas. 754; 36 Digest 109, 729; 46 L.J.Q.B. 573; 35 L.T. 637.
- (7) *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K.B. 132; Digest *Supp.*; 103 L.J.K.B. 465; 151 L.T. 87; *on appeal*, [1936] A.C. 206.
- (8) *Swadling v. Cooper*, [1931] A.C. 1; Digest *Supp.*; 100 L.J.K.B. 97.
- (9) *Chisholm v. London Passenger Transport Board*, [1939] 1 K.B. 426; [1938] 4 All E.R. 850; Digest *Supp.*; 108 L.J.K.B. 239; 160 L.T. 79.

(10) *Franklin v. Bristol Tramways & Carriage Co., Ltd.*, [1941] 1 All E.R. 188.

(11) *Butterfield v. Forrester* (1809), 11 East, 60; 26 Digest 446, 1634.

(12) *Tidy v. Battman*, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90.

APPEAL by the defendants from a decision of CROOM-JOHNSON, J., dated June 11, 1942, and reported [1942] 2 All E.R. 214. The facts are fully set out in the judgment of SCOTT, L.J.

W. H. Cartwright Sharp, K.C., and *N. R. Fox-Andrews* for the appellants. A
Alban Gordon for the respondent.

SCOTT, L.J.: This is a case of personal injuries tried by CROOM-JOHNSON, J., without a jury, in which he awarded £1,515 damages to the respondent in respect of personal injuries caused to him, when on an uncontrolled pedestrian crossing, by the breach of the Pedestrian Crossing Places (Traffic) Regulations, 1935, by the appellants' driver.

The appellants' driver, driving an unloaded 5-ton motor lorry, ran into the respondent when the latter was, as found by CROOM-JOHNSON, J., actually on an uncontrolled pedestrian crossing in Bushey Green Road, Lewisham, just north of the Brownhill Road junction. The road there runs north and south, and is 50ft. across. The crossing is 14ft. wide, and there is no refuge island. The road has a white line down the middle, and there is a tram-track with rails on each side of that line, the westerly track, therefore, being for north-bound traffic, the direction in which the appellant was bound. The accident occurred in black-out conditions about 7.25 a.m., on Dec. 28, 1940, black-out not being due to end before 8.30 a.m. It was evidently very dark at the time. The plaintiff was a man of 50, with good health and good sight, of excellent character, employed for at least 8 years in the highways department of the Lewisham Borough Council, which, on the evidence of an officer from the department, would not have employed him then or previously in that department in that particular area—a very busy traffic area—unless his eyesight and health had been perfect. B

Of the Pedestrian Crossing Places (Traffic) Regulations, 1935, Nos. 3 and 4 are the most material ones, but nearly all are relevant for the purpose of ascertaining their true intention and their effect upon the respective rights and duties of pedestrian and motor driver. No. 2 defines a crossing as a place "indicated" by a prescribed traffic sign—the familiar Belisha beacon, and the row of shining metal studs in the road on each side of the crossing. The other material regulations are as follows: C

3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing. D

4. The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing. E

6. No driver . . . shall . . . stop upon any crossing unless . . . (b) it is necessary for him to stop in order to avoid accident. F

7. No foot passenger shall remain upon any crossing longer than is necessary for the purpose of passing from one side of the road to the other with reasonable dispatch. G

These regulations were first made by the Minister of Transport in 1934, under the Road Traffic Act, 1934, s. 18, and laid on the table of both Houses under sect. 111 of the principal Act. They were repeated in the same form in 1935, and in that form continued to be applied to all pedestrian crossings until the outbreak of war. It will be observed that they assume conditions of complete visibility. They contain no provision to assist in their application to conditions of fog—although, especially in London and some other towns, in spite of peace-time illumination of streets and brilliant lighting of cars, visibility is often restricted to a few yards or even feet, especially at night. When war conditions supervened, when street lighting was suspended, buildings had to shut in their light, and the illumination of motor vehicles was drastically cut down, it might have been supposed that at least uncontrolled crossings would receive some special attention, either by way of amending the regulations or under the emergency powers of war legislation, but no such action was taken. On the contrary, H

the same regulations of 1935 were, on Mar. 14, 1941, re-introduced. That date was, it will be noted, some weeks after the accident to the respondent, and the re-enactment, therefore, does not directly affect this appeal; but the existence of the identical regulations at the time of the accident, which were so re-introduced a little later as a war measure, shows that the old regulations were intended to apply in spite of the black-out, and makes it necessary for the court to consider to what extent and how regulations which assumed perfect visibility are to be construed and applied in the black-out.

A The case is thus one of very wide public importance. It raises directly the broad question of whether effective protection is afforded to pedestrians in the black-out hours by the present system of pedestrian crossings; and indirectly our decision may affect the operation of the Pedestrian Crossing Places Regulations at all times. The validity of the regulations is challenged; and, if they are valid, we have to consider the true measure of the pedestrian's duty, under
B the regulations, towards the driver of the motor vehicle, so far as may be involved by the facts of the present case. There is also a minor question, affecting only this particular case, which we have to decide. It arises out of the course which the judge took below. He held that the plea of contributory negligence failed, but he so held as a decision of law, not of fact, because he considered that this court had in *Bailey v. Geddes* (1), laid down a general rule that the plea of contributory negligence is not open to a defendant as against a plaintiff who was
C actually on a pedestrian crossing when the motor vehicle injured him. The minor issue raises the question whether we can dismiss the appeal or must send the case back for re-trial. That question is not disposed of, in my opinion by saying that *Bailey v. Geddes* (1) did not lay down such a general rule, or that, if it did, what was said was *obiter* and wrong.

D The toll of pedestrian life and limb has been so terrible, and the internal combustion engine is so lethal a weapon and so dangerous in fog or the black-out, that very stringent regulations may well be reasonable—indeed, anything less may fail to protect. Official figures for Great Britain for the last three years before the war, 1936-1938 (see Ministry of Transport White Paper, No. 106, of 1939), show annual totals of over 6,500 persons killed and 225,000 injured in road accidents; of the latter, a quarter seriously. In 1937 and 1938, of those killed nearly half were "pedestrians", and of those injured about one-third in
E each class (seriously injured and slightly injured). In 1940 (at the very end of which year the plaintiff met with his accident) the Ministry of Transport official figures for deaths in road accidents was 8,609, and for 1941, was 9,169. The official category of "pedestrians" is not limited to pedestrians proper, as in the above figures, children on roller-skates, toy bicycles, etc., and persons wheeling bicycles and barrows, or leading animals etc., are included. These
F figures do not throw any light on the degree of usefulness of pedestrian crossings; but they do show the magnitude of our annual loss of life and limb in road accidents.

Whilst it is thus incontestable that the interest of the pedestrian proper demands strong measures of protection, it was contended by counsel for the appellants before us (as it had been, I think, below) that the regulations are wholly invalid, on the ground that they are unreasonable in the requirements
G exacted by them from the drivers of motor vehicles, because they involve the slowing down of all motor traffic to an extent, as he submitted, injurious to the commercial community of the country. He made this submission even as regards peacetime, when visibility is not cut down by black-out regulations, but urged that in war conditions it is not practically feasible to comply with them. I will deal presently with his legal argument about "unreasonableness", but I do not accept his proposition that they cannot be complied with, although no
H doubt obedience to them does involve some slowing down of traffic below the maximum speed of 20 miles per hour permissible (under the order of Jan. 27, 1940) in built-up areas in the black-out. As a general rule, in black-out conditions the driver cannot see the "indications" of an "uncontrolled" crossing from any distance away—the "Belisha beacon" not at all, unless, he is close to his near kerb and to the crossing, and the transverse line of road studs not until his head-light makes them shine. It is, of course, only very regular drivers on a route who know in advance just when to expect the next crossing. Some kind of solution is greatly needed which will give pedestrians real protection,

but will cause the minimum of inconvenience to motor traffic. How far this may prove within the power of the courts gradually to achieve, through a careful consideration of the true measure of duties respectively owed under the regulations by motor driver and pedestrian alike, it is impossible to foretell. The present case, in my opinion, helps to throw some light on that inquiry; but I doubt whether in black-out conditions there is any complete or satisfactory solution possible, without amendment of the regulations and appropriate action of an executive character by way of control or lighting.

The plaintiff's evidence was accepted by CROOM-JOHNSON, J. It was as follows. Without any torch he stepped off the pavement on the east side of Bushey Green Road at the proper place through the opening between the guard rails on to the Belisha crossing; he first looked right, then left, and saw nothing. He then proceeded across, "sticking to" the pedestrian crossing, looking straight in front of him, and following behind several young women, the nearest about 4ft. ahead of him. He had got past the middle of the road, and the young women were evidently getting or had got safely across, when he received a heavy blow from the left. He remembered nothing more. He saw no vehicle pass. The judge was quite definite in his finding that the plaintiff kept to the crossing throughout. The driver's story was that he had been stopped behind an omnibus at a controlled crossing some 200yds. back, and then had followed the omnibus at a pace of 10 miles per hour, the omnibus going ahead faster. He had a masked headlight on his off-side and a shaded side-light on his near side, the former throwing a narrow, dimmed beam straight forward for some 20ft. His lights were, I gather, dual purpose lamps. By the time he had got near to the Brownhill Road crossing, of the position of which he was fully aware, the omnibus had forged ahead; but he brought his lorry "almost to a stop to let the people cross the crossing", as he saw a man with a torch. When that man had passed over the crossing, "he proceeded on his way", changing up from first to second gear. That was just the wrong thing to do. He should have remained in first gear for 14ft. more, and changed up at the far side of the crossing. That was his duty under regs. 3 and 4 read together and that breach caused the collision. What he, in fact, did was to increase speed on entering, instead of on leaving the crossing. He saw nothing of the plaintiff till he observed his head two or three feet in front of his off wing. In his evidence the driver stated that the plaintiff was then off the crossing, some way beyond its northern edge, and it is the fact that the plaintiff was found in that position by a police constable after the accident, lying across the western tram track, the off-side front wheel of the lorry just overlapping that track; but CROOM-JOHNSON, J., was satisfied that the plaintiff was still on the pedestrian crossing when he was struck.

It may be that certain matters were never cleared up completely—that is not unusual—but CROOM-JOHNSON, J., made no comment on the plaintiff's conduct beyond observing that the plaintiff did not see any light coming from his left—either that of the defendants' lorry, or of the omnibus which had preceded the defendants' lorry by some little distance. On the driver's story, I think it is a fair inference that that omnibus had passed to the north of the crossing before the plaintiff entered it at its east end, because the omnibus went right past a stationary omnibus or lorry, which was standing on the west side of the road a little to the north of the crossing, and then drew in towards its near side to stop for passengers. I do not think that the failure of the plaintiff to observe the beam of the defendants' lorry when he was walking over the crossing is in itself any evidence of contributory negligence, or even of want of care for his own safety, for the young women had his attention because he was following their lead, and in the crossing he may well not have noticed the light, or, if he did see it, he would expect the car that bore it to stop short of the crossing. Had he seen it and realised that it was not stopping, he would not only have remembered it, but almost certainly would have stood still himself. The truth is, although he could not know it, that at the critical point of reaching the studs, the appellant not only did not stop but accelerated from first to second speed, and apparently that action was the immediate and effective cause of the accident.

Even if the measure of the duty to use care, incumbent on a pedestrian, were as much at large when he is on the crossing as off it, or if the statutory

regulations for his protection on the crossing were much less stringent for motor drivers than they are, I should feel great difficulty, on the evidence, in feeling any doubt and ordering a new trial; but, in the light of the existing regulations, which apply even in the blackest black-out, I think it would be quite wrong to put the successful plaintiff to that expense. I cannot see on the evidence anything to suggest contributory negligence. In my opinion, he was entitled as he was walking across, to expect from any motor driver: (i) that the driver would on "approaching" the crossing so regulate his speed as to be able to stop short of the crossing as required by reg. 3; (ii) that the driver would, as his masked head-light brought the studs of the crossing into view and he realised at the same time that he could see nothing on the crossing on either side of his beam of light, surely stop or proceed so cautiously as to be able to stop in an instant as required by reg. 4; (iii) (on the facts of the present case) that he would see, and take warning from the group of young women, as they were walking across in front of the respondent. When I say the respondent was "entitled to expect" such conduct, I do not suggest that he had a right in reliance on it to behave in a wholly irresponsible manner, or to commit any act of obvious stupidity; but it is important not to forget the statutory duty, which was imposed by reg. 7 on him as a pedestrian on the crossing, to continue his passage across with all "reasonable dispatch", for it was as much his duty under that regulation to "keep his course and speed", if I may use a metaphor from the regulations for prevention of collisions at sea, unless he saw danger of collision, as of the driver to manoeuvre in accordance with regs. 3 and 4; and a default by him would under reg. 7 be just as much an offence within reg. 8 as would be a default by a driver under reg. 3 or reg. 4.

The fact that the respondent did not see the man with a torch raises a presumption that the man had got over before the respondent turned to the right off the pavement and on to the crossing; and the fact that the driver saw the torch, but not the women as they crossed his beam, indicates (on the respondent's evidence, which CROOM-JOHNSON, J., believed) that the driver had a bad look-out, and that that with his acceleration and not any act or omission of the respondent was the effective cause of the accident.

Before further discussing the bearing of regs. 3 and 4 on the duty of care which a pedestrian on a pedestrian crossing owes towards the driver of a motor vehicle, a duty which must be broken if the defence of contributory negligence is to arise, it is necessary to consider more than one aspect. It will be convenient to take first the submission of counsel for the appellants that each of those regulations is so "unreasonable"—to use his word—as to make it invalid, even originally when first enacted in conditions of peace, but *a fortiori* since war and emergency legislation have almost entirely deprived our streets of illumination, and made it very difficult for our motor vehicles either to see or be seen. The criterion of such "unreasonableness", as will operate in law to invalidate delegated legislation, was considered and explained in *Kruse v. Johnson* (2), by a Divisional Court of seven judges specially convened by LORD RUSSELL OF KILLOWEN, C.J., to consider a bye-law passed by the Kent County Council for restricting street noises—for example, singing—in a residential area, which had been made under the enabling powers of the Local Government Act, 1888. The court (MATHEW, J., dissenting) held that that bye-law was valid. In the judgment of LORD RUSSELL OF KILLOWEN, L.C.J., there are two passages which are so relevant that I will quote them fully. At p. 96, he said this:

The question reserved for this court is whether the bye-law is valid. If valid, the conviction is to stand. It is objected that the bye-law is *ultra vires*, on the ground that it is unreasonable and therefore bad. It is necessary, therefore, to see what is the authority under which the bye-law in question has been made, and what are the relations between its framers and those affected by it. But first it seems necessary to consider what is a bye-law. A bye-law of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the bye-law, they would be free to do or not do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation; see *Edmonds v. Masters, etc., of the Company of Watermen and Lightermen* (3).

The second passage is on pp. 99, 100 :

... when the court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any bye-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what COCKBURN, C.J., said in *Bailey v. Williamson* (4) an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the court to condemn bye-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*". But it is in this sense and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.

If it is the duty of the courts to recognise and trust the discretion of local authorities, much more must it be so in the case of a minister directly responsible to Parliament and entrusted by the constitution with the function of administering the department to which the relevant field of national activity is remitted. Over and above these grounds for trusting to that minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses, as provided by sect. 111 of the 1930 Act with which the Act of 1934 is to be read as one, and can be annulled in the usual way. For the above reasons, this court has, in my opinion, no power to declare these two regulations invalid for unreasonableness, certainly not on any ground submitted in argument before us. The duty of compliance may, even in broad daylight, put on motor traffic a considerable burden of inconvenience; but it is for the minister, and ultimately for Parliament, to consider and weigh that drawback, and if necessary amend the regulations under the procedure of the Act; but, as the regulations stand, they seem to me to rest upon the vital importance of safeguarding life and limb, and it is not for the court to do anything but construe their language and apply their provisions so far as that is in a practical sense possible, without straining their language in order to prevent inconvenience to motor traffic.

As I have already said, the regulations throughout assume visibility. The crossing is to be seen by its "indications", the presence or absence of pedestrians on the crossing is to be observable by eyesight, whether under reg. 3 or reg. 4. In conditions of visibility I can see no reason why each regulation should not be obeyed in accordance with its tenor. But if that be the legal effect of the two regulations, the pedestrian who rightly shuns the risks of the open street between crossings and seeks the protection of his sheltered area, must surely be absolved in some degree from the insistent duty of care which he owes to motor traffic elsewhere. But there is a further aspect, over and above the obvious intention to reduce the toll of life, which should not be overlooked in construing these regulations. Before attempting to specify the respects in which that duty of care is less inside the sheltered area than outside it, it is worth while recalling the harsh and often cruel bearing of our common law doctrine of contributory negligence upon the right of a plaintiff to recover damages for negligence or breach of statutory duty by the defendant. However slightly to blame he may be, however little that blame may contribute to causing the result, if he is in fault and his fault does contribute, the plaintiff recovers nothing. It was in the light of this ancient rule of law that these regulations were framed. In addition, in the great majority of cases where a pedestrian is run into or over by a motor

vehicle, the pedestrian gets all the injury and the motor little or none. It would, therefore, not be an unreasonable exercise of discretion by the Minister of Transport if he gave his pedestrian plaintiffs some help on the issue of contributory negligence. These considerations are relevant in interpreting any doubtful language in the regulations for the purpose of ascertaining their bearing on the duty of the pedestrian. If a pedestrian were not entitled to walk across the pedestrian crossing without watching all the time to see whether some motorist might not be about to break reg. 3 by not stopping, or reg. 4 by not giving him precedence, he might almost as well be walking over the open street. I cannot think that the regulations as a whole make it his duty to be thus continually on the look-out, especially as the one positive duty they lay on him is to walk across with all dispatch. If I may take the analogy of the sea regulations in force all over the world, there is, up to a point, some analogy in the case, either of a ship at anchor run into by a ship under way, or of a ship whose duty it is merely to keep her course and speed whilst the other is under an express duty to give way, and if possible to pass under the stern of the first ship. The duty of the ship at anchor, or of the hold-on ship, is much less rigorous and exacting than that of the other ship. Primarily, it is to make no change. So, on the pedestrian crossing, I think the duty of the pedestrian is intended to be less onerous than if he were crossing the road anywhere outside the crossing; his business is to attend primarily to his own duty of getting across as soon as he can with safety. It was this broad thought that was present to my mind in *Bailey v. Geddes* (1), although I expressed myself in terms that were too universal. If the effect of the statutory code is to relieve the pedestrian on the crossing of some of the duties which he would owe to the motorist away from the crossing, the plea of contributory negligence necessarily has its scope cut down in a case like the present. The reality of the position is that the essential object of the set of regulations was to induce pedestrians to desist from the practice of crossing streets which carry much traffic anywhere and anyhow, to the danger of themselves and the inconvenience of the traffic; and the inducement was the provision of sufficient privileged crossings where the pedestrian would have the right of way and be officially authorised and indeed invited to cross without fear of being run over and free from the burden of anxiety and care involved in having to be perpetually on the look-out for approaching traffic if he wanted to avoid sudden death. This must mean a statutory lightening of his duty of care; in truth that is what the pedestrian crossing means.

There is judicial authority by analogy for the view which I am expressing that the stringency—all in favour of the pedestrian—of the statutory duties imposed on the motor driver is of itself, and apart from inferences from the terms of the duty imposed on the pedestrian by reg. 7, a reason for construing the rules as relieving the pedestrian of some of the duties which would lie upon him outside the crossing. The present action for damages for breach of the statutory requirements is similar in kind to actions under the Factory or Mines Acts for breach of statutory precautions required by their provisions, such as *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5). LORD ATKIN dealt with the nature of the action, at pp. 164-166 ([1939] 3 All E.R. at pp. 729-731):

The argument is that safety obligations are placed upon employers for the purpose of protecting not only workmen who are careful but also those who are careless, and that the object of the legislature is defeated if the right to sue for injuries caused by the breach of the safety regulations is denied to the careless workman for whose benefit amongst others, the legislation was specially enacted. I venture to think that this attractive theory does not give sufficient weight to the true cause of action in such cases. The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damages is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as, for instance, if out of bravado he puts his head into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendant's omission but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce

the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which "contributes to cause" the injury, a phrase which I take from the opinion of LORD PENZANCE, in *Radley v. London & North Western Ry. Co.* (6). . . . I cannot therefore accept the view that the action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong. I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances.

Having laid down the general rules, he then added some observations which have a bearing on what I have been saying :

But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances ; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine.

I agree with the statement of LAWRENCE, J., in *Flower v. Ebbw Vale Steel, etc., Co., Ltd.* (7), cited by LORD WRIGHT, at p. 214 :

I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

This seems to me a sensible practical saying, and one which will afford all the protection which is necessary to the workman.

In the same case, LORD WRIGHT expressed similar views. He said at pp. 174, 175 ([1939] 3 All E.R. at pp. 736, 737) :

In my opinion the appellant is right on both points. There is, first, no sufficient evidence that Caswell was guilty of any fault, so as to displace the onus imposed on the respondents by reason of their breach of statutory duty which caused the death, and secondly, the hypothesis relied on by the respondents, if established, would not show that he was guilty of more than an error of judgment or heedlessness or inadvertance in regard to his own safety not amounting to contributory negligence or misconduct such as to displace the claim. On this latter point I adopt as an adequate criterion of what would bar the man's claim the statement of LAWRENCE J., in *Flower v. Ebbw Vale, etc., Co.* (7). He accepted, as he was required to do by the authorities binding him, that contributory negligence was a valid defence to a claim for breach of a statutory duty such as had been committed in that case, but he proceeded to do what I think had not been done previously, i.e., to define a standard to help a jury or a judge to decide whether or not a man had been guilty of negligence in cases of this type. The principle, he said, did not demand of a "workman in a factory a higher degree of care than an ordinary prudent workman in a factory would show." He proceeded : "The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants' breach of duty. I find that he could and that the proximate cause of the accident was his own disobedience of orders . . ." I note the word "proximate", for the use of which there is support in *Swadling v. Cooper* (8). He added : "in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence."

He then added very fully with such actions at pp. 177-179, and said, at pp. 179, 180 ([1939] 3 All E.R. at p. 740) :

Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertance or carelessness, which is then the dominant or effective cause of the injury. This follows, I think, if the rules of contributory negligence in road accident or collision cases are suitably adapted to deal with breaches by an employer of his statutory duty.

In that phrase, "an act of inadvertance or carelessness" which is not the "dominant or effective cause of the injury", he expressed the sort of attitude which, in my view, the court ought to take up in examining the conduct of a

pedestrian accused of contributory negligence when actually on a pedestrian crossing.

On contributory negligence, CROOM-JOHNSON, J., in the present case, said, at p. 215 :

I have not heard any argument on the question of any contributory negligence by the plaintiff, because in view of *Bailey v. Geddes* (1), if it applies to this case, counsel for the defendants thought that it was not of any utility to argue the point, but I do not think that it has been given up and I think counsel for the defendants would still like to keep in reserve the question of contributory negligence if it should be held hereafter by any court that reg. 3 does not apply to the facts of this case. I see, from the approving nod which he gives to this observation, that I have rightly interpreted the course which he has taken in this trial.

I infer from this that counsel for the defendants was reserving his argument about contributory negligence for the Court of Appeal, but had not been limited by CROOM-JOHNSON, J., in any way either in cross-examination or in examination-in-chief of the driver, and that all the available evidence relevant to the issue was before the court. Apparently the only conceivable criticism of the respondent's conduct was upon his failure to see the light of the appellants' lorry. What CROOM-JOHNSON, J., said was this :

I think, however, I ought to add that the plaintiff told me that he did look both to the right and to the left. In cross-examination he told me that when he got out into the road he looked. The difficulty about that is that one would have thought that he might have seen the light of the vehicle which afterwards knocked him down, but he did not. If this point has to be determined by anybody hereafter, I can only say that I do not find it necessary to say, for the purpose of this judgment, whether that amounted to contributory negligence or not.

This is the only point upon which, in my opinion, there could be a question of sending the case back for re-trial ; but it is not, in my opinion, enough to found the suggestion that there really was any evidence of contributory negligence. In the first place, the respondent's attention may have been upon the heads or backs of the young women in front of him, particularly the one nearest him, and not on the ground. In the second place, seen at right angles in cross perspective, the line of light on the ground must have been very narrow as well as dim. Even if the respondent might have seen it, I cannot think his omission to observe it involved such a degree of fault as to constitute a breach of duty towards the appellants, who was unequivocally in breach of his statutory duty of safeguarding the respondent, amounting to contributory negligence, still less such as can be regarded as a causal factor in the accident within *Caswell's* case (5). It would be exactly the kind of omission or slight want of care which, in the light of the positive regulations, would not establish the defence of contributory negligence. I have, therefore, come to the conclusion that although CROOM-JOHNSON, J., was wrong in treating the *obiter dicta* contained in *Bailey v. Geddes* (1) as necessarily excluding the question of contributory negligence in all pedestrian crossing cases, I think that the effective, or dominant, or real cause of the accident was the driver's breach of regs. 3 and 4, and that CROOM-JOHNSON, J., arrived at the right conclusion in the present case and that we ought not to send it back.

Before parting with the case I would make certain earnest suggestions for the consideration of the authorities concerned. The first is that the regulations should be again carefully considered with a view to amendment, if so advised, or more probably with a view to executive action by way of control, particularly in regard to lighting arrangements for pedestrian crossings in towns, if feasible at the present time ; or possibly to reducing the number of uncontrolled crossings. This would be hard on pedestrians, but, if vehicular traffic is to suffer inconveniences—as it must—it may possibly be fair to put pedestrians to a rather larger share of it—even to make the pedestrian carry a torch except at controlled crossings ; it may be necessary to make it an offence in some traffic areas for a pedestrian to cross anywhere but at a "pedestrian crossing". Many unnecessary accidents to pedestrians occur in this way. I express no opinion on these questions of executive policy. But the really important need, in the interest of the public, is to prevent the loss of life and the maiming of pedestrians.

There is one suggestion of legal reform, the need for which for pedestrians would, if my judgment is erroneous on the issue of contributory negligence

in the present case, be raised in an acute form. It is that the common law rule of contributory negligence, which today constitutes a complete defence so that the injured pedestrian recovers nothing, should be abolished, and for it should be substituted the proportional rule under which the court can apportion the loss between plaintiff and defendant in accordance with the degree of blame attaching to each for causing the accident, as has been done with such eminently satisfactory results in the Admiralty Court since 1911, pursuant to the International Convention which the late LORD STERNDALÉ and I signed on behalf of His Majesty's Government at Brussels, in 1910. In 1939 the very strong Law Revision Committee, presided over by LORD WRIGHT (with GODDARD, L.J., as a member) devoted the whole of a closely reasoned report to the reform, and urged its adoption very strongly. I venture to suggest that a bill to carry that advice into effect would be non-contentious, and universally welcomed even during the war.

In my opinion the appeal should be dismissed. My brethren think a new trial should be ordered. I recognise that the point on which we differ is not an easy one; but, assuming that I am wrong, to define the just measure of care owed under the Pedestrian Crossing Regulations by a pedestrian on a crossing to a motorist is not simple, and the proper direction to a jury on that issue would raise some questions of law which are not easy. I have endeavoured to give some guidance on them. My brethren offer none. I think the trial judge is entitled to such guidance as we can give him if the case is to go back.

MACKINNON, L.J. : This is an appeal from CROOM-JOHNSON, J. The plaintiff was knocked down by the defendants' lorry during the black-out period, when the lights on the lorry were by regulation reduced to a minimum. When he was hit, the plaintiff was within the limits of a pedestrian crossing. He, therefore, claimed that the defendants were liable because their driver had acted contrary to the provisions of the Pedestrian Crossing Places (Traffic) Regulations, 1935.

Those regulations in terms contemplate that the driver of a vehicle as he approaches a crossing (a) can see that it exists, and (b) can see what is upon it. Apparently the regulations have been re-enacted after the time when all street lighting was prohibited and when lights on motors were drastically reduced. It is difficult to understand how the regulations can be reasonably enforced when (a) a driver not familiar with a particular locality does not know, and cannot see, that he is approaching a crossing, or when (b) though he does know that he is approaching a crossing (as the defendants' driver did in this case), it is quite impossible for him to see if there is any pedestrian upon it. Those considerations need not be explored in this case, having regard to the course of the trial. The judge intimated that he regarded the decision of this court in *Bailey v. Geddes* (1) as laying down a rule of law which bound him, and he took that rule of law to be that in any case in which a pedestrian is hit within the limits of a crossing by a motor, the owners of the motor must be liable to pay him damages, and it is not open to them to plead that there was contributory negligence on the part of the pedestrian. He, therefore, gave judgment for the plaintiff, without addressing his mind to the question whether the plaintiff had been negligent in not observing the lights of the car, and not stopping. I am not sure whether all the evidence on this aspect of the case was adduced, having regard to the judge's view of the law. But in his judgment he expressly states that he is not considering that question, and that counsel for the plaintiff, by a respectful nod, has reserved it for future consideration.

I think the judge was in error in thinking that *Bailey v. Geddes* (1) propounded the suggested rule of law. It is true that there are passages in the judgment of SLESSER, L.J., which may be thought to do so. GREER, L.J., certainly did not do so; his judgment deals solely with the facts of the case. SCOTT, L.J., in the later case of *Chisholm v. London Passenger Transport Board* (9) has stated that he did not do so. The majority of this court in *Chisholm's* case (9) held that in such a claim by a pedestrian, the defence of contributory negligence on his part is, as a matter of law, open to the owner of the motor. DU PARCQ, L.J., dissented, but he did so on the questions of fact, and I do not understand him as suggesting anywhere that when a claim is based on breach of this regulation, no defence of contributory negligence is open to the motor owner as a matter of law.

That that defence may be relied on, and, if established on the facts, must defeat the pedestrian's claim, seems to me clear on general principles. The regulation has statutory force. The claim of the pedestrian can be, and is based on an alleged breach by the motorist of a statutory duty, and may be so based without specifying negligence on his part. It seems, however, to be now clearly settled by *Caswell v. Powell Duffryn Co., Ltd.* (5), in the House of Lords, that to a claim for damages for personal injury caused by a defendant's breach of a statutory duty, that defendant may plead that the effective cause of the injury was the plaintiff's negligence, that is, a plea of contributory negligence; and, if he establishes that, the plaintiff will fail in his claim.

A In the result, I think that CROOM-JOHNSON, J., applied a supposed rule of law that was erroneous, and his judgment based thereon must be set aside. As he abstained from considering the suggested defence of contributory negligence, because he thought it was not available, and as I do not think the evidence was sufficiently elicited on that question for us to deal with it, I think that there must be a new trial of the action. The appellants should have the costs of this appeal, and the costs of the abortive trial should abide the result of the new trial.

C I have had the privilege of reading the judgment of SCOTT, L.J., and that of GODDARD, L.J., and the addendum to it. I entirely agree with the observations in that addendum. In particular I welcome the protest against the practice of reporting judgments of this court upon questions of fact, which are later relied upon by counsel as laying down rules of law. There is no more glaring instance of that than *Franklin v. Bristol Tramways* (10). I believe I am recorded in that as saying "I agree". If I had ever dreamed that anyone would think the case worth reporting, and still more if I had thought that anyone would regard it as a precedent, I should certainly have said, "I agree in the proposed result". If anyone suggests that the leading judgment lays down any rule of law, so far as I am concerned, I protest against the idea. The observations in that judgment seem to me merely to voice a truism, namely, that when it is pitch dark, everyone on a highway, whether he is driving or walking or riding, must be more alert and exercise more care than he needs to do when there is brilliant sunshine.

E So far as this case is concerned, for my own part, I think that it lays down one rule of law, and only one, namely, that, when a plaintiff claims damages for injury caused to him by the defendant's breach of a statutory regulation, the defence of contributory negligence, that is, that the effective cause of the plaintiff's injury was his own negligence, is available to the defendant. If anyone thinks this case is worth reporting when that very proposition has been so clearly laid down in *Caswell's* case (5), I trust that it will only be cited as authority for that proposition and for nothing more.

F GODDARD, L.J. [read by MacKINNON, L.J.]: In this case it has been found as a fact that at the time when he was struck by the lorry the plaintiff was on a pedestrian crossing. It was admitted that the defendant did not see the plaintiff till he was 2 or 3 ft. away from him and when he could not stop, but it follows that the plaintiff must have been on the crossing when the defendant reached it. G In these circumstances the judge has held, on the authority of *Bailey v. Geddes* (1), that there is no answer to the claim and that no question of contributory negligence arises.

H Two questions arise. The first is whether the lighting regulations have made any difference to the positive duty imposed by the Pedestrian Crossing Regulations in a case where it was impossible for the defendant to see that the plaintiff was on the crossing. The second is whether contributory negligence can be a defence where the accident takes place on a crossing.

On the first question, as the Pedestrian Crossing Regulations have been re-issued and laid before Parliament since the restriction on lighting was imposed, it must be assumed that it was not intended that the obligations imposed by the former should be affected by the latter; but it is obvious that very considerable difficulties arise in their application, because—more especially in regard to reg. 3—one would suppose that it is contemplated that the driver of a vehicle must be able to see, first, that he is approaching a crossing, and, secondly, whether or not a pedestrian is on the crossing. Pedestrian crossings have to be

indicated by standards on either side and by studs in the road. It may be that the minister is satisfied that the lighting which is permitted on cars is enough to enable a driver to see that he is approaching a crossing. If it is, and he is unable to see whether a pedestrian is on it, it would seem to follow that at every crossing he must approach at a speed that will enable him to stop if necessary before he reaches it.

In the present case the judge has found that the plaintiff was on the crossing, and the defendant admitted that he knew of the crossing and thought he was on it but he contended that the plaintiff was beyond it. It is unnecessary to consider what the position would have been had the defendant not known of the presence of the crossing and it had been found that he could not see it. The judge held that *Bailey v. Geddes* (1) decided that the duty imposed is positive, and gave no finding on the issue of contributory negligence. It was apparently assumed, both by counsel and by the judge, that in view of that decision it was not open to argue in the court below that contributory negligence was a defence, though the point was taken so that it might be argued on appeal. It has, I think, been generally assumed that *Bailey v. Geddes* (1) did decide that once a breach of the regulations was proved there was no room for a defence of contributory negligence, and that the later decision in *Chisholm v. London Passenger Transport Board* (9) did not turn on contributory negligence, but on the fact that, in the circumstances of that case, the driver had not committed a breach of the regulations, and so was able to rely on the negligence of the plaintiff. In the former case it is true that two members of the court did say that it was impossible for a defendant, who had committed a breach of the regulations, to rely on the defence of contributory negligence; but, with respect, when the facts of that case are examined, the passages in the judgments to which I have referred are really *obiter*. GREER, L.J., decided the appeal on the ground that on the accepted facts it was the defendant's negligence that caused the accident, and that there was no evidence of negligence on the part of the plaintiff. He nowhere said that, if there had been contributory negligence, the plaintiff could none the less recover. The other members of the court, I think, took the same view of the facts, and in that case the observations to which I have referred were not necessary for the decision.

However, assuming that this court did decide that the negligence of the plaintiff could not be pleaded in answer, such a decision cannot, in my opinion, now be considered correct in view of *Caswell v. Powell Duffryn* (5). That was a case of breach of statutory duty, and I cannot see that, for this purpose, there is any difference between the duty imposed by one statute and another. LORD WRIGHT defined the action in *Caswell's* case (5), as a common law action based on the statute to protect the workman, and said that it belonged to the category of strict and absolute liability. Here the action is based on a statutory regulation to protect the pedestrian; but it is equally an action on the case, and damage is the gist of the action. So it seems to me that the question for the court is whether the damage was caused by the defendant's breach of the statutory regulation. If it was not, but was caused by the plaintiff's act or default, the defendant is not liable, nor is he if the damage is caused partly by the plaintiff's negligence if it be an effective cause. LORD ATKIN in *Caswell's* case (5) put it thus, at p. 165:

I find it impossible to divorce any theory of contributory negligence from the concept of causation . . . you must in the ultimate analysis be asking who caused the injury. Later he quoted LORD ELLENBOROUGH, in *Butterfield v. Forrester* (11), at p. 60:

One person being in fault will not dispense with another's using ordinary care for himself.

I can find no warrant for differentiating between one class of statutory duty and another for this purpose. If contributory negligence is a defence to a breach of the duty imposed by the Factory Acts for the protection of a limited class, it must be equally a defence where the duty is imposed by the Road Traffic Act and orders made thereunder for the benefit of a wider class, if, indeed, it is right to consider pedestrians as a class, though I think they should be regarded as the public generally. This is not to say that negligence ought to be lightly imputed to a pedestrian on a crossing. He is entitled to expect that a driver will obey the regulations, just as a driver or pedestrian is entitled to expect that

another driver will keep to his proper side of the road. But it must also be remembered that the lighting regulations have imposed special difficulties on drivers, and pedestrians ought to bear in mind that, while they can see the lights of an approaching car, it is far more difficult and perhaps impossible for the driver to see them. Whether a pedestrian has exercised the degree of care that an ordinary prudent man would have done in the circumstances is a question of fact, and I hope that courts may no longer hear *Franklin v. Bristol Tramways* (10) cited as though it laid down some rule of law, for, as was pointed out in *Tidy v. Battman* (12), it is wrong that questions which are questions of fact should be confused by importing into them as principles of law a course of reasoning which has been properly applied in deciding other cases on other sets of facts.

Since writing the above I have read the judgment of SCOTT, L.J., and must make some further observations. I agree with him that we cannot treat the order as invalid; but I cannot agree that we should dismiss the appeal on the ground that, though the judge gave no finding on the matter, there was no evidence of contributory negligence. In my opinion the court cannot lay down any rule or set any particular standard for determining whether or not a plaintiff has been guilty of contributory negligence, whether the accident happened on a pedestrian crossing or elsewhere. As I have already said, I think this is a question of fact depending on all the circumstances of the case, and ought not to be treated as one of law. If, to use the words of LORD ATKIN in *Caswell's case* (5), the injury is the result of two causes operating at the same time, a breach of duty by the defendants and an omission on the part of the plaintiff to use ordinary care for his own protection, he cannot recover. I cannot, for myself, attempt to lay down what may or may not constitute negligence on the part of a plaintiff in regard to a particular class of accident beyond the classic definition of negligence. This is just what is so often contended was done in *Franklin's case* (10) with regard to the duty of foot passengers in the present lighting conditions; yet this court has refused over and over again to treat that case as establishing a rule by which it and courts of first instance are to be bound, and I need not repeat what I quoted earlier in this judgment from *Tidy v. Battman* (12). It is worth remembering that in that case the county court judge and one judge in the Divisional Court thought that they were obliged to find the defendant guilty of negligence because of some observations in previous cases in this court, and it was against this view that LORD WRIGHT, M.R., protested.

I think the trial judge should in this case, as in any other, be left to form his own opinion on the facts. The judge gave no finding on the matter because he thought he was precluded from doing so, and it is clear from his judgment that counsel did not argue the point, though he left it open, because he had thought the same. In my opinion there was evidence on which the judge could have found contributory negligence, and this is not a case in which we could have reversed his decision, whichever way he found, had he decided it. A judge who can see and hear the witnesses is in a far better position than we can be to decide the matter, and I think, therefore, that the case should go back for a new trial.

Appeal allowed.

Solicitors: *Stanley & Co.* (for the appellants); *Mawby, Barrie & Letts* (for the respondent).

[Reported by C.ST. J. NICHOLSON, Esq., Barrister-at-Law.]

H BRITISH AMERICAN TOBACCO CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Porter), **December 7, 8, 9, 1942.**]

Revenue—National defence contribution—"Controlling interest" in company—Indirect control—Finance Act, 1937 (c. 54), Sched. IV, paras. 4, 7 (b), 11.

The appellant company held shares in 11 companies operating outside the United Kingdom, which were not, therefore, liable to be assessed to

national defence contribution. In the case of 4 of those companies, the appellant company itself controlled more than 50 per cent. of the votes. In the case of the remaining 7 companies, more than 50 per cent. of the votes were controlled by the appellant company in conjunction with a company or companies in which the appellant company controlled more than 50 per cent. of the votes :—

HELD : the appellant company had a controlling interest in all the companies within the meaning of the Finance Act, 1937, Sched. IV, para. 7 (b), and the dividends received by the appellant company from these companies should be included in its income liable to national defence contribution.

Decision of the COURT OF APPEAL ([1941] 2 All E.R. 651) affirmed.

[EDITORIAL NOTE.] It has been unsuccessfully contended that a control by a bare majority holding is insufficient. The argument was that, to have a controlling interest, a controlling company must have such a holding that it could ensure the passing of resolutions which must be passed by more than a bare majority of votes. This contention has been rejected by all the courts and in a few sentences VISCOUNT SIMON, L.C., has shown that a bare majority of votes is sufficient for effective control of a company.

AS TO CONTROL OF COMPANY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 89-92, para. 187, p. 290, para. 576; and FOR CASES, see DIGEST, Vol. 28, pp. 25-30, Nos. 136-154.]

Case referred to :

(1) *Noble v. Inland Revenue Comrs.* (1926), 12 Tax Cas. 911.

APPEAL by the taxpayer from an order of the Court of Appeal, dated June 30, 1941, and reported [1941] 2 All E.R. 651, dismissing an appeal from a decision of LAWRENCE, J., dated Apr. 8, 1941, and reported [1941] 2 All E.R. 86, where the facts are fully set out.

J. Millard Tucker, K.C., and *John S. Scrimgeour* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

VISCOUNT SIMON, L.C. : My Lords, this appeal is brought, by special leave of this House, from the order of the Court of Appeal (SCOTT, CLAUSON and GODDARD, L.JJ.), which dismissed an appeal by the appellants from a judgment of LAWRENCE, J., on a case stated by the commissioners for special purposes of the Income Tax Acts. The matter arises upon an assessment to national defence contribution made upon the appellant company under the Finance Act, 1937, Part III, and the question in dispute is whether the appellant company had "a controlling interest" in certain foreign companies referred to in the case within the meaning of that expression as contained in the Finance Act, 1937, Sched. IV, 7 (b), so as to require that dividends received by the appellant company from these foreign companies should be included in its income liable to national defence contribution.

Counsel for the appellant company put forward two contentions in support of the view that the appellant company had no such controlling interest. First, he argued that "interest" in this connection means interest of a proprietary nature and that the condition that there should be a controlling interest would only be satisfied if the appellant company itself owned a sufficient shareholding in the other company to control the latter. Secondly, he contended that, in any event, a controlling interest is not constituted by the control of the bare majority of shares (whether directly or through other companies), but that the control must be of such proportion of shares as would secure the passing of a special resolution or other resolution for which a special majority is required by the terms of the constitution of the foreign company.

These two contentions have been rejected as unsound by each tribunal which in turn has dealt with the appellant company's claim, and at each stage the decision arrived at has been in favour of the Crown. Notwithstanding the full and careful argument addressed to the House, I take the view that the decision arrived at below was correct, and I understand that your Lordships are in agreement with me that the appeal should be dismissed.

The case turns on the meaning of the words "controlling interest" in the context in which they are used. The appellant argues that, in order that one company should have a controlling interest in another, it must be the beneficial owner of a requisite number of shares in that other company, either registered

in its own name or in the name of its nominees; and that if company No. 1 owns all the shares in company No. 2, which in turn owns all the shares in company No. 3, company No. 1 has no interest, controlling or otherwise, in company No. 3.

A It is true that in such circumstances company No. 1 owns none of the assets of company No. 2, and *a fortiori* owns none of the assets of company No. 3, and in that sense neither owns, nor has an interest in, company No. 3. But that is to treat the phrase "controlling interest" as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. The word "interest", however, as pointed out by LAWRENCE, J., is a word of wide connotation, and I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company. If, for example, the B appellant company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellant company will none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter.

C In my opinion this is the meaning of the word "interest" in the enactment under consideration, and, where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act. I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this D connection got a controlling interest in the company.

E As to what may be the requisite proportion of voting power, I think a bare majority is sufficient. The appellant company has, in respect of each of the foreign companies referred to in the case, the control of the majority vote. I agree with the interpretation of "controlling interest" adopted by ROWLATT, J., in *Noble v. Commissioners of Inland Revenue* (1), when construing that phrase in the Finance Act, 1920, s. 53 (2) (c). He said at p. 926 that the phrase had a well-known meaning and referred to the situation of a man

... whose shareholding in the company is such that he is more powerful than all the other shareholders put together in general meeting.

F The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes. It is true that for some purposes a 75 per cent majority vote may be required, as, for instance (under some company regulations) for the removal of directors who oppose the wishes of the majority; but the bare majority can always refuse to re-elect and so in the long run get rid of a recalcitrant board. Nor can the articles of association be altered in order to defeat the wishes of the majority, for a bare majority can always prevent the passing of the necessary resolution.

G We are proceeding, in the absence of evidence as to foreign law, on the basis that the law governing these foreign companies does not differ materially from our own.

I move that the appeal be dismissed with costs.

LORD ATKIN: My Lords, I agree.

LORD THANKERTON: My Lords, I am of the same opinion.

LORD RUSSELL OF KILLOWEN: My Lords, I also agree.

H LORD PORTER: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: D. M. Oppenheim (for the appellants); Solicitor of Inland Revenue (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

CLAYTON AND ANOTHER *v.* RAMSDEN AND OTHERS.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Romer), **October 28, 29, December 4, 1942.**]

Wills—Conditions—Forfeiture—Uncertainty—“Marriage with a person who is not of Jewish parentage and of the Jewish faith.”

The testator by cl. 8 of his will inserted a condition subsequent whereby his daughter would forfeit her interest under his will if she married “a person who is not of Jewish parentage and of the Jewish faith.” The testator died in 1925 and the daughter subsequently married a man who, it was admitted, was neither of Jewish parentage nor of the Jewish faith. It was contended that the terms “of Jewish parentage” and “of the Jewish faith” were both so vague that the condition was void for uncertainty:—

HELD: (i) the clause imposed only one condition of forfeiture.

(ii) the words “of Jewish parentage” referred to race and not religion, but were uncertain because they did not show how many ancestors of the husband were to be of the Jewish race.

(iii) (*per* LORD ROMER) the words “of the Jewish faith” were uncertain because they did not define the degree of adherence to the faith required.

Decision of Court of Appeal ([1941] 3 All E.R. 196) *reversed*.

[EDITORIAL NOTE.] The principle to be applied in a case of this kind has been settled since 1859, but until recent decisions in the Chancery Division it was generally thought that such expressions as “of the Christian faith” or “of the Jewish faith” were sufficiently certain, the only point to be resolved being one of fact which the court ought to answer one way or the other on the evidence available. Indeed LORD WRIGHT takes this view in the present case, but he agrees that the phrase “of Jewish parentage,” which many would have thought a far simpler matter to determine on the evidence, is not sufficiently certain. The real question at issue is purely a practical one. A certain type of testator requires provisions of this nature in his will and the draftsman has to frame a clause which is sufficiently certain within the authorities. It seems that there may be but two practical ways of meeting the difficulties. The first is to require the beneficiary to obtain some certificate from the appropriate church authority that the husband belongs to the church in question and to make the certificate conclusive evidence for the purposes of the gift. The other is to make the decision of the trustees of the will final in this matter. Where the trustee is a bank or an insurance company the latter is hardly a suitable method and the position of individual trustees has become so onerous that it is hardly fair to put a further burden upon them. It might, indeed, become practically impossible to find persons willing to undertake so invidious a task. The disfavour with which such clauses are viewed by their Lordships is very generally held by those who have had practical experience of such provisions and, indeed, the hope has been expressed that the legislature will intervene to make such conditions illegal. However, so long as such conditions are legal and there is a demand for their inclusion, the duty of conveyancers seems to be to draft a clause sufficiently certain having regard to the decisions affecting them. So far as the words “of the Jewish faith” are concerned, LORD ROMER has expressed the view that they are uncertain, LORD RUSSELL OF KILLOWEN supports this view, but refrains from actually deciding it, LORD WRIGHT thinks they are sufficiently certain, and the matter is not dealt with by LORD ATKIN or LORD THANKERTON, though, as both agree with LORD ROMER, it would appear that they also are of the opinion that these words are too indefinite. It seems, too, that the decision in *Re Blaiberg* (3) is now restored.

AS TO CONDITIONS OF FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 105-109, paras. 141-143; and FOR CASES, see DIGEST, Vol. 44, p. 462, No. 2825.] Cases referred to:

(1) *Clavering v. Ellison* (1859), 7 H.L. Cas. 707; 44 Digest 440, 2668; 29 L.J. Ch. 761; affg. (1857), 8 De G.M. & G. 662; affg. (1856), 3 Drew. 451.

(2) *Sifton v. Sifton*, [1938] A.C. 656; [1938] 3 All E.R. 435; Digest Supp.; 107 L.J.P.C. 97; 159 L.T. 289.

(3) *Re Blaiberg, Blaiberg and Public Trustee v. De Andia Yrrarrzaval and Blaiberg*, [1940] 1 K.B. 385; [1940] 1 All E.R. 632; Digest Supp.; 109 L.J. Ch. 166; 162 L.T. 418.

(4) *Fillingham v. Bromley* (1823), Turn. & R. 530; 44 Digest 442, 2675.

APPEAL from an order of the Court of Appeal, dated Aug. 1, 1941, and reported [1941] 3 All E.R. 196, allowing an appeal by the respondents from an order of BENNETT, J., dated Mar. 31, 1941, and reported [1941] 1 All E.R. 539. The facts are fully set out in the judgment of LORD RUSSELL OF KILLOWEN.

H. B. Vaisey, K.C., and E. M. Winterbotham for the appellants.

R. F. Roxburgh, K.C., and H. O. Danckwerts for the respondents.

LORD ATKIN : My Lords, I have had the advantage of reading in advance the opinion about to be delivered by LORD ROMER, and as I agree with his reasoning and its result I need only add a few words. Like him I am unable to accept the view that "not of Jewish parentage and of the Jewish faith" means "not of parentage of the Jewish faith and of the Jewish faith." If the testator had meant this he would have said so, and the variation in the turn of the phrase seems to me in itself a strong indication that he did not so mean. I think that while it would be sufficient to defeat the forfeiture that either limb of the composite clause should be uncertain, in this case neither limb achieves the necessary degree of certainty. For my own part I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear. But at least the control by forfeitures imposed by conditions subsequent must be subject to the rule as to certainty prescribed by this House in *Clavering v. Ellison* (1) and judged by the test there prescribed this forfeiture fails. It is true that, as contended by counsel for the respondents, on any possible construction of the clause, Clayton, an English Wesleyan, was disqualified. But any possible construction is not the question : the actual construction must be certain : and, since it is not, the appeal succeeds.

LORD THANKERTON : My Lords, I also have had the opportunity of considering the opinion about to be delivered by LORD ROMER, and I agree with it, and also with the remarks just made by LORD ATKIN.

LORD RUSSELL OF KILLOWEN [read by LORD THANKERTON] : My Lords, this is a case in which the testator has sought, in the words of LORD GREENE, M.R., to direct the lives of his children from the grave. The particular matter for our consideration is his attempt, by means of a forfeiture clause to take effect on the happening of a condition subsequent, to control his daughter Edna's choice of a husband.

By his will he bequeathed a large pecuniary legacy and a share of residue upon trust for his daughter Edna for life, and after her death upon trust for her issue as she should by deed or will appoint, and subject thereto for her children as therein mentioned in equal shares, with a power to his daughter to appoint a life or less interest to a surviving husband. By cl. 8 of his will the testator declared that if his daughter (I now quote the relevant words) :

... shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith then as from the date of such marriage all the trusts powers and provisions in this my will contained ... in favour of (a) my said daughter ... contracting such marriage or (b) the person with whom she shall contract such marriage or any subsequent marriage or (c) any child or children thereafter to be born of her or (d) the issue of any such last mentioned child or children shall cease and determine and be no longer exercisable and this my will shall thenceforth operate and take effect as if my said daughter had died at the date of such marriage.

There can be no doubt as to the stringency of this clause if it be effective. Once the terms of the condition of defeasance have been fulfilled the daughter, her husband, her children by him and their issue, and any aftertaken husband, her children by him and their issue are one and all deprived of all the interest previously given by the will.

The testator died on June 2, 1925, and his daughter Edna married Harold Clayton on Mar. 5, 1927. Harold Clayton is not in any possible sense of the words a person of Jewish parentage, nor has he been at any time in any possible sense of the words a person of the Jewish faith. That is admitted by Mr. and Mrs. Clayton who are the appellants here. The question for our decision is whether the trusts in the will in favour of Mrs. Clayton, her husband and issue, ceased on the marriage. The answer depends upon whether the condition of defeasance is a valid condition.

The condition was held to be void for uncertainty by BENNETT, J. This decision was reversed in the Court of Appeal, which discharged the above declaration and declared that upon the true construction of the will the conditions imposed by cl. 8 thereof were not void for uncertainty, and that by reason of the said conditions the trusts, powers and provisions in the said will contained in

favour of Mrs. Clayton and her husband and issue ceased and determined on her marriage on Mar. 5, 1927, as if she had died on that date. It is only against this portion of the order made by the Court of Appeal (which covers other matters) that the present appeal is brought. My Lords, for the reasons which I will indicate I am of opinion that your Lordships should hold this condition of defeasance to be void, and allow this appeal.

The courts have always insisted that conditions of defeasance, in order to be valid, should be so framed that the persons affected (or the court if they seek its guidance) can from the outset know with certainty the exact event upon the happening of which their interests are to be divested. The principle was enunciated many years ago by LORD CRANWORTH in *Clavering v. Ellison* (1) at p. 725, in the following words:

... where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

In all such cases that is the test which has to be applied to the particular condition which the testator has chosen to impose. It was recently applied by the Judicial Committee in *Sifton v. Sifton* (2) to a condition of defeasance in a will as to the testator's daughter "continuing to reside in Canada." The condition was held void. The testator clearly having intended that his daughter should be at liberty to leave Canada for some purposes for some periods, he had failed to define either the purposes or the periods: hence the uncertainty which invalidated the condition. Let me now apply the principle to this condition. The crucial words are "who is not of Jewish parentage and of the Jewish faith."

A preliminary question was raised. Is this one condition, or do the words impose alternative conditions upon the happening of either of which a forfeiture occurs? This is a question of construction, separate from the main question. The testator has insisted on his daughter's husband having both the qualifications which he has mentioned. It was suggested that, if there was no uncertainty as to one of the qualifications, and the husband did not possess it, the forfeiture clause would operate. I cannot agree with this view, for its corollary would be that marriage with a husband not of Jewish parentage (whatever those words mean) but who before the wedding became a convert to the Jewish faith (whatever those words mean) would not bring about a forfeiture; a result quite inconsistent with the intention of the testator as disclosed by the language which he has used. I am of opinion that there is here only one condition of forfeiture, and that the whole of the contingency on the happening of which the forfeiture is to take place must be certain.

I now turn to consider the words "of Jewish parentage." The first doubt which is obviously inherent in them is whether they refer to race or religion or both. LORD GREENE, M.R., referred them to religion. That part of his judgment is its mainspring, for, as will appear, had he taken the other view (though he is careful to say that he expresses no opinion on the point), his decision on the appeal might have been different. He expressed himself thus, at p. 200:

It was contended that the words were capable of construction, and that they referred to race, and not to religion. It may well be that, if, on the true construction of the words, they did refer to race, they might be too vague. I do not express any opinion one way or the other upon that question. It might be said that, in the absence of any definition of the percentage of Hebrew blood which the testator required, it would be impossible to determine whether or not a given person fell within the language used. I express no opinion as to whether such an argument would be right or wrong. . . . In my opinion, however, the context here points rather to the fact that the testator was thinking not of race, but of religion.

He then indicates the context upon which he relies. It is the fact that the husband is required to be of the Jewish faith. I quote again from the judgment at p. 201:

It is obvious, from the requirements which he lays down for the husband himself, that it is religion of which he is thinking, and it is the Jewish religion into which he wishes his daughter to marry. That, I think, gives a clue to his intention when he goes back a generation and deals with the parents of the proposed husband.

My Lords, the context, as it appeals to me, points in the opposite direction. The testator is describing two qualities which he requires in his daughter's husband. In going back a generation he is still dealing with a quality required

in the husband, viz., that his parentage should be Jewish. It seems to me much more likely that, of these two qualities, the testator is stipulating that one should be religious and the other racial than that both should be associated with religion. In my opinion, on construction, the words, "of Jewish parentage" refer to race. Other elements of doubt surround the words. Must both parents be of the Jewish race, or would one alone, and which, suffice? I confess myself unable to find any context which provides an answer; but the answer may well be that, in the absence of a context to the contrary, the true construction is that both parents must be of the Jewish race. But at this point the real difficulty begins, viz., the question of degree. The testator has given no information or clue as to what percentage or proportion of Jewish blood in the husband will satisfy the requirement that he should be of Jewish parentage. The daughter could never, before marrying the man of her choice, be certain that he came up to the requisite standard of Jewish parentage, nor could a court enlighten her beforehand. The standard is unknown, and incapable of ascertainment. It is this uncertainty of degree which prevents the divesting event from being seen precisely and distinctly from the beginning, and which makes this condition void for uncertainty. The uncertainty attaching to the requirement of Jewish parentage avoids the whole condition subsequent, with the result that no defeasance takes place.

In these circumstances it is unnecessary to express an opinion upon the certainty of the words "of the Jewish faith"; but had it been necessary I should have felt a difficulty in holding that their meaning was clear or certain. It seems to me that (apart from the difficulty which arises from the existence of the three varieties of Judaism referred to by LORD GREENE, M.R.) the testator has given no indication of the degree of attachment or adherence to the faith which he requires on the part of his daughter's husband. The requirement that a person shall be of the Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual complies with the requirement. The decision of MORTON, J., in *Re Blaiberg* (3), though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of the uncertainty of the words there in question.

I concur in the motion proposed by LORD ATKIN.

LORD WRIGHT: My Lords, a testator who wishes to leave an estate or interest subject to a defeasance clause must be very careful or his lawyers must be very careful how the clause is expressed. LORD ELDON, L.C., in *Fillingham v. Bromley* (4), at p. 534, said:

There is great difficulty in saying that a forfeiture was incurred, when the court cannot see clearly what the testator meant.

Later LORD CRANWORTH more precisely in *Clavering v. Ellison* (1), at p. 725, said that:

... where a vested condition is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

The matter was treated by LORD CRANWORTH as one to be decided as it were *in vacuo*, simply on the construction of the clause. He said, at p. 726:

... the question is ... whether you can predicate on reading the will, what it was that was to defeat the vested estate.

I have wondered why this peculiar stringency should have been insisted on in these cases. The modern idea perhaps is that the beneficiary should be in a position to know beyond a peradventure what he is to do or not to do if he is to avoid a forfeiture. That must be ascertainable by him. As LORD ROMER said in delivering the judgment of the Judicial Committee in *Sifton v. Sifton* (2), at p. 671:

If the provision be clearly expressed, it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it.

The same explanation or justification of the rule has been given by LORD RUSSELL OF KILLOWEN. I am not sure that more technical reasons may not have primarily weighed with LORD ELDON and LORD CRANWORTH. However that may be, the rule is well settled and is not disputed by any judge in these proceedings. LORD GREENE, M.R., in a powerful judgment has, however, held that it does not apply here.

The facts and documents have been sufficiently stated in the opinion just delivered of LORD RUSSELL OF KILLOWEN and in the opinion about to be delivered (which I have read) by LORD ROMER. I substantially agree with the opinions of my noble and learned friends. I shall content myself with a very few and short observations.

The first question is whether the defeasance depends on one composite condition, so that if either limb is not sufficiently clear and distinct, the whole condition is void. In my opinion that is the true construction. The defeasance clause which is one and indivisible is void as a whole if one limb is void. In the language of the condition subsequent "not of Jewish parentage and of the Jewish faith," the word "and" is I think conclusive, even apart from material considerations which support that view. It is then necessary to consider each limb of the composite condition separately. In my opinion the former limb fails to pass the test of clearness and distinctness. I am prepared to accept that it refers to both parents and not merely to one; but I think it refers to race, not to faith. These may be regarded as being matters of ambiguity in construction capable of being resolved by the court. But it is a different problem to determine what is the degree of racial purity in fact required by the condition. In that respect the clause falls short of clearness and distinctness. On reading it, the court or other party interested is left in complete doubt what degree of racial purity will satisfy the condition. Is it to be 100 per cent., or will 75 per cent. or 50 per cent. be sufficient? The words of the clause do not enable any definite answer to be given. LORD GREENE, M.R., construed the clause as referring to religion, not to race. But if they were to be construed as referring to race "they might," he said, "be too vague." On the construction which I adopt they are, I think, too vague. It is not that the language is ambiguous, so much as imperfect and incomplete. The court would have to amplify and add to it before it could be held to denote any definite set of facts. That would be to rewrite the testator's will in that respect, and be beyond the competence of the court, and still more of the party interested. That limb of the composite condition is therefore void and, it follows, so is the whole condition.

This conclusion renders it unnecessary to express a final opinion on the words "of the Jewish faith." As at present advised, I do not think they are of insufficient clearness and distinctness. I am not impressed by the contention that they refer to a state of mind or of religious conviction which is incapable of proof. States of mind are capable of proof like other matters of fact: courts of law and equity have to decide questions of fraudulent intent or the like. I do not understand that the rule in *Claverling v. Ellison* (1) deals with questions of proof but solely with the clearness and distinctness of the language used in the clause, that is, its capability of defining precisely a specific state of fact. I do not see why "Jewish faith" should not connote a specific fact equally with "Christian faith." The latter is an all-embracing term which includes many possible varieties: Roman Catholic, Anglican, Presbyterian, Lutheran and others. There are many mansions but they are all included in one house. I should not be disposed to regard "Christian faith" as a phrase lacking in clearness and distinctness. I see no reason in principle why "Jewish faith" is not sufficiently clear and distinct to identify a specific set of facts to which it may be applied. But I do not pursue these questionings. The view I have expressed on the words "Jewish parentage" is sufficient to decide the appeal with the result that in my judgment the whole condition is void.

It may be that Clayton, however unobjectionable in other respects, would not have been welcome to the testator because of his race and religion, and it may be that in this way the intention of the testator is frustrated. But that is not the question. The rule, if I understand it, is not concerned with actual facts, but merely with the clearness and distinctness of the clause.

I agree that the appeal should be allowed.

LORD ROMER: My Lords, this appeal is concerned with a clause in the will of one Barnett Samuel who died on June 2, 1925. He was one of those testators, of whom I venture to think there have been far too many, who by means of a forfeiture clause have sought to compel a person to whom benefits are given by the will to act or refrain from acting in matters concerned with religion not in accordance with the dictates of his own conscience but in accordance with the

religious convictions of the testator himself. That a testator may do this should he so desire is beyond question; but in such a case it behoves him to define with the greatest precision and in the clearest language the events in which the forfeiture of the interest given to the beneficiary is to take place. The rule as to clauses forfeiting by condition subsequent interests given by a will has long been settled by a decision of your Lordships' House. It is *Clavering v. Ellison* (1) where the rule is stated by LORD CRANWORTH in these words, at p. 725 :

A . . . I consider that, from the earliest times, one of the cardinal rules on the subject has been this : that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

B The question to be decided upon this appeal is whether the forfeiture clause contained in the will of Barnett Samuel satisfies the requirements of the rule to which I have just referred. If it does not it is void for uncertainty.

C Except for the forfeiture clause the precise terms of the will are not material. It is sufficient to say that a pecuniary legacy and a share of residue were settled upon trusts for the benefit of the testator's daughter, the appellant Edna Violet Clayton (who was then a spinster and is therein called Edna Samuel) and for the benefit of her issue and of any husband who might survive her. The forfeiture clause so far as it affects the said appellant her husband and issue and so far as it is material must be set out in full. It is cl. 8 of the will and is in the words following :

D Notwithstanding anything hereinbefore contained I declare that if my said daughter Edna Samuel shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith, then as from the date of such marriage all the trusts powers and provisions in this my will contained and at that date subsisting and capable of taking effect thereafter in favour of (a) my said daughter contracting such marriage or (b) the person with whom she shall contract such marriage or any subsequent marriage or (c) any child or children thereafter to be born of her or (d) the issue of any such last mentioned child or children shall cease and determine and be no longer exercisable and this my will shall thenceforth operate and take effect as if my said daughter had died at the date of such marriage.

E The events which have led to this clause coming before your Lordships for consideration are as follows. On Mar. 5, 1927, the appellant Edna Violet Clayton was married to the appellant Harold Clayton who admittedly was not of Jewish parentage or of the Jewish faith on any reasonably possible construction of those words. It was accordingly for some time thereafter generally assumed by everyone concerned that the forfeiture clause had operated to deprive her and her husband and any issue she might have of all interest in the estate of the testator. But by the month of February, 1940, the appellants or their legal advisers would appear to have entertained doubts (engendered possibly by the decision of the Privy Council in *Sifton v. Sifton* (2)) as to the validity of the forfeiture clause and accordingly on Feb. 21, 1940, an originating summons was issued for the purpose (amongst others) of having that question decided.

F The summons in due course came on for hearing before BENNETT, J., who held that the clause was void for uncertainty. As regards the words "of Jewish parentage" he said that he could find nothing in the will to show whether the testator used them with reference to the race of the husband's parents or with reference to their religion and that for this reason the condition as to parentage was void for uncertainty. As regards that part of the condition that required a husband to be "of the Jewish faith" he expressed no opinion of his own but merely followed the decision of MORTON, J., in *Re Blalberg* (3), where it was held that a condition of forfeiture in the event of marriage to a person not of the Jewish faith was void for uncertainty. An order was accordingly drawn up bearing date May 22, 1941, containing amongst other things a declaration that the conditions imposed by cl. 8 of the will were void for uncertainty. From that order an appeal was taken to the Court of Appeal by some of the present respondents. It came on for hearing before LORD GREENE, M.R., CLAUSON and DU PARCQ, L.JJ.

H In delivering the judgment of the court, LORD GREENE, M.R., said that, if the words "of Jewish parentage" referred to race, they might be too vague. He expressed no final opinion upon this point, however, inasmuch as he held as

a matter of construction that the words referred not to race at all but to the religion of both his parents at the time of the husband's birth. As to the words "of the Jewish faith" which he regarded for this purpose as meaning of the Jewish religion he thought that they involved no uncertainty as it could easily be ascertained whether a husband was or his parents were of that religion. LORD GREENE, M.R., said at p. 202 :

Prima facie I should have thought without hesitation that the question falls to be answered out of the mouth of the person in question.

He regarded the question as being merely one of fact which, if disputed, would have to be resolved by evidence like any other question of fact and that in that event the person's *bona fide* sincere assertion that he adhered to the Jewish religion would be the utmost weight. He added that the mere difficulty in ascertaining facts does not mean that the language into which those facts have to be fitted is too uncertain to be enforced. The appeal was accordingly allowed and by an order dated Aug. 1, 1941, it was declared that the conditions imposed by cl.8 of the will were not void for uncertainty, and the order of BENNETT, J., so far as it declared the contrary was discharged. From that order an appeal is now brought by Mrs. Edna Violet Clayton and her husband to your Lordships' House.

My Lords, the first question to be determined on the appeal is what is the meaning of the words "of Jewish parentage." Do they refer to race or religion ? This is no doubt a difficult question to answer, but the difficulty of answering it does not render the forfeiture clause void for uncertainty. It is the duty of the court to solve the problem if it be possible to do so, and for my own part I do not find it impossible. In my opinion on the true construction of this will the words refer to race and not to religion or faith, which I agree with LORD GREENE, M.R., are for the present purpose synonymous terms. In the first place the testator in stating the qualifications that must be possessed by a husband of his daughter Edna seems to be drawing a clear distinction between parentage and faith. If he had intended that the husband should be and his parents should have been of the Jewish faith, he could so easily have said so. I cannot think that he would have used the language in which this clause is in fact expressed. In the next place it seems to me to be much more probable that, when stating the qualifications to be possessed by a husband of his daughter, the testator, while stipulating that he should be of the Jewish faith, should concern himself in addition with the racial descent of the husband rather than with the religion of the husband's father and mother. Finally, one of the meanings of the word "parentage," and I am disposed to think its primary meaning when coupled with a word indicating nationality such as Jewish, English, French or the like, is race or descent.

What then did the testator mean by the stipulation that the daughter's husband was to be of Jewish race or descent ? It cannot reasonably be supposed that the husband was to show an unbroken line of descent from the patriarch Jacob. If the daughter were compelled to wait for such a husband, she would remain a spinster all her life and the condition would be void as amounting to a total restraint on marriage. It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess ? Would it be sufficient if one only of his parents were of Hebraic blood ? If not, would it be sufficient if both were ? If not, would it be sufficient if in addition it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents ? Or must the husband trace his Hebraic blood still further back ? These are questions to which no answer has been furnished by the testator. It is, therefore, impossible for the court to see from the beginning precisely or distinctly upon the happening of what event it is that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty.

My Lords, this is sufficient to dispose of the appeal. If one of the two qualifications required in a permissible husband is expressed in so uncertain terms that it is impossible to say of any particular individual whether he does or does not possess it, the whole condition is void. For it is a composite qualification that is required, and, if it cannot be said of an individual that he possesses part of the composite qualification, it is obvious that he cannot be said to possess the

whole. It is impossible merely because the condition as to Jewish parentage fails for uncertainty to split up the forfeiture clause in such a way as to permit, for example, marriage with a husband whose ancestors have been Christian for many generations but who on the eve of the marriage has embraced the Jewish faith in the fullest sense of those words. Such a thing would be quite contrary to the testator's intention. His intention cannot be given effect to because he has not chosen to express it in sufficiently unambiguous terms. But that does not justify the court in making a new will for him and treating him as if he had expressed a different intention altogether.

- A Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? It will have been observed from what I have already said that in the Court of Appeal they answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words "of the Jewish faith." Until I know that, I do not know to what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of and observe every rule of practice and conduct prescribed by the Jewish religion. As to them there can be no doubt that they are of the Jewish faith. But there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. Now, I do not doubt that each of these last mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules.

- D My Lords, I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid and what degree will bring about a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty.

- E I would allow this appeal.

Appeal allowed.

- F Solicitors: *L. A. Hart* (for the appellants); *Arthur Hunt & Hunt* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

LONDON BRICK CO., LTD. v. ROBINSON.

- G [HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Romer), **November 5, 9, December 15, 1942.**]

Workmen's Compensation—Widow and child dependants—Claim by widow under Fatal Accidents Acts and Law Reform (Miscellaneous Provisions) Act, 1934—Claim by child to lump sum and children's allowance under Workmen's Compensation Act, 1925—Workmen's Compensation Act, 1925 (c. 84), s. 8 (1).

- H The deceased workman left a widow and one child under 15 years of age. They were both wholly dependent upon the workman's earnings. The widow elected to claim damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, and accepted a sum of £1,750 in satisfaction of her claim. She was, therefore, debarred from claiming compensation under the Workmen's Compensation Act, 1925, by reason of sect. 29 (1) of that Act. The infant child claimed compensation under the Workmen's Compensation Act. It was admitted that the infant son was

entitled to the lump sum of £300 and the question was whether in the circumstances the infant could also claim the children's allowance :—

HELD : the infant dependant was entitled under sect. 8 to the full compensation provided by the Act including the children's allowance.

Decision of the COURT OF APPEAL ('[1942] 2 All E.R. 106) *affirmed*.

[EDITORIAL NOTE.] It was decided in *Avery v. London & North Eastern Ry. Co.* (2) that defendants by separating their claims could obtain damages at common law in the case of some dependants and compensation under the Act in the case of others. That case, however, left over for decision the point which here falls to be decided. In the case of an infant dependant under the age of 15 years, does the compensation under the Act to which he is entitled in such circumstances include the children's allowance? Dealing with the matter, as the Court of Appeal did, as purely a question of the construction of the material words of the Act, the House of Lords have decided that the infant can claim the full sum.

AS TO AMOUNT OF COMPENSATION IN CASE OF DEATH, see HALSBURY, Hailsham Edn., Vol. 34, pp. 908-912, paras. 1248-1254; and FOR CASES, see DIGEST, Vol. 34, pp. 408-413, No. 3322-3359.]

Cases referred to :

- (1) *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181.
- (2) *Avery v. London & North Eastern Ry. Co.*, [1938] A.C. 606; [1938] 2 All E.R. 592; Digest Supp.; 107 L.J.K.B. 546; 159 L.T. 241; 31 B.W.C.C. 133; *revsg.* [1937] 2 K.B. 515; [1937] 2 All E.R. 777.

APPEAL by the employers from a decision of the Court of Appeal dated June 12, 1942, and reported [1942] 2 All E.R. 106. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

F. A. Sellers, K.C., and *W. H. Duckworth* for the appellants.

F. W. Beney for the respondent.

VISCOUNT SIMON, L.C. : My Lords, this appeal brings up to this House one of those difficult cases under the Workmen's Compensation Act, arising from the fact that, when fatal injury, arising out of and in the course of the employment, is caused to a workman, the workman's dependants are not in all cases confined to the remedy and scales of compensation provided under the Act, but may, if the facts warrant it, proceed independently of the Act to enforce any civil liability of the employer, such as that which might arise under the Fatal Accidents Acts, 1846 and 1864, the Employers Liability Act, 1880, or at common law. Remedies against the employer arising independently of the Workmen's Compensation Acts have, ever since the enactment of the first Act in 1897, been expressly preserved as an alternative—see sect. 1 (2) (b) of the 1897 Act; sect. 1 (2) (b) of the 1906 Act; and now sect. 29 of the 1925 Act. Each of these sections, while preserving the alternative remedy, if any, goes on :

... but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . .

By sect. 48 (3) of the 1925 Act any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants.

The form of this provision would naturally suggest that it secures the employer against liability to pay compensation in respect of the same accident both under the Act and independently of the Act. In the case of a workman who is injured, but not killed, that plainly is the result. He makes his claim either under the Act or independently of the Act, but he cannot do both. He is protected if he mistakenly supposes that he can recover independently of the Act, and fails to do so, for it is provided that, if it is determined that his employer is not liable to pay damages independently of the Act, but that the employer would have been liable to pay compensation under the Act, the court which is deciding against the former claim may assess the proper compensation under the Act and make the same award (subject to a possible deduction for costs) as would follow from proceedings under the Act. That is the effect of sect. 29 (2) of the 1925 Act—formerly sect. 1 (4) of the 1897 Act and sect. 1 (4) of the 1906 Act. So far, there is no difficulty.

When, however, owing to the workman's death resulting from the injury, the claim against the employer is made by the workman's dependants, and there are more than one of them, a complication arises which the courts have done their best to straighten out, but which produces consequences which it is difficult

to think the legislature had fully in mind. What is to happen if proceedings are taken on behalf of some of the dependants against the employer independently of the Act, and other dependants take proceedings under the Act? This House decided in *Kinneil Cannel and Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (1) that the provision above quoted that the employer :

... shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act ...

A did not mean that the employer cannot in any circumstances be under liability to pay in two independent proceedings. That appeal came from Scotland. The workman's widow suing for herself and his infant children had raised an action at common law against the appellants, alleging fault on their part and concluding for damages and solatium. Subsequently a stepson of the deceased raised proceedings in the Sheriff Court for recovery of compensation under the Workmen's Compensation Act, and the appellants admitted liability and paid into court the maximum sum for which they could be held liable in Workmen's Compensation proceedings. The appellants' plea in law in the common law action was that, having paid into the Sheriff Court the maximum compensation under the Act, and not being liable to proceedings independently of the Act, the widow's action was incompetent. This House, affirming the decision of the second division of the Court of Session, rejected this plea. That case involved the unusual feature that the stepson could only have claimed under the Act, for he had no right of action at common law, and to decide in favour of the appellants would have been to deny to the widow the option to which the Act referred. LORD BUCKMASTER, with reference to the provision that the employer shall not be liable both independently of and also under the Act, said at p. 580, that this provision :

D ... is intended to relate only to cases where the proceedings are taken by the same persons and affects only the cases where the workman proceeding under the statute had the option of proceeding either under the statute or at common law. The claims of the widow and children of proceeding at common law cannot be defeated by the act of somebody to whom the common law remedy is not open.

It was thought by LORD DUNEDIN that the section could not be construed as meaning that all dependants must act together, and select one form of remedy or the other, for there is no provision as to how this choice is to be exercised if they differ, and he added, at pp. 584, 585 :

E The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum, plus a children's allowance if there are such. But the claim to participate in this lump sum is an individual claim, and what I think the section means to say, and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act.

F We must take it, therefore, as established law that, though the employer is declared by the statute not to be liable to pay compensation in respect of the same accident both independently of and also under the Workmen's Compensation Act, the employer is nevertheless liable to pay compensation both independently of and also under the Act if one dependant has only one remedy and another dependant pursues another.

G The matter was taken a stage further 7 years later by the decision of this House in *Avery v. London & North Eastern Ry. Co.* (2). In that case, following upon a fatal accident to a workman, the workman's widow claimed damages under the Fatal Accidents Acts and the Employers Liability Act, and the workman's children claimed compensation under the Workmen's Compensation Act. The question was whether the amount which the employers had to pay in either action was reduced by the circumstance that in each case the claim H was not the claim of the whole body of the dependants, but only of a part of them. The Court of Appeal had held that since the widow's proceedings must, by virtue of the Fatal Accidents Act, 1846, s. 2, be taken to have been brought for the benefit of herself and her children, she could only receive her proper share of the total damages as restricted by the Employers Liability Act, 1880, s. 3 ; and similarly that the children could only receive, in proceedings under the Act, their proper share of the lump sum assessed as compensation under the 1925 Act. This House reversed that decision and decided that, in assessing the damages recoverable by the widow, it was right to ignore the fact that the

children were claiming compensation under the Act, and similarly that the amount of compensation that the children would receive would not be affected by the fact that the widow had exercised her option to claim damages independently of the Act. In the course of his opinion in that case, LORD ATKIN, anticipated, without actually deciding, the exact question which we now have to answer. He said, at p. 616 ([1938] 2 All E.R. at p. 597):

Another problem that was suggested during argument was whether when the widow was claiming independently she should be taken into account when assessing the total lump sum under the provisions of s. 8. I incline to think that those provisions only relate to dependants who are in fact claimants, but the matter does not arise in the present case, and I express no considered opinion about it.

It is this problem which now comes up for decision. The workman who succumbed to his injuries left as his dependants a widow and a son who was an infant in arms. They were both wholly dependent upon his earnings. The widow has made a claim against the appellants under the Fatal Accidents Acts, and the Law Reform (Miscellaneous Provisions) Act, 1934, which has been satisfied by the payment to her of £1,750. The infant respondent by his next friend has made a claim on his own behalf under the Workmen's Compensation Act. Sect. 8 provides that the compensation, where death results from injury, shall be a lump sum, which in the present case is £300, together with an additional sum, which is referred to as the children's allowance, of an amount calculated in accordance with the Act, which in the present case is £228 12s. These two amounts are to be added together and "dealt with as a single sum." It is admitted that this infant is entitled to be awarded the £300, and the dispute is whether the additional sum of £228 12s. also falls to be paid to him.

Sect. 8 provides that this additional sum is to be added to the lump sum :

. . . if the workman leaves a widow or other member of his family (not being a child under the age of 15) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of 15 so dependent . . .

Reading these words literally, the condition they prescribe is satisfied. The workman did leave a widow and in addition left a child under 15, and they were both dependent wholly on his earnings. The appellants contend that the reference to a widow in the conditional phrase which I have quoted is to a widow who is making a claim under the Act. The Court of Appeal felt constrained to reject this argument, notwithstanding LORD ATKIN'S observation in *Avery v. London & North Eastern Ry. Co.* (2), which was, of course, not the concluded view or even an incidental *dictum* of my noble and learned friend, but was merely a speculation thrown out in the course of unravelling a most perplexing matter.

LORD GREENE, M.R., MACKINNON, and GODDARD, L.JJ. were fully alive to the strange consequences of rejecting the appellants' contention and the illustrations contained in those judgments do indeed show that results follow which, to me at least, seem surprising. The maximum amount for which the employer could be liable under the Workmen's Compensation Act in the present case, if the widow and the infant child joined in claiming it, would be £528, which would be distributed between the two dependants in a suitable proportion. If, however, the widow makes her claim independently of the Act and receives £1,750 as damages, so that there is now only one dependant to claim under the Act instead of two, the result is that this one dependant now takes the whole sum of £528 in which he otherwise would only be entitled to a share. I agree with the Court of Appeal that the words which we have to interpret are not in themselves obscure or ambiguous, and there is no justification for construing the phrase "if the workman leaves a widow" as though it ran "if the workman leaves a widow who is claiming compensation under the Act." The employer's liability in the case of fatal accidents must be calculated according to the language of sect. 8. The "lump sum" and "the children's allowance" constitute a single sum and that is the amount for which, in the circumstances, the employer is liable in proceedings brought against him under the Act. He has not fully discharged that liability under the Act until he has paid that total sum. The circumstance that, owing to the widow's choice of a different remedy, the only person to receive this total sum is the infant dependant is fortunate for the infant, but does not justify the award to him of less than the total amount for which the appellants are liable under the Act.

While I agree with your Lordships in holding that the House can come to

no other conclusion than that which I have indicated, in view of previous decisions, I must add that, speaking for myself, my concurrence is partly based on the issues as presented to us for decision in the printed cases of the parties. The appellants, in para. 4 of their case, state without comment or challenge that the widow :

... elected not to claim compensation but took proceedings under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, and on Oct. 15, 1941, accepted the sum of £1,750 in settlement of her claim.

- A This appears to assume that, when the person killed by the neglect of the appellants' servants, leaves a widow and a child, the Law Reform (Miscellaneous Provisions) Act, 1934, as well as the Fatal Accidents Acts, may be used by the widow alone to recover damages for her own benefit without the child's claim being involved or compromised. I feel the greatest difficulty in accepting the view that the procedure indicated is regular and proper. The cause of action under the Act of 1934 is necessarily for the benefit of the deceased's estate.
- B I fail to understand how such a claim can properly be regarded as the personal claim of the widow ; indeed, in the case of the deceased's intestacy, the child would share in any balance of the residuary estate (other than the personal chattels) over £1,000. As regards the Fatal Accidents Acts, the decision in *Avery's case* (2) appears to have recognised the possibility of the widow claiming damages for her own personal benefit and omitting to claim at the same time for the benefit of the child.

- C I move that this appeal be dismissed with costs.

LORD ATKIN : My Lords, I should not have thought it necessary to add any words of my own had it not been that in *Avery v. London & North Eastern Ry. Co.* (2), referring to the section now in question I ventured on a *dictum* :

I incline to think that those provisions only relate to dependants who are in fact claimants, but the matter does not arise in the present case, and I express no considered opinion about it.

- D It was tentative enough but it was ill-advised, especially in a field where *obiter dicta* have added enough difficulty to decided cases. His Honour JUDGE LAWSON CAMPBELL at Peterborough having formed his own opinion very rightly disregarded the *dictum*. Now that I have had the opportunity of forming a considered opinion I have no doubt that the learned judge's decision and that of the Court of Appeal were correct for the reasons which they have given.
- E The words of the section are clear, and there is no absurdity, inconsistency or repugnance as suggested by the appellants to lead us to disregard the natural meaning of the words. I do not think it necessary to discuss suggested anomalies. It is sufficient to say that it is obvious that there may well exist conditions in which either the widow is not a claimant, or being a claimant would be awarded only a small proportion of the lump sum, where the children, if under 16, would receive substantially the whole sum increased by the additional allowance.
- F I agree that the appeal should be dismissed.

LORD THANKERTON : My Lords, the facts of this case are simple. The father of the infant respondent died on Jan. 22, 1941, as the result of personal injury by accident arising out of and in the course of his employment with the appellant company, which occurred on Dec. 20, 1940. The deceased workman left a widow, Mabel Robinson, and the respondent, then aged about one year.

- G The widow took proceedings in the High Court of Justice independently of the Workmen's Compensation Act, and the litigation was compromised by the payment of £1,750 by the appellants to her. The widow was thus excluded from claiming under the Workmen's Compensation Act, s. 29 (1).

The respondent elected to claim compensation under the Workmen's Compensation Act, which fell to be ascertained under sect. 8 of the Act. The parties are agreed that the full amount of the lump sum is £300 and the full amount of the children's allowance is £228 12s. It is not disputed that the respondent is entitled to the whole of the lump sum of £300, but the dispute arises whether the compensation can include a children's allowance. The respondent maintains that, inasmuch as the deceased workman left a widow wholly dependent upon his earnings and in addition left one child under the age of 15 so dependent, the children's allowance should be included. The appellants maintain that unless the workman's widow is a claimant under the Act she was not such a widow as is referred to in sect. 8 (1) of the Act, and the conditions necessary to

- H

the inclusion of a children's allowance are not present. The appellants' contention was rejected by the county court judge, and the Court of Appeal.

Accordingly, the only question in the appeal is whether, under these circumstances, a children's allowance falls to be added to the lump sum by virtue of the provisions of sect. 8 (1) of the Act. The material words in that section are :

... together with, if the workman leaves a widow or other member of his family (not being a child under the age of 15) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of 15 so dependent, an additional sum (hereinafter referred to as the children's allowance) of an amount calculated in accordance with the rules hereinafter contained, so, however, that the lump sum and children's allowance (which shall be added together and dealt with as a single sum) shall not in any case exceed in the aggregate £600.

Counsel for the appellants admitted that his construction required the words "leaves a widow" to be read as meaning "leaves a widow who is claiming under this Act", and the same construction would equally apply to the words "or other member of his family". I can find no justification for the insertion of the additional words by the court, as the words of the section are clear and unambiguous. In the present case the workman did leave a widow wholly dependent on his earnings, and in addition left one child under the age of 15 so dependent, thus exactly answering the only conditions expressed in the section.

If it were necessary, my view is reinforced by the decisions of this House in *Kinneil Cannel and Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (1), and *Avery v. London & North Eastern Ry. Co.* (2). By the former case it was authoritatively decided that each dependant of a deceased workman who is entitled to claim compensation under the Workman's Compensation Act has an individual right, which is not to be affected by the exercise by another dependant of the option as to choice of proceedings allowed by sect. 29 (1). In the latter decision, it was held that in assessing damages in the actions brought by the widows independently of the Workmen's Compensation Act, the county court judge was right in ignoring the fact that the children were claiming in respect of the same accident under the Workmen's Compensation Act, and, similarly, in respect of the claims by the children to compensation, he was right to ignore the fact that the widows were claiming damages. This decision directly reversed the view expressed in the Court of Appeal that the exclusion of the widows, owing to their having recovered damages, could not increase the sums payable as compensation to the dependants who did claim under the Workmen's Compensation Act.

It has to be remembered that the Act nowhere prescribes the amount of compensation to which an individual dependant is to be entitled, nor does it fix a maximum for such a claim. Further, the number of dependants left by a deceased workman did not affect the amount of compensation for which the employer was liable—which was based on the wage paid by the employer—until the children's allowance was introduced by the 1923 Act. The amount of the children's allowance is affected by the number of children under 15, though it is still based on the wage paid; but, here again, no part of the children's allowance is reserved for any specified dependant or dependants; on the contrary, the lump sum and the children's allowance are to be added together and dealt with as a single sum. I may add that the existence of a workman's family was ignored in regard to the weekly payments, which were also based on the wage paid, until provision was made by the Workmen's Compensation (Supplementary Allowances) Act, 1940, for a supplementary allowance in respect of each child under 15, which is not regulated by the wage paid.

I have made these observations in order to stress the fact that the Act has approached the question of compensation, as introduced in sect. 1 of the Act, from the angle of the employer's liability to pay, and the amount of that liability is ascertainable under sects. 8-14. Nowhere is the number of dependants claiming, whether they are excluded by virtue of sect. 29 (1), or fail to claim, made an element in the calculation of the employer's liability. This was recognised by this House in *Avery's* case (2), and I am of opinion that the court has no justification for importing such a qualification as is sought for by the appellants. I, therefore, agree with the course proposed by VISCOUNT SIMON, L.C.

LORD RUSSELL OF KILLOWEN: My Lords, I agree that this appeal fails and should be dismissed. In my opinion, it cannot succeed in view of the decision of this House in *Avery v. London & North Eastern Ry. Co.* (2).

LORD ROMER (read by LORD RUSSELL OF KILLOWEN): My Lords, having regard to the decision of this House in *Avery's* case (2), I am of opinion that this appeal necessarily fails and should be dismissed.

Appeal dismissed with costs.

A Solicitors: Barlow, Lyde & Gilbert (for the appellants); Chamberlain & Co., agents for Mellows & Sons, Peterborough (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

HOWELL v. ADDISON.

B [COURT OF APPEAL (Lord Greene, M.R., and Goddard, L.J.), **December 10, 1942.**]

Emergency Legislation—Agriculture—Cultivation according to rules of good husbandry—Termination of tenancy—Consent of Minister—Whether inquiry to be held—Power of committee to take possession—Defence (General) Regulations, regs. 51, 62—Cultivation of Lands Order, 1939 (S.R. & O., 1939, No. 1078).

C A war agricultural executive committee, having held that the appellant had not cultivated his land according to the rules of good husbandry, obtained the consent of the Minister of Agriculture and Fisheries to the termination of the appellant's tenancy of his holding. In accordance therewith, the committee served on the appellant a notice, dated Aug. 19, 1942, requiring him to give up possession of the holding as from Sept. 29, 1942. The appellant did not comply with the notice and on Nov. 9, 1942, notice was given to him stating that the committee would take certain steps to secure vacant possession if the appellant had not vacated the holding by Nov. 20, 1942. The appellant thereupon commenced an action claiming an injunction to restrain the committee from taking steps to enforce the notice of Aug. 19, 1942, or to deprive the appellant of possession of the holding. The appellant contended, *inter alia* (a) that the Minister could not give permission to terminate the tenancy without himself holding an inquiry and (b) that, although the Minister had given authority to terminate the tenancy, he had not given permission to take possession:—

E HELD: (i) once the committee had found the necessary facts, the act of the Minister in giving his consent to the termination of the tenancy was a purely executive one and he was not bound to hold an inquiry before giving such consent.

F (ii) since the Minister had given such consent, the committee were empowered by the regulations to give the consequential directions requiring the tenant to give up possession of the holding.

(iii) no case had been made to justify the granting of the interlocutory injunction claimed.

G [EDITORIAL NOTE. In reading this case it must be remembered that the application was for an interlocutory injunction and that it is clear that that relief was refused on the ground that the evidence was insufficient. What is said on the construction of the regulations is, therefore, *obiter*. The more important point in this aspect of the case is whether in deciding that a holding is not being cultivated in accordance with the rules of good husbandry a war agricultural executive committee is exercising a quasi-judicial function or performing a delegated executive act of the Minister. Without expressing any concluded opinion on the matter, it seems clear that the Court of Appeal incline to the view that this is not a quasi-judicial function. This view is not inconsistent with *West Riding County Council v. Wilson* (1), for it can be said of that case that the decision was that, even if the principle of *Board of Education v. Rice* (2) was there applicable, its obligations had been carried out by the committee.

H FOR THE CULTIVATION OF LANDS ORDER, 1939, see BUTTERWORTH'S EMERGENCY LEGISLATION, [1] 3.]

Cases referred to:

- (1) *West Riding County Council v. Wilson* [1941] 2 All E.R. 827; Digest Supp.
- (2) *Board of Education v. Rice*, [1911] A.C.179; 19 Digest 602, 290; 80 L.J. K.B. 796, 104 L.T. 689; *affy.* S.C. *sub nom.* *R. v. Board of Education*, [1910] 2 K.B. 165.

APPEAL by the plaintiff from an order of ASQUITH, J. dated Nov. 27, 1942. The facts and argument are fully set out in the judgment of LORD GREENE, M.R. *W. Harvey Moore* for the appellant.

Kenneth Diplock (for *Hubert Hull* on war service) for the respondent.

LORD GREENE, M.R. : Under the Defence (General) Regulations, reg. 62, the Minister of Agriculture and Fisheries, if it appears to him that an agricultural holding is not being cultivated by the tenant in accordance with the rules of good husbandry, may, by notice in writing served on the tenant and on the landlord, terminate the tenancy and give the tenant directions requiring him to give up possession of the land. Under para. 2A, where such directions have been given, power is given for securing compliance with the directions. Under the Cultivation of Lands Order, 1939, the power of the Minister of Agriculture under that regulation, and some other regulations, notably reg. 51, to which I will refer in a moment, is delegated to war agricultural executive committees, with a proviso that such a committee :

... shall not without the consent of the Minister in writing being previously given (a) take possession of any land or terminate the tenancy of any land otherwise than by agreement, or (b) requisition any chattel except such chattels as may be found upon or may have been removed from any land of which the committee take possession. Reg. 51 is a regulation giving power to the Minister to take possession of land.

Now it is to be noticed that reg. 62 empowers the Minister to terminate the tenancy and secure the ejection of the tenant. Whether or not the Minister or any person authorised by him thereby is to go into possession is a question between the Minister or the authorised body and the lessor, who on the termination of the tenancy would *prima facie* be the person entitled to possession. It would appear that under reg. 62 all that the regulation is concerned with is getting the tenant out. The further step of taking possession by the Minister or by the war agricultural executive committee rather than the landlord is another matter with which the tenant has no concern whatever. In the present case—I do not propose to go into the details of it—the appellant was given by the committee concerned a notice to terminate his tenancy. The date of the notice was Aug. 19, 1942, and the notice was to terminate the tenancy of his holding as from Sept. 29, 1942, and it directed him to give up possession of the holding on that date. The consent of the Minister to terminate the tenancy of the land in question had been obtained, but no consent had been given to the war agricultural executive committee to take possession of the land. The appellant did not comply with the notice, and on Nov. 9, 1942, a letter, quite improperly headed “Without prejudice,” was written by the deputy executive officer of the war agricultural executive committee. In it he stated that the war agricultural executive committee would take certain steps to secure vacant possession if by Nov. 20, 1942, the appellant had not wholly vacated the holding. Those steps were (i) the removal of the furniture with the assistance of the police, (ii) the removal of the farm implements, and (iii) the removal of the appellant’s livestock by requisition with the consent of the Minister of Agriculture. That consent had in fact been obtained, and the power to requisition cannot be disputed. The object of that, we are informed, is to secure complete vacant possession of the holding for a new tenant, and in order to do that it is necessary that the livestock should be removed. I shall say a further word about the livestock in a moment or two.

The action was begun by a writ claiming an injunction to restrain the defendants from taking steps to enforce the notice of Aug. 19, 1942, or to deprive the plaintiff of possession of the land comprised in his tenancy. An *ex parte* injunction was granted by ASQUITH, J., on Nov. 19, 1942, restraining the then defendants, who were the war agricultural executive committee—the present defendant has been substituted for them—from taking possession of the plaintiff’s farm and removing the furniture and effects from the farmhouse and all the live and dead stock of the plaintiff until after the hearing of the summons, leave to serve which with the writ was given. That summons came on for hearing on Nov. 27, 1942, and ASQUITH, J., discharged the injunction.

Before us certain additional evidence was put in. I do not propose to say anything more about it than this. It contains certain suggestions on the part of the appellant which appear to impute bad faith to somebody connected with these transactions on the side of the committee and to base a case on some such

allegation. It is very undesirable that I should express any opinion whatsoever as to those matters, except to say that the evidence is quite insufficient to justify any court in granting an interlocutory injunction on the strength of it. It is quite clear that for the purpose of an interlocutory injunction that evidence carries the matter not one whit further than it was before ASQUITH, J. Apart from that evidence, the points which the appellant raises are these. First of all, he says, that it was the duty of the war agricultural executive committee, before deciding that the holding was not cultivated in accordance with the rules of good husbandry, to hold an inquiry and to give the appellant an opportunity of being heard. I think it undesirable to express any opinion one way or the other as to the correctness of the proposition that the Minister, or any person to whom his power is delegated under reg. 62, is bound to hold any such inquiry at all. This is a very special class of legislation, and I certainly would not, without considerable argument, accede to the proposition that such an inquiry is necessary in the sense of some formal inquiry. That is a matter which may have to be decided at the trial. However, that may be, there was a hearing and he was given an opportunity of being heard. He was invited to attend and did attend at the relevant meeting of the sub-committee of the executive committee. He had ample opportunity of putting the whole of his case forward, but apparently he did not avail himself of that opportunity. He complains, indeed, that he did not at that meeting have the opportunity and that the proceedings were not conducted in such a way as to give him the opportunity. I express no opinion on that at this stage; but the evidence which he tenders in support of that allegation is again quite insufficient to enable the court to grant an interlocutory injunction. He can make whatever he can of that point when the matter comes on for trial. The considerations which influence a court in granting an interlocutory injunction are not such as to allow the court to grant an interlocutory injunction on that ground.

He then says that the Minister could not give permission to terminate the tenancy under the Cultivation of Lands Order, 1939, para. 1, without himself holding an inquiry. With regard to that it seems to me that the argument is quite untenable. The act of giving consent to terminate the tenancy as the result of, and as based upon, a finding by the war agricultural executive committee that the holding was not properly cultivated, seems to me to be a purely executive act, and the suggestion that once the committee has found the necessary facts the Minister must hold an inquiry himself in order to see whether he would give his consent to the termination of the tenancy, is an argument which simply will not bear examination. Therefore, so far as that is concerned, it seems to me that the appellant is wrong.

Then the next point he takes is that, although the Minister gave authority to determine the tenancy, he did not give power to take possession, and that by the letter to which I have referred the committee was threatening to take possession. He bases that argument on the fact that in the Cultivation of Lands Order, 1939, para. 1 (a) "take possession of any land or terminate the tenancy of any land," are treated as two separate things. That is perfectly correct, but the words "take possession of any land" appear to me quite clearly to refer to the Minister's power to take possession under reg. 51. The termination of the tenancy is a thing which is done under reg. 62, and when one looks back at reg. 62, para. 2, one finds that the Minister's power under it is to terminate the tenancy and give directions to the tenant requiring him to give up possession of the land. Of those two things the only one which requires the consent of the Minister before a delegated authority can be exercised by the war agricultural executive committee is the first, namely, the termination of the tenancy. The giving of directions to give up possession of the land, which are merely consequential on the termination of the tenancy, is a thing for which the consent of the Minister is not required, and, indeed, quite naturally so. The substantial thing is: is the Minister going to consent to the tenancy being determined? Once he has done that, it would follow quite naturally that the executive committee, having got the consent, can take steps to get the tenant out. It is quite obvious for that reason that the consent of the Minister to the giving of directions requiring possession to be given up is not required.

In the result, therefore, as it seems to me, that point also fails, because the permission of the Minister to terminate the tenancy having been given to the

delegated authority, it empowers the executive committee to give the consequential directions requiring the tenant to give up possession of the land, and the police can be called in to assist. For whose benefit that possession is obtained as between the executive committee and the landlord is not a matter which concerns this appellant. The only question he is concerned with is whether the steps proposed to be taken to get him out of possession are justified. For the reasons I have given it seems to me that there is no case made out on this interlocutory application which would justify the court in granting any injunction such as that which is claimed. A

There is the point with regard to the cattle which requires a special word of notice. If the appellant had obtained an injunction, the threat with regard to the cattle could, of course, not have been carried out. He fails to obtain the injunction and that threat stands. The threat to requisition the cattle is one with regard to which the appellant has not attempted to show that any illegal step is proposed, and, therefore, he is not entitled to an injunction to restrain the requisitioning and selling of the cattle. On the other hand, the only reason why the committee desire to exercise that power is to ensure that the new tenant will have vacant possession of the land, which obviously he would not have if the appellant's cattle were to be left there. It is, therefore, necessary to take the cattle away, and counsel for the respondent said, quite properly, that the appellant can take the cattle away if he wants to, and, indeed, they would much prefer that he should. B

In the result the appeal must be dismissed, but any question of a time within which the appellant is to exercise his right to remove his cattle must be a matter which must be settled between counsel. C

GODDARD, L.J. : I agree. I only want to add a word on one point. Counsel for the appellant has argued that it was necessary, as I understood his argument, before the step of terminating the tenancy was taken, that there should have been an inquiry both by the war agricultural executive committee, and, indeed, by the Minister. For that proposition he cites—it is not correct to say the case supports his argument—*West Riding County Council v. Wilson* (1), at p. 827, in which I think VISCOUNT CALDECOTE, L.C.J., did take that view, basing himself on the *Board of Education v. Rice* (2). It seems worth saying a word about it, because I notice that in the editorial note in the report of that case in the All England Reports the following statement is made : D

The powers of the committee must, of course, be exercised in accordance with the principles laid down by LORD LOREBURN in *Board of Education v. Rice* (2). They must fairly hear both sides and their deliberations and decisions must be free from bias, but, provided they reach a *bona fide* decision observing these principles which must guide everybody acting judicially, their decision is not subject to review. E

I daresay many solicitors, especially in the country, pay considerable attention to these editorial notes. But for myself I desire to say that I reserve entirely the question as to whether or not *Board of Education v. Rice* (2) has any application to the matters set out at all. It seems to me to be entirely different. In *Board of Education v. Rice* (2) the board was acting, as LORD LOREBURN said, as an arbitral tribunal between two bodies, the local education committee and the school managers. They were the body under the statute to decide a question which had arisen in that case. In this case, the case of an order made under this regulation, it seems to me an entirely different consideration arises by the very wording of the regulation itself. All this regulation says is that, if it appears at any time to the Minister of Agriculture, which includes the war agricultural executive committee when he has delegated his powers to it, that the tenant of the holding is not cultivating it according to the rules of good husbandry, the Minister may take certain steps. The only condition imposed on the Minister taking steps is that it appears to him that the tenant is not cultivating the place in accordance with the rules of good husbandry. I, therefore, for myself cannot assent to the view that the principles laid down in *Board of Education v. Rice* (2) have any application at all. F

Appeal dismissed with costs.

Solicitors : *Bell & Ackroyd* (for the appellant) ; *Official Solicitor to the Ministry of Agriculture and Fisheries* (for the respondent). G

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.] H

OWNERS OF STEAMSHIP OR VESSEL "BRITISH FAME"
v. OWNERS OF STEAMSHIP OR VESSEL "MACGREGOR."

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter), **November 16, 1942.**]

Tort—Joint tortfeasors—Apportionment of liability—Variation of apportionment on appeal—Limitation of jurisdiction.

A

The finding of the trial judge as to the degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in very exceptional circumstances.

The Testbank (2) overruled.

[**EDITORIAL NOTE.** It was said by the Court of Appeal in *The Testbank* (2) that the apportionment of blame was a conclusion of fact and as such was open to review on appeal no more and no less than any other finding of fact by the trial judge. The House of Lords here point out that this is too wide a statement. An apportionment is more in the nature of the exercise of a discretion than a finding of fact and it had been decided in the House of Lords that it can only be reviewed in exceptional circumstances.]

B

AS TO APPORTIONMENT OF LIABILITY, see HALSBURY, Hailsham Edn., Vol. 32, pp. 188, 189, para. 282; and FOR CASES, see DIGEST, Supp., Tort, No. 72a.]

C

Cases referred to:

- (1) *The Umtali* (1938), 160 L.T. 114; Digest Supp.; 19 Asp. M.L.C. 254.
- (2) *The Testbank*, [1942] P. 75; [1942] 1 All E.R. 281; Digest Supp.; 111 L.J.K.B. 49.
- (3) *The Karamea*, [1921] P. 76; 41 Digest 784, 6448; 90 L.J.P. 81; 124 L.T. 653; 15 Asp. M.L.C. 318; on appeal, *sub nom. S.S. Haugland v. S.S. Karamea*, [1922] 1 A.C. 68.
- (4) *Kitano Maru S.S. Owners v. Otranto S.S. Owners, The Otranto*, [1931] A.C. 194; Digest Supp.; 100 L.J.P. 11; 144 L.T. 251; 18 Asp. M.L.C. 193.
- (5) *The Peter Benoit* (1915), 84 L.J.P. 87; 41 Digest 764, 6166; *affd.* 85 L.J.P. 12.
- (6) *The Clara Camus* (1925), 134 L.T. 50; 16 Asp. M.L.C. 570; 41 Digest 784, 6449; on appeal (1926), 136 L.T. 291; 17 Asp. M.L.C. 171.

D

APPEAL from a unanimous decision of the Court of Appeal (MACKINNON, L.J., DU PARCQ, L.J. and LEWIS, J.), dated Jan. 19, 1942, varying a judgment of BUCKNILL, J., dated July 15, 1941, on the proportions of blame to be attributed to each of the two ships concerned. The action and counterclaim in this case arose out of a collision between the motorship British Fame and the steamship Macgregor, which occurred about 11.12 p.m. on Mar. 5, 1940, off Cape St. Vincent. BUCKNILL, J., held that both the British Fame and the Macgregor were to blame for the collision and apportioned the liability one-third to the British Fame and two-thirds to the Macgregor. The Court of Appeal reversed these proportions and found the British Fame two-thirds and the Macgregor one-third to blame. The British Fame and the Macgregor were units of a convoy of about 33 ships arranged in nine columns. The Macgregor was at the head of the outside port column. Her proper station was second ship in the column, but as the leading ship in her column was not with the convoy her actual position was somewhat undefined. The British Fame's station was second ship in the second column from the port side with the British Petrol ahead of her. In the third column from the port side the Port Nicholson was the leading ship of the column with the Desmouler astern of her. The distance between the columns was 3 cables and the distance between the ships in the columns was 2 cables. Before the events leading up to the collision occurred, all these vessels were on a convoy course of 295° true and were proceeding at a speed of about 7½ knots. The weather was fine and clear and there was no wind. The collision occurred between the port bow of the British Fame and the starboard side forward of the Macgregor at an angle of about 3 points the Macgregor at the time being about 4 points to starboard of the convoy course and the British Fame about 1 point to starboard of the convoy course. The collision happened fairly close to the line of the third column from the port side and in the van of the convoy. These findings of fact were not challenged by the respondents who were the appellants in the Court of Appeal and were accepted by the Court of Appeal.

H

R. F. Hayward, K.C. and Owen L. Bateson for the appellants.

Lewis Noad, K.C. and E. W. Brightman for the respondents.

VISCOUNT SIMON, L.C. : My Lords, this is an appeal brought by the owners of the *British Fame* against a decision of the Court of Appeal which varied the proportions in which blame is to be shared in respect of a collision between the *British Fame* and the *Macgregor*, where both were found by BUCKNILL, J., at the trial to be to blame.

There is no cross appeal, and we must proceed on the basis that it cannot be disputed that the collision between the *Macgregor* and the *British Fame* was one for which both ships were to blame. The only question that remains for debate is the question of the distribution of that blame. As to that, BUCKNILL, J., came to the conclusion that two-thirds of the blame should be apportioned to the *Macgregor* and one-third to the *British Fame*. When one examines the judgment of BUCKNILL, J., it becomes quite clear why he took that view. He had come to the conclusion that the *Macgregor* was not skilfully manoeuvred and that she starboarded too much, and was wrong in doing that and was wrong in not taking any action at all to reduce her speed. In fact, the *Macgregor*, which was the foremost ship of the line of vessels in the convoy which was the most to port, starboarding because of a crossing vessel, moved out of her normal line to such an extent that she passed just in front of the leading vessel of the second column, and the collision between her and the *British Fame* took place not very far off the line of the third column.

After discussing the behaviour of the *British Fame*, BUCKNILL, J., restates his view as to the *Macgregor* in these words :

The *Macgregor* is to blame for coming across into her wrong water at an angle of about four points. . . . In my view, the trouble started with the *Macgregor*. There was no necessity for her to do what she did do, and doing what she did, she put the *British Fame* to some extent in a difficulty.

I do not think, my Lords, that the phrase of BUCKNILL, J., that "the trouble started with the *Macgregor*" means much more than that it was the action of the *Macgregor* which was the primary cause of the trouble, and, speaking for myself, I think the conclusion at which he arrived as regards the distribution of the blame was a perfectly reasonable one, having regard to the facts which he found.

The Court of Appeal has thought it right, while maintaining the view that both ships are to blame, to vary the distribution of the blame by putting two-thirds of it on the *British Fame* and relieving the *Macgregor* so that the *Macgregor* has to carry only the remaining one-third. It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge. I do not, of course, say that there may not be such cases. I apprehend that, if a number of different reasons were given why one ship is to blame, but on examination some of those reasons were in the Court of Appeal found not to be valid, that might have the effect of altering the distribution of the burden. If there were a case in which the judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that might perhaps be—it would be, I think—a reason for considering whether there should be a change made on appeal. But subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare.

I remind your Lordships of the language used by LORD WRIGHT in *The Umtali* (1), and I will read a short passage from p. 117. In his opinion in that case, which was agreed to by the other lords, LORD WRIGHT said :

I am opinion that both vessels were seriously to blame. It was contended by the appellants that in that event this House should vary the apportionment of liability which the judge has found, because it was said the misconduct of the *Umtali* in porting was very gross and that of the *Corrientes* was slight in comparison. But I agree with the judge's apportionment . . . I think with him that both vessels were seriously to blame and that there is no satisfactory reason for saying that one is to blame more than the other. The assessors sitting with your Lordships also take that view, as did those sitting with the judge. I ought to add that it would require a very strong and exceptional case to induce an appellate court to vary the apportionment of the different degrees of blame which the judge has made, when the appellate court accepts the findings of the judge.

It appears to me, my Lords, that that passage directly applies here. I do not find in the judgments of the Court of Appeal or in the arguments which have been addressed to us by the respondents sufficient ground for interfering with the apportionment decided upon by BUCKNILL, J. That apportionment, in my judgment, should stand, and I move that this appeal be allowed with costs.

A LORD ATKIN : My Lords, I agree entirely with the opinion which has just been expressed by VISCOUNT SIMON, L.C., and in those circumstances, though we are differing from the judgment of the Court of Appeal, I find it unnecessary to add any reasons of my own.

LORD THANKERTON : My Lords, I concur.

B LORD WRIGHT : My Lords, I also concur ; but I ought to add a very few words on a case in the Court of Appeal to which my attention has just been called. The case is *The Testbank* (2), and it is a case in which the Court of Appeal did vary the apportionment of degrees of blame as between two vessels actually found to be in fault. In the headnote to that case it is stated :

The finding of the trial judge as to the degrees of blame to be attributed to two or more ships which are in fault . . . is a conclusion of fact, and as such is open to review by the Court of Appeal no more and no less than any other finding of fact of the trial judge.

C The important words in that headnote, which seem to me to be borne out by the judgment, are those stating that such a finding is open to review no more and no less than any finding of fact by the trial judge.

D With the greatest respect to the Court of Appeal, and without in any way expressing any conclusion on the actual decision at which they there arrived, I venture to think that their statement of principle is not quite in accord with the authorities, so far as laid down up to the present. *The Umtali* (1), which is a decision of this House, was not cited to the Court of Appeal, but there was cited *The Karamea* (3), in which LORD STERNDALÉ, M.R., a great authority on these matters, dealing with this question of apportionment at p. 78, says :

. . . I think it would need a very strong case indeed to induce this court to interfere with his discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it.

WARRINGTON, L.J., is reported, at pp. 83, 84, as saying :

E It may well be and probably is the case that if the court arrives at the same conclusion both on the facts and in law it would not interfere merely because the learned judge in his discretion has given proportions which this court thinks it would not have given. SCRUTTON, L.J., at p. 89, says :

. . . if the Court of Appeal agrees with the findings of fact and law of the learned judge below, and the only difference is that it attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships. . . .

F It seems to me that these observations of three very eminent judges are quite in accord with what was said in *The Umtali* (1), and with what VISCOUNT SIMON, L.C., has just said: I do not say, any more than they did, that under proper conditions, such as those indicated by the three members of the Court of Appeal in *The Karamea* (3), the judge's apportionment might not be interfered with by an appellate court ; but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations ; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that the courts have warned an appellate court against interfering, save in very exceptional circumstances, with the judge's apportionment. The accepted rule was clearly stated by LORD BUCKMASTER, with the assent of the other Lords, in *The Otranto* (4), at p. 204, in these words :

H Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed.

I might add that in *The Karamea* (3), the Court of Appeal varied the proportion

of liability because they took a different view of the facts. Their decision was affirmed by this House (*The Haughland* (3)).

LORD PORTER : My Lords, I also agree that this appeal should be allowed, and I agree with the reasons given by VISCOUNT SIMON, L.C., and also with the grounds and reasoning of LORD WRIGHT. I have only to say that, speaking for myself, if I had to choose between the reasoning of the judgments in *The Karamea* (3) and that in *The Testbank* (2), as at present advised, I should prefer that in *The Karamea* (3).

The principles which govern an appellate court in determining whether to vary the apportionment of blame in an Admiralty case have been laid down in a number of decisions and consistently followed both in this House and in the Court of Appeal, at any rate since 1916. In that year in *The Peter Benoit* (5) (affirmed in this House without discussion on this point), the Court of Appeal thought that the trial judge had misinterpreted a rule of navigation and, therefore, varied the proportion of blame, but PICKFORD, L.J., in the course of his judgment said at p. 90 :

I think this court ought not lightly to interfere with the judgment of the court below on a question of apportioning liability, and certainly should not do so if this court accepted all the facts found by the learned judge or all the elements of his decision upon which he based his proportion.

A similar view was taken by BANKES, L.J.

The Kamarea (3) has already been referred to. Its principles were followed in *The Clara Camus* (6), where SCRUTTON, L.J., adopted language almost identical with that which he used in the former case, and his words were repeated and approved by LORD SHAW on an appeal to your Lordship's House. Perhaps, however, I may be forgiven for quoting a few words from the opinion of LORD BUCKMASTER, in *The Otranto* (4), where, dealing with the same topic, he says, at p. 204 :

Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

My Lords, I venture to add these observations to those of VISCOUNT SIMON, L.C., and of LORD WRIGHT, because, whatever may be the true view as to the decision in *The Testbank* (2), of which I say nothing, the principle applicable to the review of apportionment of blame is, as I think, too widely stated in that case having regard to the series of decisions which preceded it. With the exception of *The Karamea* (3) those decisions do not appear to have been quoted to the Court of Appeal, and consequently I have thought it desirable to repeat the opinions which they express.

Appeal allowed with costs.

Solicitors : *William A. Crump & Son* (for the appellants) ; *Thomas Cooper & Co.* agents for *Gilbert Robertson & Co.*, Cardiff (for the respondents).

Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.

R. v. VAN PELZ.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Wrottesley and Tucker, JJ., **December 1, 1942.**)]

Criminal Law—Proceedings after verdict—Statement by police—Limitations to be observed.

Where a police officer is called to give evidence about a person after conviction, he should confine himself to matters which should receive the consideration of the court and are not disputed by the prisoner himself ; such as any previous convictions, the prisoner's antecedents and facts relating to his home and upbringing where the prisoner's age make this material ; he should also inform the court of anything in the prisoner's favour, such as periods of employment and good conduct.

Nothing in the foregoing affects the right of the court to inquire into any matter in any individual case where the court thinks it right to ask for such information.

[EDITORIAL NOTE. In the case of a person who has been under their observation for a considerable time the police may well feel reasonably convinced of many matters which have not been the subject of judicial inquiry. Such matters, however, must be omitted from their observations at the conclusion of the trial, unless the prisoner has admitted them and asked that they shall be taken into consideration in passing sentence. If they are not admitted, these matters should, if the police so decide, be made the subject of a further charge.

AS TO MATTERS TO BE CONSIDERED IN FIXING PUNISHMENT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 256-259, para. 365; and FOR CASES, see DIGEST, Vol. 14, pp. 470-476, Nos. 5028-5170.]

Cases referred to :

(1) *R. v. Burton*, [1941] 28 Cr. App. Rep. 89.

(2) *R. v. Campbell* (1911), 75 J.P. 216; 6 Cr. App. Rep. 131; 14 Digest 470, 5029.

APPLICATION for leave to appeal against a sentence of 15 months' imprisonment for larceny passed at the Central Criminal Court. All the facts are set out in the judgment.

J. Flowers, K.C., and *Derek Curtis-Bennett* for the applicant.

Vernon Gattie for the Crown.

VISCOUNT CALDECOTE, L.C.J. : The details of the case need not be rehearsed.

It was a sordid, squalid case, in which, according to the evidence, a man, who has disappeared and never been heard of since, co-operated with the applicant in robbing a man named Isaacs of some jewellery and money. The offence took place at a gambling party, and doped drink was used to enable the larceny to be committed. The applicant was found guilty and was sentenced to 15 months' imprisonment.

We think that 15 months' imprisonment for the offence was a very proper sentence, and one with which it would be quite impossible for us to interfere; but, when the case was before the court on the last occasion, questions were raised as to the statements made by a police officer about the character and activities of this applicant, and the court thought it right to ask that counsel for the prosecution should attend in order to give whatever assistance he could on this question of the propriety of statements made by the police after conviction or after a plea.

In this particular case, a police officer was called, who gave the age of the woman, and the main details of her life for some 10 or 12 years. Then he proceeded to say this :

For many years past this woman has led a loose and an immoral life, and she has associated constantly with convicted thieves in the west end of London. On her arrest she described herself as a property owner, but that was not the case.

The police officer described how she made profits out of dealing with property, and continued :

She is very well known indeed as a prostitute who frequents the west end of London with a view to contacting men with money, and her activities in this direction have exercised the mind of the police for a considerable time past. I have in my possession a letter which was written in April of this year to the Law Land Co., who are the owners of Harley House. The writer alleges that shortly before writing the letter he met this woman at the Mayfair hotel, and after he had bought her a number of drinks and entertained her to dinner she suggested that he should return with her to her flat for drinks. He was there for two hours during which time he says that he was under the impression that a man was on the premises. Immediately after leaving he found that a sum of £60 was missing from his wallet. In conclusion, this woman is undoubtedly as adventuress; she is regarded as a very dangerous woman indeed. She is completely unscrupulous, and for many years past she has lived entirely upon her wits.

Counsel for the appellant, who has appeared to give the court the assistance for which it asked, has submitted that the first part of the police officer's statement was unobjectionable, but he agrees that the latter part, particularly the last five or six sentences dealing with an alleged offence, and describing this woman as a very dangerous woman indeed, ought not to have been given by the police officer. If we had reason to believe that the recorder in sentencing

her had paid attention to these statements, and had sentenced her on the basis that they were true, the court would have had to consider whether the sentence should be reduced on that account. It seems quite plain in this case that the recorder, as he himself said, sentenced this woman without taking these statements into account. He said that it was true that there had been no convictions against her, and he was taking a lenient view on that account. The sentence of the court was one of 15 months' imprisonment. Therefore, the only question that arises is as to the propriety of police officers who are called in such circumstances making general statements about other offences and statements of that nature.

The matter was recently before this court in *R. v. Burton* (1), where improper evidence was given by a police officer to the effect that police inquiries had definitely proved that the prisoner was responsible for the losses which had taken place owing to stealing on the railway. With reference to that HUMPHREYS, J., said :

That was a most improper statement to make. Either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving.

For many years past, the police have had the advantage of a judgment of LORD ALVERSTONE, L.C.J., in February, 1911, in which the matter was dealt with a little more generally and fully. In *R. v. Campbell* (2) LORD ALVERSTONE, L.C.J., said this :

For many years it has been known that after the conviction of a prisoner it is the duty of some responsible officer of police to tell the court what he knows about the prisoner as the result of enquiry, where it would involve great difficulty and expense to prove the facts by legal evidence. At times, no doubt, police officers on these occasions say more than they ought to say against prisoners ; but there is nothing to show that that occurred in this case.

The question which has exercised the minds of the court is an important one. Police officers are always called, or nearly always called, to give the court such assistance as it ought to have in considering the sentence to be passed upon a convicted person. We think that in this case we should enlarge a little on what LORD ALVERSTONE, L.C.J., said in *R. v. Campbell* (2), and upon what HUMPHREYS, J., said in *R. v. Burton* (1). When a police officer is called to give evidence about a man who has been convicted, he should in general limit himself to such matters as previous convictions, if any, and antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the person convicted makes this information material. It is the duty of the police officer, we think, to inform the court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the court. Police officers should inform the court of anything in the prisoner's favour which is known to them, such as periods of employment and good conduct. We have no reason to believe that this is contrary to the present practice of the police who, as we all know, constantly inform the court of matters which are in the prisoner's favour. We think that it is the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof, and which he has reason to think will be denied by the prisoner. It must not be taken that we are attempting to lay down a rule in such wide, and at the same time such exact terms, as would cover every case, for the simple reason that this would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation we need to make is this, and I hope it is unnecessary. Nothing I have said is intended to affect in the least degree the right of the court to inquire into any matter in any individual case upon which the court itself thinks it right to ask for information.

Applying these observations to the present case, it is the opinion of the court that the police officer went further than he should. In the view which we take as to the effect of these improper statements upon the mind of the court

in passing a sentence of 15 months' imprisonment, we do not think it right to interfere with the sentence, and therefore the application for leave to appeal will be refused. Having regard to the circumstances, this application having been before the court twice, the time during which the accused has been in prison will count as part of her sentence.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *The Director of Public Prosecutions* (for the Crown).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

Re HAWKINS, KING v. HAWKINS.

[CHANCERY DIVISION (Farwell, J.), December 9, 1942.]

Income Tax—Payment free of tax—Limitation of deduction—Stated sum—Stated sum per week for dogs and horses—Sum paid as outgoings in respect of property—Finance Act, 1941 (c. 30), s. 25.

The testator directed his trustees to allow his wife to reside in the mansion house rent free and out of the rents and profits of his settled freeholds to pay "all rates, taxes and other outgoings and keeping the same in good repair and condition and properly insured". He also directed them to pay to his wife 3s. per week for each of his dogs and 15s. per week for each of his horses whilst they were alive. The Finance Act, 1941, s. 25, provides that any provision for the payment of a stated amount free of income tax contained in any will shall be satisfied by the payment of twenty twenty-ninths of the original sum. The question at issue was whether the amounts directed to be paid to the wife were stated amounts:—

HELD: (i) an amount which was not stated in any proper definition of that term was not a "stated amount" within sect. 25, and the provision as to the rates and taxes and other outgoings was not, therefore, within the section since it would vary according to the amount of repairs needed and the other variable items included therein. Such payment should not be reduced.

(ii) the provision as to the dogs and horses was a "stated amount" within the meaning of the section as the exact amount could be ascertained by finding out the number of such animals and accordingly this payment should be reduced as laid down by the section.

[EDITORIAL NOTE. The provisions of the Finance Act, 1941, s. 25 are well-known as they affect annuities, but the section applies to all stated sums whether payable periodically or otherwise so long as they are to be paid free of tax. The question here is what is a stated sum. Both classes of payment dealt with are payments, the amounts of which may vary from time to time. One class, however, can be definitely arrived at in any year by calculation and this is held to be a stated sum. The other varies according to the variation in such items as taxes, rates and repairs and cannot in any sense be called a stated sum since its components are so variable in themselves.

FOR THE FINANCE ACT, 1941, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 119.

SUMMONS to determine whether certain payments were stated amounts within the Finance Act, 1941, s. 25.

The testator, Henry Hawkins, made his will on June 13, 1930, and appointed Lansdown Harding, Thomas A. King and the Public Trustee to be the executors and trustees thereof. By cl. 5 of the said will the testator directed:

(1) My settled freeholds are hereby devised to my trustees for the said term of 100 years upon the trusts following.

(2) My trustees shall permit my wife Dorothy Kathleen Hawkins so long as she remains my widow to reside rent free at and have the use and enjoyment of Everdon Hall aforesaid and (so long as she continues to reside at Everdon Hall) of the chattels in or about or appropriated to Everdon Hall in cl. 15 hereof referred to as "the settled chattels" my trustees out of the rents and profits of my settled freeholds paying all rates taxes and other outgoings and keeping the same in good repair and condition and properly insured against fire and any other risks my trustees may think fit to insure against.

(5) To raise and pay to my said wife Dorothy Kathleen Hawkins so long as she and any of my dogs and horses are alive the following sums clear of all deductions including death duties and income tax for the keep of my dogs and horses while living and not sold or otherwise disposed of by her (that is to say) three shillings per week for each dog fifteen shillings per week for each horse such sums to commence from my death and to be considered as accruing from day to day and to be payable quarterly the first payment to be made at the expiration of 3 months from my death if my said wife is then living.

The testator died on Aug. 12, 1930, and probate of his will was granted in the Principal Probate Registry on Nov. 6, 1930. Application was made to the court in 1938 and heard in 1939 to decide certain questions arising under the will, and on May 29, 1942, the surviving executors and trustees of the will took out a further summons for the determination of questions arising thereunder, and asking, *inter alia*, whether the directions in cl. 5 were to be reduced by virtue of the Finance Act, 1941, s. 25.

The Finance Act, 1941, s. 25 (1), provides as follows :

Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which : (a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing ; and (b) was made before Sept. 3, 1939 ; and (c) had not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10s. in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

Wilfred M. Hunt for the plaintiffs, the executors and trustees of the will.

F. Baden Fuller for the first defendant, the testator's son, an infant.

G. E. Timins for the second defendant, the testator's daughter.

J. V. Nesbitt for the third defendant, the testator's granddaughter, an infant.

H. E. Salt for the fourth defendant, the testator's widow.

E. M. Winterbotham for the fifth defendant, the testator's sister.

FARWELL, J. : The question is whether the direction in cl. 5 of the will for payment of rates, taxes, outgoing, repairs, and insurance of the mansion house and grounds is a provision for the payment annually or otherwise of a stated amount free of income tax and is, therefore, subject to the provisions of the Finance Act, 1941, s. 25. A similar question arises with regard to the provision of the annual sums for dogs and horses. In my judgment, it is not possible to say that the provision for payment of rates, taxes, outgoing, repairs and insurance is for a stated amount. It is no doubt an amount which is ascertainable in each year, but it is not a stated amount, inasmuch as the amount must vary according to the repairs which are done and other matters in connection therewith, and on the true construction of sect. 25 of the 1941 Act, the section does not apply where the amount is not stated in any proper definition of that term at all. In my judgment, an amount which can be ascertained ultimately when the payments have to be made is not a stated amount within the meaning of the Act. On the other hand, the provision with regard to the dogs and horses is a provision for payment of a definite sum. That is, 3s. per week for each dog and 15s. per week for each horse. The amount can be ascertained by finding out how many dogs and horses there are. It is stated because the amounts which are to be paid, namely, 3s. and 15s. per week, are stated amounts, although the actual sum which has to be paid has to be ascertained by finding out the number of dogs and horses that are in existence. In my judgment, the second provision is within sect. 25 of the 1941 Act.

Declaration accordingly.

Solicitors : *Langlois, Harding, Tate & Johnson* (for the plaintiffs and the fifth defendant) ; *G. H. H. Richards* (for the first and second defendants) ; *Garrard, Wolfe & Co.* (for the third and fourth defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

SIMON v. ISLINGTON BOROUGH COUNCIL.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), November 3, 4, 5, December 10, 1942.]

Tramways—Repair of road—Tramway abandoned by London Passenger Transport Board—Notice by highway authority of intention to remove tramway equipment—Fatal accident—Liability of highway authority for non-feasance—Tramways Act, 1870 (c. 78), ss. 25, 28—London Passenger Transport Act, 1933 (c. 14), s. 23 (2), (5), (7).

The London Passenger Transport Board operated a tramway within the area of the defendant local authority. In 1938 the board abandoned the tramway and substituted a system of trolley buses. The local authority as the highway authority gave notice under the London Passenger Transport Act, 1933, s. 23 (5), of their intention to take up, remove and dispose of the tramway equipment and to make good the surface of the road. On Apr. 2, 1941, a fatal accident was caused by the want of repair of the tramway track and this action was brought to recover damages in respect of that accident. The local authority admitted that they were responsible for the maintenance of the track at the time of the accident, but they contended that they were responsible only as a highway authority, and, therefore, were not liable for non-feasance:—

HELD: (i) the abandoned tramway formed no part of the road proper, and the duty of the local authority, having undertaken the liability to remove it, was totally distinct from its duties as a highway authority. The doctrine of non-feasance was, therefore, not applicable. The want of repair amounted to a nuisance which it was the duty of the local authority to abate.

(ii) by deciding to allow the tramway plant to remain in the road, the local authority took a positive and active step which was the reverse of non-feasance.

(iii) *Semble*, until the expiration of the 3 months' notice, the tramway authority was liable in respect of third-party claims for damages.

[EDITORIAL NOTE.] The sole question in this appeal is whether the liability of the local authority in the circumstances was a liability as a highway authority. The nature of the liability was important since, if the local authority was liable only as a highway authority, it was not liable for mere non-feasance. Having regard to the authorities the facts of this case might have been thought to show a clear case of non-feasance, but the court have held that, in allowing the tramway plant to remain *in situ*, the local authority has taken a positive and active step which was the reverse of non-feasance. The Court of Appeal, after a careful analysis of the relevant statutory provisions, have decided that the local authority was not responsible for the repair of the abandoned tramway track as a highway authority but as transferees of the duty imposed upon the tramway authority by the Tramways Act, 1870, s. 25. Quite apart from that consideration, however, the Court of Appeal have treated this matter as governed by *Skilton v. Epsom and Ewell U.D.C.* (4), which case decided that the immunity of a highway authority for non-feasance does not extend to works constructed in a highway for other than highway purposes. If such works get out of repair or are improperly fixed in the first instance, they are nuisances which it is the duty of a highway authority to abate, assuming, it is to be supposed, that there is no other authority in control of such works and liable for their proper upkeep.

AS TO LIABILITY FOR REPAIRS OF TRAMWAY TRACK, see HALSBURY, Hailsham Edn., Vol. 32, pp. 716, 717, para. 1038; and FOR CASES, see DIGEST, Vol. 43, pp. 344-346, Nos. 33-49.]

Cases referred to:

- (1) *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526.
- (2) *Dublin United Tramways Co. v. Fitzgerald*, [1903] A.C. 99; 43 Digest 344, 37; 72 L.J.P.C. 52; 87 L.T. 532.
- (3) *White v. Hindley Local Board* (1875), L.R. 10 Q.B. 219; 26 Digest 412, 1322; 44 L.J.Q.B. 114; 32 L.T. 460.
- (4) *Skilton v. Epsom and Ewell U.D.C.*, [1937] 1 K.B. 112; [1936] 2 All E.R. 50; Digest Supp.; 106 L.J.K.B. 41; 154 L.T. 700.
- (5) *Broune v. De Luxe Car Services and Birkenhead Corpn.*, [1941] 1 K.B. 549; [1941] 1 All E.R. 383; Digest Supp.; 110 L.J.K.B. 369; 165 L.T. 175.
- (6) *McClelland v. Manchester Corpn.*, [1912] 1 K.B. 118; 26 Digest 404, 1270; 81 L.J.K.B. 98; 105 L.T. 707.
- (7) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 34 Digest 218, 1815; 67 L.J.Q.B. 862; 79 L.T. 284.

- (8) *Saunders v. Holborn District Board of Works*, [1895] 1 Q.B. 64; 26 Digest 413, 1325; 64 L.J.Q.B. 101; 71 L.T. 519.
- (9) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 33 Digest 23, 100; 49 L.J.Ch. 89; 40 L.T. 736.
- (10) *Pictou Municipality v. Geldert*, [1893] A.C. 524; 26 Digest 400, 1252; 63 L.J.P.C. 37; 69 L.T. 510.
- (11) *Hesketh v. Birmingham Corpn.*, [1924] 1 K.B. 260; 33 Digest 48, 280; 93 L.J.K.B. 461; 130 L.T. 476.

APPEAL by the plaintiff from a decision of CROOM-JOHNSON, J., dated May 19, 1942, and reported [1942] 2 All E.R. 490, where the facts are fully set out.

Serjeant Sullivan, K.C. and *A. E. Holdsworth* for the appellant.

S. R. Edgedale for the respondent.

The London Passenger Transport Board was not concerned in the appeal.

Serjeant Sullivan, K.C.: The borough council assumed a duty, and the defence of non-feasance was not open to it. It undertook a statutory duty imposed upon it apart from being the highway authority as successors of the surveyor of highways. [Counsel referred to *McClelland v. Manchester Corpn.* (6), *Skilton v. Epsom and Ewell U.D.C.* (4), and *Browne v. De Luxe Car Services* (5).]

Edgedale: No implication can be drawn from sect. 23 that the local authority was liable. The council's duty was to carry out the repairs within a reasonable time after giving the notice that they would do the work, and there was no unreasonable delay here. There would have been no necessity for the statute to provide an indemnity for the London Passenger Transport Board if the liability was on the local authority. [Counsel referred to *Groves v. Wimborne* (Lord) (7), *Saunders v. Holborn District Board of Works* (8), *Glossop v. Heston and Isleworth Local Board* (9), *Municipality of Pictou v. Geldert* (10), and *Hesketh v. Birmingham Corpn.* (11).]

SCOTT, L.J. [delivering the judgment of the court]: This appeal from CROOM-JOHNSON, J., raises a question depending partly on the correct interpretation of the London Passenger Transport Act, 1933, and partly on the scope of the common law doctrine as to the non-feasance immunity of a highway authority. The appellant is the personal representative of an unfortunate lad who was killed on Apr. 2, 1941, when riding a bicycle in the Caledonian Road, Islington. His machine was upset by reason of the tramlines and adjoining setts being out of repair, and he was forthwith run over by an omnibus of the London Passenger Transport Board (hereinafter called the board) without any negligence on the part of the driver. The action was brought against both the respondent council and the board, the only case made against the board being based on the alleged negligence of their driver. Judgment was, therefore, given in favour of the board, and there is no appeal against it. At the time of the accident the tramway was no longer in service, the ownership and possession of the whole of the fixed equipment of the tramway undertaking in the road having passed to the council as a result of what had taken place between the two authorities under the London Passenger Transport Act, 1933, s. 23; but CROOM-JOHNSON, J., held himself bound to follow a judgment of ATKINSON, J., given in 1941 in a similar case, where that judge held that a highway authority sued in similar circumstances was protected from liability under the doctrine that a highway authority is only liable for misfeasance, and not for non-feasance. His view was that that principle applied so as to confer immunity on a metropolitan borough council, which had acquired from the board the possession and ownership of the physical assets, fixed in one of the council's roads, which had once formed part of a tramway undertaking, and had then been transferred to the board under its Act of 1933, and subsequently pursuant to sect. 23 of that Act "abandoned" by the board to the council.

It is beyond dispute that the combined arrangement of tramrails and adjoining setts, which, in the present case also, had been the property of the London Passenger Transport Board, and before it of the tramway promoters operating under the 1870 Act, was, at the time of the accident, in a dangerous condition of disrepair by reason of the rails and the setts not being level with each other, and that that condition was the cause of the accident. CROOM-JOHNSON, J., fixed the damages at £450 1s., with a view to an appeal. The sole question before us is as to the liability of the council. The legal problem can be brought out most clearly by analysing the legal position in steps. (i) The duties of the

tramway undertaking, from which the London Passenger Transport Board took over, had been, under sect. 25 of the 1870 Act, to maintain the tramway in such manner that the uppermost surface of the rail is on a level with the surface of the road, and under sect. 28 to maintain and keep in good repair the setts on each side of the rails at that level. (ii) A breach of that duty causing injury to a person lawfully on the highway was actionable as "statutory negligence" (the phrase used by LORD WRIGHT in *Lochgelly Iron & Coal Co., Ltd. v. M'ullan* (1), at p. 23), and entitled a person injured thereby to recover damages from the tramway company: see sect. 55 of the 1870 Act, and compare *Dublin United Tramways Co., Ltd. v. Fitzgerald* (2). Alternatively, an action lay in respect of a dangerous condition of the tramway in the public road, causing damage to an individual, for nuisance at common law against the tramway company as owners and occupiers of the plant which gave rise to the nuisance. Even without sect. 55 we think the position would have been the same. (iii) The London Passenger Transport Act, 1933, by sects. 5 and 100, transferred to the board the various tramway undertakings mentioned in Sched. II, and imposed upon the board the above-mentioned duties in respect of the tramway equipment, *inter alia*, in the Islington area. The Tramways Act, 1870, s. 55, is not one of the sections excepted from the application of that Act. (iv) As long as the board remained in occupation of the tramway equipment which they owned, they remained under those duties, including the statutory duties of maintenance under the Tramways Act, 1870, ss. 25 and 28. (v) Although the Tramways Act, 1870, s. 41, which contains a code about discontinuance of a tramway, is not amongst the sections of that Act which the London Passenger Transport Act, 1933, s. 100, says are not to apply to the board, sect. 23 of that Act in effect supersedes it, and is the only statutory provision about the discontinuance of the Islington tramway that we need consider. That section was no doubt framed for the express purpose of providing simple machinery for bringing metropolitan tramways to an end, which was one of the objects for which the board was created by Parliament. It conferred on the board the right in its discretion at any time to give notice of abandonment of its tramway equipment in any area to the local highway authority "responsible for the road on or above which the tramway is laid or erected": subsects. (1) and (2). By subsect. (3) the board had the right, or, if the responsible highway authority required, the duty within a limited time to remove its equipment, and (under subsect. (4)) make good the road. Subsect. (5) is the important provision in the appeal. Under it the highway authority was empowered within 2 months of the board's notice to give a counter-notice saying that they would do the removal, but at the expense of the board, save that they were to credit the board with the proceeds of sale of the tramway equipment taken over by them; and they were required to carry out the work with all reasonable dispatch. In the event of the highway authority exercising this option, the property in and possession of the equipment, in our opinion, would pass to that authority, i.e., in the present case to the defendant council; and the council would take it over in its then condition. (vi) Subsect. (7) is in the following terms:

As from the date on which abandonment by the board of any tramway or part thereof takes effect, the board shall cease to be charged with any expenses incurred under, and shall be relieved of any liability arising by virtue of, any statutory enactment relating to the maintenance or repair of the road by the persons working the tramway or part thereof, as the case may be.

The phrase "any statutory enactment relating to the maintenance or repair of the road" refers primarily to sects. 25 and 28 of the 1870 Act, but the subsection is wide enough to cover also any common law liability, as for damages for a nuisance, which arises out of a failure to perform the duties of sects. 25 and 28.

There is a little ambiguity in the language of the section about the date when the abandonment takes effect as contemplated by subsect. (3). That subsection makes it take effect on the expiration of the board's notice, i.e., in 3 months. Subsect. (5) relieves the board of their "obligations" under subsects. (3), (4) and (6) in respect of the road covered by the board's notice, presumably from the time the counter-notice is received. This relief is, we think, limited to those obligations, and does not of itself free the board from liabilities to third parties; and this interpretation seems to be borne out by the words of indemnity which

follow. The complete release from liability given by subsect. (7) should thus be construed as operating only from the expiration of the board's notice; but at that moment it should be contemplated as freeing the board from all liability to third parties arising directly or indirectly out of the plant laid by the tramway undertaking, and taken over by the board. (vii) The board gave its 3 months' notice of abandonment under sect. 23 on Sept. 23, 1938. On Nov. 9 the council gave their counter-notice. The notice of abandonment therefore "took effect" within subsect. (7) on Dec. 24 of that year. From then onwards up to Apr. 2, 1941, nothing whatever was done by anybody to see that the "tramway equipment" so taken over by the board was maintained in a safe condition. Nothing was done by the board because they no doubt regarded all their liabilities either under the statute or at common law, as ended by the abandonment; for the property in the equipment and the possession of it had both passed out of them. Nothing was done by the council; whether from want of thought, or because they imagined they were immune as a highway authority under the doctrine of non-feasance does not appear. We were told that negotiations were proceeding in regard to other stretches of track both within and without their borough limits. The short fact is that nothing was done for the safety of the public.

Before delivery of the statement of claim the plaintiff's solicitors wrote to the solicitor to the council inquiring as to the position of the council under sect. 23. The reply dated Jan. 5, 1942, was as follows:

We have ascertained from our clients that responsibility for the removal of the tram track in Caledonian Road, including the maintenance thereof, was assumed as from Dec. 24, 1938, and that after that date, the London Passenger Transport Board were no longer under any liability in respect of the maintenance, removal or re-instatement.

The date of Dec. 24, 1938, be it observed, was the day on which the board's 3 months' notice of abandonment "took effect." In our opinion, the letter correctly states the council's legal position. Having regard to the great age of the equipment of many of the tramway undertakings in 1933 when transferred to the board, and the notorious inconvenience and dangers incidental to the presence of the rails in the streets, it would have been an extraordinary omission if Parliament had provided for the termination of the board's liability when its notice of abandonment took effect, without providing that the "abandonnee" authority should assume that liability. We say "extraordinary," because the conversion of tramways into trolley-bus systems, which was generally understood to be the intention of the 1933 Act, might involve years of delay, as, in fact, happened in Islington. In our opinion, it has not so failed to provide; but if there be any ambiguity in the language of the Act or any doubt left open, it ought to be resolved in favour of not defeating what must have been the intention of Parliament.

After delivering the statement of claim, the plaintiff's advisers arranged for the consent of the council to an alternative claim being added by amendment to the statement of claim, namely, that the council's unreasonable delay in removing the rails and restoring the road was the cause of the fatal accident on which the action was based. We allowed the amendment, but, in our opinion, it is irrelevant. The cause of the accident was either negligence in regard to the state of disrepair, or common law nuisance, not the delay in removal. That the council did come under liability for such street accidents as that sued on, is made clear by the following considerations. The physical things constituting the "tramway equipment" within sect. 23 (3) were originally inserted in the road under the powers of sect. 26 of the 1870 Act. They remained foreign to the highway, though in the road, and remained in the legal possession first of the tramway promoters and then of the board, to each of whom they in turn belonged. When they were abandoned to the council both property and possession passed to the council. If the state of disrepair of any part of them had constituted a nuisance the day before abandonment took effect, the board would have been liable. On what principle can it be argued that the day after it took effect, that same nuisance did not expose the council, which owned and possessed the things which constituted the nuisance, to the same liability?

In our opinion, the principle that a highway authority is not liable for non-feasance is wholly irrelevant. That immunity descended to it as the lineal successor first of the surveyor of highways, and before him of the inhabitants

- at large; but it must continue to be limited to those duties, incumbent on a modern local authority with highway functions, which are owed by it as highway authority. In the present case the council stands in the shoes of the board for the sole purpose of removing the board's cast-off superfluities. If those things constituted a danger when taken over, or became dangerous by decay after transfer to the council, they were still foreign to the road as such, and due to be removed with reasonable dispatch. But for the council's counter-notice they would have been removed and the road made good by the board by the end of 1938 or thereabouts. It was the choice of the council that stopped the removal by the board. The council wanted for ulterior reasons to let the plant remain in the road, until such time as it should suit the council's own convenience to remove it. In our opinion, that was a positive and active step taken by the council in order to keep the plant where it was, and, if it did constitute a nuisance, to keep the nuisance *in situ*. In its essence, that was the reverse of non-feasance.
- B** Over and above that consideration there is a reason of a different kind for holding that the council fail to bring themselves within the rule of immunity to highway authorities. That immunity extends only to damage due solely to the non-repair of the road *qua* road. It does not extend to acts or defaults of the highway authority in connection with any duties, except characteristic highway duties such as that of repairing the road. It does not apply in connection with public health duties, e.g., in connection with sewers: see *White v. Hindley Local Board* (3); nor with the duty of protecting the public from falling into an unfenced pit alongside the high road; nor with duties imposed by the Road Traffic Acts, 1930 and 1934. If such other duties have been undertaken by the body which is also the highway authority, and ill-performed, then the highway authority may be sued by the person injured and the immunity doctrine is no defence. In *Skilton v. Epsom and Ewell U.D.C.* (4) the Court of Appeal, consisting of SLESSER and ROMER, L.J.J., and SWIFT, J., had before them an action against a district council, which was in fact the highway authority, for damages for negligence through a stud in the road, fixed by the defendant council under the Road Traffic Act, 1930, but insecurely so fixed, flying up and injuring the plaintiff on his bicycle. The stud was, in fact, negligently fixed. It was held that the council were not entitled to take refuge behind the doctrine of the immunity of a highway authority for non-feasance. A long string of cases was reviewed, and except for the circumstance that the council had themselves fixed the stud in the first place, whereas in the present case the council took over the tram-rails and setts from the board, there is no difference between that case and this. In our opinion, that difference is immaterial, because in the present case, the council took over something which was an artificial work, foreign to the roadway as such, inserted into it under the enabling powers of the Tramways Act, 1870, s. 26. The council was concerned to remove it, because with the expiry of the board's tramway powers, the iron and stone, which had been a tramway, lost their identity and became incongruous foreign matter in a modern road, and mere obstructions to traffic. They were no part of the road proper, and the duty of the council as highway authority was to treat them as obstructions to traffic, protect traffic from their dangers and abate the nuisance as soon as they could. In the meantime, they took the risk of any injuries to members of the public using the road as a mere road. The capacity in which they were related to the obstructing metal and stones was that of highway authority owning a road in which a foreign substance had been inserted, and we cannot see any legal ground on which they were in any better position than if they had themselves put similar lengths of metal and blocks of granite in the surface of the road, where as road material they had no place. The council was in no better position than if the board had gone into liquidation and the council had bought the old iron and granite from the liquidator, in order to remove it themselves and sell it at a profit.
- H**

Skilton's case (4) is a decision, binding on us, to the effect that the relation of a highway authority to works constructed in a highway for other than highway purposes, by whomsoever placed there, is not one clothed with the immunity of the ancient highway authority known to English law. It is unnecessary to discuss the authorities which were reviewed in that case; but for the principle involved see particularly *White v. Hindley Local Board* (3), *per* BLACKBURN, J., at p. 223.

The appeal must be allowed with costs here and below, including all costs reserved, and judgment entered for the plaintiff for the sum of £450 ls., the sum provisionally fixed by CROOM-JOHNSON, J.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *White & Co.* (for the appellant); *William Charles Crocker* (for the borough council).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

BEAK (INSPECTOR OF TAXES) v. ROBSON.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Porter), **December 15, 1942.**]

Income Tax—Schedule E—"All salaries, fees, wages, perquisites or profits whatsoever"—Director subject to restrictive covenant—Payment of lump sum as consideration for covenant—*Income Tax Act, 1918 (c. 40), Sched. E, r. 1.*

The respondent, on Oct. 4, 1937, entered into an agreement with a company in whose employment he had been for some time, whereby he was to be employed for a term of 5 years as director and manager at a salary therein stated. The agreement contained clauses under which, in the event of the respondent determining the agreement by notice, as he was entitled under one of the clauses to do, or committing a breach of it which led to its determination, he covenanted for a certain period not, without the consent of the company, to be engaged or interested in the business of a coal exporter within a radius of 50 miles of Newcastle-upon-Tyne. The respondent was paid £7,000 by the company on the execution of the agreement in consideration of the respondent entering into that covenant. The Crown contended that the £7,000 was remuneration from his office as director and manager and accordingly was taxable under the *Income Tax Act, 1918, Sched. E* :—

HELD : the sum of £7,000 was not chargeable under *Sched. E*, because, though it was true to say that if he had not entered into the agreement he would not have received that sum, it was not a profit from the office of director and manager. The sum was the consideration for the benefit of a covenant which only came into operation after the completion of the service.

Decision of the COURT OF APPEAL ([1942] 1 All E.R. 639) affirmed.

[EDITORIAL NOTE.] The House have affirmed the decision of the Court of Appeal herein upon the same grounds as those upon which that court based its judgment. The decision is of importance, since it now seems to be clear that, in drawing service agreements, the consideration for the covenant not to compete can be severed from the main consideration or remuneration and will not be liable to tax. It does not need great foresight to see that, while income tax is charged at a high rate, there will be a great temptation to allocate the greater part of the consideration to the covenant not to compete in reduction of the salary and fees to be received in respect of the office and this may lead to difficulty and possibly to legislation.

AS TO WHAT ARE EMOLUMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 212-217, paras. 431-438; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

APPEAL by the Inspector of Taxes from a decision of the Court of Appeal, dated May 7, 1942, and reported [1942] 1 All E.R. 639, affirming an order of LAWRENCE, J., dated Jan. 16, 1942. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

Attorney-General (Sir Donald B. Somervell, K.C.) and Reginald P. Hills for the appellant.

Cyril King, K.C., and John Charlesworth for the respondent.

VISCOUNT SIMON, L.C. : My Lords, in this case the Crown contends that a payment of £7,000 to the respondent by a private company named William Mathwin & Son (Newcastle), Ltd., under a written agreement between them, dated Oct. 4, 1937, was a "profit from the office" of director and manager of that company within the meaning of the *Income Tax Act, 1918, Sched. E, r. 1*. The Commissioners for the General Purposes of the *Income Tax Acts* for the division of the city of Newcastle decided against this contention and were required to state a case for the opinion of the High Court. LAWRENCE, J., upheld the decision of the General Commissioners, and the Crown's appeal to the Court of Appeal (LORD GREENE, M.R., DU PARCQ, L.J., and LEWIS, J.)

failed. Leave was given to the Attorney-General to appeal to this House, on his undertaking that the Crown would pay the solicitor and client costs of the respondent in any event, and that the order as to costs in the Court of Appeal would not be disturbed. Notwithstanding the able arguments addressed to us by the Attorney-General and by Mr. Hills, I am of the opinion that the decision appealed against is right and that the present appeal must be dismissed.

A The written agreement of Oct. 4, 1937, recites that Robson has for some years served the company as a director and manager at a fixed salary with bonuses, and that his service is terminable by short notice on either side, but that his services and connection are important to the goodwill of the business. The provisions of the agreement are then set out in eight numbered clauses. Cl. 1-6 deal with the terms of Robson's service as a director and manager of the company. He is to serve for a term of 5 years from Apr. 1, 1937, at a salary at the rate of not less than £2,000 per annum, subject to a right in either party by B 6 month's notice in writing to terminate the agreement not earlier than Sept. 30, 1940. Provision is also made for the granting of bonuses to Robson out of the company's profits, and during his service he is not to enter into any other business of a similar nature without the previous consent of the board. So far the clauses of the contract constitute a service agreement pure and simple.

C Clauses 7 and 8 of the agreement deal with a different matter. Cl. 8 binds Robson if his service in the company is terminated before Apr. 1, 1942, not to be concerned or interested in the business of coal exporter, coal merchant, or ship-broker within 50 miles of Newcastle-upon-Tyne until Apr. 1, 1942, is reached. Cl. 7 provides that in consideration of this restrictive covenant the company shall on the execution of the agreement of Oct. 4, 1937, pay to Robson the sum of £7,000. This sum has been duly paid and, as I have said, the Crown claims that it constitutes profit from Robson's office of director and manager and is taxable accordingly under Sched. E. D LORD GREENE, M.R., has indicated the answer to this claim in very clear language. In the agreement before us, the obligations flowing from the contract of service and the remuneration to be received by the respondent in respect of that service are entirely separate from the restrictive covenant and the consideration which is given for it. The sum of £7,000 is not paid for anything done in performing the services in respect of which Robson is chargeable under Sched. E. The consideration which he has to give E under the covenant is to be given not during the period of his employment, but after its termination. He is giving to the company for a sum of £7,000 the benefit of a covenant which will only come into effect when the service is concluded. I agree with the Court of Appeal in the view that to treat this £7,000 as a profit arising from the respondent's office is to ignore the real nature of the transaction. It is quite true that, if he had not entered into the agreement F to serve as a director and manager, he would not have received £7,000. But that is not the same thing as saying that the £7,000 is profit from his office of director so as to attract tax under Sched. E.

The Attorney-General points out that it is not uncommon in managerial agreements to include a covenant not to compete after the service is terminated without any separate consideration being allocated to the covenant, and it was suggested that a decision in favour of the respondent in this case might involve G the apportionment of the remuneration which a manager receives under his agreement between the profit of his office and the price paid to secure the covenant. I propose to say nothing about that, and to decide the present case purely upon the terms of the agreement of Oct. 4, 1937. That agreement is admitted to be a *bona fide* contract and, so regarded, the £7,000 cannot properly be treated as a profit arising from the respondent's office or employment.

H I move that the appeal be dismissed with costs to the respondent as between solicitor and client.

LORD ATKIN : My Lords, I agree.

LORD THANKERTON : My Lords, I agree.

LORD RUSSELL OF KILLOWEN : My Lords, I also agree.

LORD PORTER : My Lords, I agree also.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant); *Hyde, Mahon & Pascall*, agents for *Wilkinson & Marshall*, Newcastle-on-Tyne (for the respondent). [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

TRUSTEE IN BANKRUPTCY OF BOWRING-HANBURY v. BOWRING-HANBURY.

[COURT OF APPEAL (Lord Greene, M.R., Lord Clauson and du Parcq, L.J.),
November 12, 13, 16, December 15, 1942.]

Limitation of Actions—Acknowledgment—Executor—Debt due to executor mentioned in inland revenue affidavit—Debt mentioned in statement to trustee in bankruptcy of creditor—Same hand to pay and receive—Debt due to executor—Suspension of operation of statute.

The respondent advanced £10,000 to his wife in Dec., 1924, of which she repaid £1,000 in June, 1929. She died in 1931, having by her will appointed the respondent her sole executor. For the purpose of obtaining a grant of probate, the respondent, in May, 1931, swore an inland revenue affidavit in which the debts listed as due from the wife included the debt of £9,000 due to him upon the loan. He was adjudicated a bankrupt in 1935, and in June, 1936, the solicitors who acted for him in the executorship sent a copy of the executor's cash account to his trustee in bankruptcy in which they referred to a possible claim by the respondent against the estate in respect of the £9,000. The action was commenced in July, 1936, by the trustee in bankruptcy of the respondent who sued the respondent as the executor of his wife. It was contended that, although 6 years had elapsed from the accrual of the cause of action, the debt sued upon was not barred by the Limitation Act, 1623, because the statements in the affidavit and the solicitors' letter constituted acknowledgments of the debt by the respondent sufficient to take it out of the operation of the statute. It was further contended, conceding for the purposes of this point that the statute began to run from June, 1929, that in computing the period of 6 years referred to in the Act, the time subsequent to Mar. 17, 1931, must be disregarded, since from that date, owing to the fact that the wife had appointed the respondent her executor, there was one hand only to pay and to receive and, therefore, the operation of the statute was suspended and ceased to operate while that state of affairs continued:—

HELD: (i) the statement in the inland revenue affidavit was a mere statement of facts and could not be taken to imply a promise and in any case was not made to the creditor or the creditor's agent.

(ii) as regards the solicitors' communication to the appellant in June, 1936, there was no evidence of any authority given to the solicitors by the respondent to make any acknowledgment of the debt on his behalf.

(iii) the statute did not cease to operate by reason of the fact that since Mar. 1931, the creditor had been the executor of the debtor and, therefore, the debt was statute-barred.

Decision of BENNETT, J. ([1942] 1 All E.R. 516) affirmed.

[EDITORIAL NOTE.] On the question of acknowledgment, the Court of Appeal have affirmed the decision of BENNETT, J., and on that part of the case there seems little room for any doubt. After the decision of BENNETT, J., it was suggested that an important point had been overlooked in this case and special leave to appeal notwithstanding that the normal time for appealing had elapsed was obtained. This point was whether the operation of the statute is suspended when, as the phrase goes, there is one hand to pay and to receive, or, in other words, where, if an action could be brought for the debt, the plaintiff and defendant would be the same person. In this case the creditor became the executor of the debtor and it was argued that, since he could not sue himself, the operation of the statute was suspended. On the authorities it is clear that the main principle which has been applied in cases of the limitation of actions is that, if the statute begins to run, it continues to run whatever happens. In this case, it would appear that time had begun to run before the creditor became executor. The only case which seems in point to suggest that, when the creditor becomes the personal representative of the debtor, the operation of the statute is suspended is *Seagram v. Knight* (5) and, after a very careful examination of this authority, the Court of Appeal have come to the conclusion that it is not an authority for the proposition that time ceases to run when the debtor becomes the executor, though it may be if he becomes the administrator of the debtor. This distinction is said to be based on the fact that the creditor could sue the heir in the case of a failure of assets, but the point that the heir has ceased to exist since 1925 is not dealt with. Indeed, the facts of this case do not appear suitable for raising this question, for there does not seem to have been sufficient assets in the estate of the debtor to allow the executor to retain the full

amount of his debt, nor was the debt vested in the executor after his bankruptcy in 1935, but apparently passed to his trustee in bankruptcy. The decision, therefore, strongly confirms the general proposition that, once time has commenced to run, it continues to run whatever happens, though it may well be that the decision herein should be confined to the particular facts of this case.

AS TO SUSPENSION OF OPERATION OF STATUTE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 618-621, paras. 777-784; and FOR CASES, see DIGEST, Vol. 32, pp. 349-351, Nos. 318-341.]

A Cases referred to:

(1) *Spencer v. Hemmerde*, [1922] 2 A.C. 507; 32 Digest 364, 484; 91 L.J.K.B. 941; 128 L.T. 33.

(2) *Re Beavan, Davies, Bankes & Co. v. Beavan* [1912] 1 Ch. 196; 23 Digest 360, 4273; 81 L.J.Ch. 113; 105 L.T. 784.

(3) *Stamford, Spalding & Boston Banking Co. v. Smith*, [1892] 1 Q.B. 765; 32 Digest 390, 716; 61 L.J.Q.B. 405; 66 L.T. 306.

B (4) *Lloyd v. Coote and Ball*, [1915] 1 K.B. 242; 23 Digest 360, 4274; 84 L.J.K.B. 567; 112 L.T. 344.

(5) *Seagram v. Knight* (1867), 2 Ch. App. 628; 23 Digest 238, 2899; 36 L.J.Ch. 918; 17 L.T. 47; *affg.* L.R. 3 Eq. 398.

(6) *Prideaux v. Webber* (1661), 1 Lev. 31; 32 Digest 349, 319; 1 Keb. 204.

(7) *Bynton's case* (1667), cited in *Hall v. Wybourn* (1690), 2 Salk. 420; 32 Digest 347, 301.

(8) *Beckford v. Wade* (1805), 17 Ves. 87; 32 Digest 349, 322.

C (9) *Rhodes v. Smethurst* (1838), 4 M. & W. 42; 7 L.J.Ex. 273; *affd.* (1840), 6 M. & W. 351; 24 Digest 737, 7653.

(10) *Re Benzoni, Bower v. Chetwynd*, [1914] 2 Ch. 68; 32 Digest 351, 339; 83 L.J.Ch. 658; 110 L.T. 926.

(11) *Copley v. Dorkmincque* (1676), 2 Lev. 166.

(12) *Burrell v. Egremont (Earl)* (1844), 7 Beav. 205; 32 Digest 415, 929; 13 L.J.Ch. 309.

(13) *Wynne v. Styant* (1847), 2 Ph. 303; 32 Digest 472, 1358.

D (14) *Nedham's Case* (1610), 8 Co. Rep. 135a; 23 Digest 39, 140.

(15) *Wankford v. Wankford* (1704), 1 Salk. 299; 23 Digest 48, 258.

(16) *Wilson v. Wilson*, [1911] 1 K.B. 327; 32 Digest 326, 118; 80 L.J.K.B. 296; 104 L.T. 96.

(17) *Smith v. Poole* (1841), 12 Sim. 17; 23 Digest 359, 4271; 10 L.J.Ch. 192.

(18) *Maniram v. Seth Rupchand* (1906), 22 T.L.R. 619; 32 Digest 368, 525.

(19) *Re Emmett, Jenkins v. Emmett* (1906), 95 L.T. 755; 23 Digest 359, 4272.

E (20) *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352; 32 Digest 347, 306; 63 L.J.K.B. 621; 71 L.T. 51.

APPEAL by the plaintiff from an order of BENNETT, J., dated Mar. 12, 1942, reported [1942] 1 All E.R. 516. The facts are fully set out in the judgment.

H. B. Vaisey, K.C., and *Sir George Jones* for the appellant.

H. Wynn Parry, K.C. and *Herbert Malone* for the respondent.

Vaisey, K.C.: The inclusion of a debt in an affidavit was for a long time thought to be a sufficient acknowledgment: *Smith v. Poole* (17). The debt was not statute-barred when the respondent swore the affidavit. One cannot get nearer to restating an obligation than by a statement made in an affidavit. The one exception to the rule that time under the statute does not cease to run is when there is the impossibility of an action for the debt because the creditor and the debtor are the same person. The 6 years ceased to run at the date of the grant of probate to the respondent of his wife's will. He could only exercise his claim by right of retainer. It is difficult to see how there can be an extinguishment of the debt if there is a right of retainer in respect of it. A right of retainer and a right of action are both means to an end. That end is the payment of the debt. The appellant should be entitled to an order which would enable him to prove in the wife's estate in the same way as other creditors and to obtain a dividend from that estate. [Counsel referred to *Maniram v. Seth Rupchand* (18), *Re Emmett, Jenkins v. Emmett* (19), *Re Beavan, Davies, Bankes & Co. v. Beavan* (2), *Lloyd v. Coote* (4), *Stamford Bank v. Smith* (3), *Seagram v. Knight* (5), *Musurus Bey v. Gadban* (20), *Spencer v. Hemmerde* (1), *Wilson v. Wilson* (16), *Nedham's case* (14), *Wankford v. Wankford* (15), *DARBY AND BOSANQUET ON STATUTES OF LIMITATIONS*, 2nd Edn., p. 53, *LIGHTWOOD ON THE TIME LIMIT OF ACTIONS*, p. 205, *INGPEN ON EXECUTORS*, p. 519, and *HALSBURY*, Hailsham Edn., Vol. 20, p. 625.]

Wynn Parry, K.C.: Regarding the letter from the respondent's solicitors to the appellant I say that there was no authority. A general authority from a client to his solicitor is not sufficient. No specific authority to make an

acknowledgment was given. *Seagram v. Knight* (5) is not an authority for the proposition, put so widely as it has been put, that the statute does not operate when the same hand has both to pay and to receive. Once the Statute of Limitations starts to run, its operation is not interrupted. The right of retainer was given to an executor who was a creditor for his benefit and protection because he could not sue for the debt. The reasoning underlying *Seagram v. Knight* (5) has no relevance to the present case. The proposition that where the creditor or debtor on the one hand, and the executor on the other, are the same person and, therefore, the running of the statute is suspended, is a proposition that proceeds upon a fallacy. It involves the dangerous expedient of arguing from the particular to the general. *Seagram v. Knight* (5) merely shows that it is one of those cases in which the law sets its face against unjust enrichment. In the present case there are no special circumstances in which a court of equity would have held that the time had been stopped from running.

Vaisey, K.C., in reply.

LORD CLAUSEN [delivering the judgment of the court]: In December, 1924, Victor Bowring-Hanbury (whom it will be convenient to refer to as the husband) lent to his wife the sum of £10,000. In June, 1929, the wife repaid £1,000 to the husband, thus leaving £9,000 owing to him. The wife died on Mar. 17, 1931, having by her will (of which probate was in due course granted to the husband) appointed the husband her sole executor and bequeathed to him the residue of her estate. On Mar. 14, 1935, the husband was adjudicated bankrupt. The plaintiff in the present action is the husband's trustee in bankruptcy. By his writ issued on July 25, 1936, he claims payment of the £9,000 which remained owing to the husband from the wife after the repayment of £1,000 in June, 1929. The defendant is the husband, sued as executor of the wife.

The husband took the point that the trustee's claim (assuming the debt of £9,000 to have vested in him on the husband's bankruptcy) is barred by the Limitation Act, 1923, s. 3, which provides that all actions of debt grounded upon lending without specialty shall be commenced and sued within 6 years next after the cause of such actions, and not after. To this the plaintiff set up the answer that the debt was acknowledged by the defendant within 6 years before the issue of the writ (a) by an inland revenue affidavit sworn by the husband in order to obtain probate on May 4, 1931, in which there appeared in the list of debts the following item, "balance due to [the husband] of loans made by him, £9,000"; and (b) by a letter written to the plaintiff in June, 1936, by the husband's solicitors which contained by reference to an enclosed document the statement that "there is a possible claim by [the husband] for £9,000, the balance of a loan of £10,000 he made to [his wife] in 1924".

The law as to the operation of an acknowledgment (which is authoritatively expounded by LORD SUMNER in the House of Lords in *Spencer v. Hemmerde*, (1)), has been altered by the Limitation Act, 1939, but (see sect. 33 of that Act) not so as to affect the present case. BENNETT, J., referring to the decision of NEVILLE, J., in *Re Beavan* (2), held that the statement in the inland revenue affidavit was a mere statement of facts and not an acknowledgment of anything to anybody, and could not be taken to imply a promise, and in any case was not made to the creditor or the creditor's agent. This decision appears to us to be plainly right and to accord with *Stamford, Spalding and Boston Banking Co. v. Smith* (3), and *Lloyd v. Coote* (4). As regards the letter written to the plaintiff by the husband's solicitors, BENNETT, J., held that the document disclosed no intention of acknowledging the existence of the debt. However this may be (and we express no opinion on the point) it is a complete answer to the plaintiff's plea based upon this letter that there was no evidence of any authority given to the solicitors by the defendant, to make any acknowledgment of the debt on his behalf. We, accordingly, see no ground for interfering with the decision of BENNETT, J., on the points submitted to him by the parties.

It remains, however, to deal with an entirely different point, which was raised for the first time in this court. The plaintiff assumed, for the purposes of this point, that the statute began to run from June, 1929, the last date on which a payment was made on account of the debt, but contended that in computing the period of 6 years referred to in the Act, the time subsequent to Mar. 17, 1931, must be disregarded, since from that date, owing to the fact that the wife had appointed the husband her executor, there was one hand only to pay and to

receive, and that in consequence, as it was said, the operation of the statute was "suspended," and the statute ceased to operate, while that state of affairs continued. It was not clear to us whether it was admitted or not that the statute resumed its operative effect as from Mar. 14, 1935, when, as it was suggested the debt became vested in the plaintiff, as the husband's trustee in bankruptcy, and, accordingly, if the latter suggestion was correct, there were again two parties concerned, the one to pay and the other to receive. It must be admitted, and indeed the contrary was not contended, that there is nothing in the words of the Limitation Act to produce this cesser of the operation of the statute; but it was said that it was settled by the authority, binding on this court, in *Seagram v. Knight* (5), that the operation of the Limitation Act might be "suspended" in the proper circumstances, and that the circumstances that there was one hand only both to pay and receive would be a circumstance that would "suspend" its operation. It, accordingly, becomes necessary to examine what was decided in *Seagram v. Knight* (5).

It is convenient first to recall that as long ago as 1661 (*Prideaux v. Webber* (6)), it was decided in effect that, where time had begun to run, it continued to run, and that there was no warrant for excluding from the period of limitation a space of time when, owing to the closing of the courts, no action could be brought. This decision appears to have been based on the view, that the words of the Act governed the matter, and that the absence of any exception in the Act of a space of time when no action could in fact be brought, was fatal to the suggestion that such an exception existed. (See *Bynton's case* (7), cited in *Hall v. Wybourn*, 2 Salk. 420, and the judgment of the Privy Council delivered by GRANT, M.R., in 1805, in *Beckford v. Wade* (8)). These decisions would seem to make it difficult to read into the Act an exception of a space of time when no action could be brought because there was one hand only both to pay and to receive.

It should also be noted that the fact that, owing to the death of a debtor, and subsequent delay in constituting a personal representative to him, there is a space of time during which the creditor cannot sue for the debt, does not enable the creditor to call for the exclusion of that space of time from the period of limitation. This was settled, after elaborate argument, in *Rhodes v. Smethurst* (9).

The matter was considered in this court in *Re Benzon* (10), when CHANNELL, J., delivering the judgment of the court (COZENS-HARDY, M.R., BUCKLEY, L.J., and CHANNELL, J.), said at p. 76:

The real difficulty in the way of the appellants is the well-established rule that if the statute begins to run it continues to run whatever happens. The only case we can find in the books where the running of the statute has been said to have been suspended is ... *Seagram v. Knight* (5), but that was a peculiar case on very special facts, and whatever may be taken of it, it clearly is not an authority in the present case. The general rule is clear; *Copley v. Dorkmincque* (11), where after the time had begun to run the courts were closed owing to the rebellion, and no action could be brought, is a very strong case. *Rhodes v. Smethurst* (9) is another strong case where the whole matter was carefully considered. The principle of the rule—if on such a technical matter there can be said to be any principle—appears to be that if any man has a cause of action which is ripe so that he has an opportunity of bringing his action and does not do so, he thereby takes the risk of some unexpected event happening which takes away from him the possibility of bringing his action within the remainder of the period which he has under the statute. The rule may work hardship in particular cases, but it is so well-established that no court would now decline to follow it.

The only comment we would venture to make on this passage is that it seems clear that by some slip the case in Levinz to which CHANNELL, J., referred has been cited as *Copley v. Dorkmincque* (11), whereas CHANNELL, J., must have intended to refer to *Prideaux v. Webber* (6).

Seagram v. Knight (5) came first before ROMILLY, M.R. The material facts were that from 1830 the grandfather, W.F.S., was tenant for life of certain freeholds with remainder to the father, W.L.S., in fee. The grandfather, W.F.S., cut certain timber in 1831, while the father, W.L.S., was still under age (in circumstances which, in the opinion of ROMILLY, M.R., made the cutting a wrongful act) and treated the proceeds as his own. In 1842, 1843, and Mar. 1844, the grandfather, W.F.S., again cut timber wrongfully. In Apr., 1844, the remainderman, the father W.L.S., died intestate, leaving the grandson (the plaintiff), then an infant, as his only son and heir. The grandfather, W.F.S.,

took out administration to the father, W.L.S., *durante minore aetate* of the grandson (the plaintiff), and after the death of the father, W.L.S., cut further timber wrongfully. In Nov., 1864, the grandfather, W.F.S., died. In Mar. 1865, the grandson (the plaintiff) came of age, and in Mar., 1866, having taken out administration to the father, W.L.S., filed a bill against the executor of the grandfather, W.F.S., for an account of all moneys received by the grandfather, W.F.S., in respect of timber cut on the land during the life of the father, W.L.S., and since the death of the father, W.L.S., and for payment to the grandson (the plaintiff) of such moneys with interest from the death of the grandfather, W.F.S. The executor of the grandfather, W.F.S., offered to account to the grandson (the plaintiff) for the proceeds of the timber cut after the death of the father, W.L.S., with interest from the death of the grandfather, W.F.S. This offer the grandson (the plaintiff) declined. ROMILLY, M.R., held that this offer would give the grandson (the plaintiff) all that he was entitled to, and decreed in terms of the offer. He decided that the statute must be considered to have run from the period when the father, W.L.S., attained 21, and that the claim to the proceeds of the timber cut in 1831 must, therefore, be treated as statute-barred. He also considered that in the circumstances of the case the claim for the timber money must be treated as having been settled between the grandfather, W.F.S., and the father, W.L.S., in the lifetime of the father, W.L.S., and on this ground he refused an account in respect of the timber cut in the lifetime of the father, W.L.S., in 1842, 1843, and Mar. 1844. The grandson (the plaintiff) took the case on appeal to LORD CHELMSFORD, L.C., and the case took a course which must be related in detail. Counsel for the plaintiff agreed that the cutting by the grandfather, W.F.S., was rightful, as the court would in the circumstances have directed the cutting, that the income of the proceeds would accordingly belong to the grandfather for life, and that the remainderman (*scil.*, the father, W.L.S., or his heir, the plaintiff) would become entitled to them only on the death of the grandfather, W.F.S., in 1864; on that footing, he submitted, that the right of the grandson (the plaintiff) to claim the proceeds of the timber did to accrue until the grandfather's death. This argument, if successful, would have resulted in the grandson (the plaintiff) obtaining an account of the proceeds of the timber cut in 1831, as well as of the proceeds of the timber cut in 1842, 1843, and Mar., 1844.

As an alternative argument the plaintiff submitted that the statute had not run because the grandfather, W.F.S., became administrator to the father, W.L.S., and the same hand, therefore, was to pay and to receive. Counsel for the plaintiff cited *Burrell v. Egremont* (12), and *Wynne v. Styant* (13). The former case decides that the Limitation Act has no application to a case where there is no assignable person liable to pay a charge which a limited owner claims to keep alive for his own benefit, and no person who by the delay could be induced to suppose the charge abandoned or merged, and where the rent out of which the interest upon the charge ought to be paid is receivable by and belongs to the person who is entitled to the interest on the charge if it be alive. The latter case seems to be relevant only as recognising the principle that where a mortgagee is in receipt of the rents of the mortgaged estate, the Limitation Act does not run against the mortgage charge; that is to say, that in such circumstances the mortgagee must for the purposes of the statute be treated as receiving interest on the mortgage, and, accordingly, there is no room for the application of the statute. Counsel for the defendant, having pointed out that the case was concerned with persons in whom legal estates were vested, and that even if application could have been made to the court by the tenant for life for leave to cut the timber, the court would not in this particular case have sanctioned it (a view with which LORD CHELMSFORD, L.C., agreed, as is shown by the observations reported at pp. 630, 631) was stopped by LORD CHELMSFORD, L.C. In reply the counsel for the plaintiff reiterated his submission that the court would in this particular case have sanctioned the cutting of the timber, and that the cutting was accordingly not wrongful, and that the proceeds must be treated as belonging to the remainderman subject to the life interest of the grandfather, W.F.S., in the income. LORD CHELMSFORD, L.C., however, proceeded to deal with the case on the footing that the cutting was wrongful, and that the remedy of the remainderman was either in trover or in an action for money had and received, and that the question was whether the remedy was barred. His

Lordship had no difficulty in holding that the claim in respect of the cutting in 1831, must be treated as barred. As regards the cutting in 1842, 1843, and Mar., 1844, his Lordship differed from the view of ROMILLY, M.R., that the claim of the father, W.L.S., must be presumed to have been settled, and his Lordship quite clearly held that the operation of the statute had been suspended as from the time when the grandfather, W.F.S., became the administrator of the father, W.L.S., and the same hand, viz., that of the grandfather, W.F.S., was the hand

- A to pay, as the hand of the tortfeasor, and the hand to receive, as the hand of the personal representative of the father, W.L.S., the remainderman who had suffered by the tort. When judgment had been delivered, counsel for the defendant referred for the first time to *Rhodes v. Smethurst* (9), and suggested, as indeed might well seem to be the case, that LORD CHELMSFORD, L.C., could not reach his decision without overruling the principle recognised in *Rhodes v. Smethurst* (9), that when the statute had once begun to run it could not be stopped. Thereupon LORD CHELMSFORD, L.C., seems to have disclaimed any intention of overruling *Rhodes v. Smethurst* (9), explaining, as we read his observations, that the statute would not be suspended by the fact of the creditor becoming the executor of the debtor, but that the statute might well be, and was to be, treated as suspended by the fact that (as was the case in *Seagram v. Knight* (5), then under consideration) the debtor became the administrator of the creditor.
- C LORD CHELMSFORD, L.C., seems to have satisfied himself that the latter proposition was to be deduced from *Nedham's Case* (14), and *Wankford v. Wankford* (15). Whether his Lordship's view on this point would be held to be correct in a court not bound by his decision, it would not be pertinent for us, sitting in a court bound by his decision, to consider; but, if we are right in construing his Lordship's observations as indicating that *Rhodes v. Smethurst* (9) was rightly decided in so far as it recognises the general principle that a space of time during
- D which it is impossible to sue for a debt is not to be excepted from the 6 years period, but that in the special case where the impossibility is due to the fact that the debtor has become the administrator of the creditor the rule is otherwise, his Lordship's judgment in *Seagram v. Knight* (5), is an authority against and not for the correctness of the argument put forward by the plaintiff in the present case, that the space of time during which the creditor was (as indeed he still is) the executor of the debtor is to be excepted from the period of 6 years
- E laid down by the statute.

Before leaving *Seagram v. Knight* (5) we may point out that there the debtor was the administrator, not the executor, of the creditor. LORD CHELMSFORD, L.C., bases his decision narrowly upon this fact, citing in support of it *Wankford v. Wankford* (15), where a distinction between the case of a debtor administrator and that of a debtor is drawn by POWELL, J. (at p. 303). In the case of a creditor executor that judge points out that:

- F . . . the debt is not extinct, but only upon supposal that the executor has assets which he may retain himself.

In the present case it was agreed by counsel on each side that this "supposal" does not arise upon the facts. *Wankford v. Wankford* (15) is certainly not an authority in favour of the appellant and it was only relied on by LORD CHELMSFORD, L.C., as covering the special case of a debtor administrator. It is no authority for the proposition that the statute is suspended where the creditor is the executor of the debtor. As was pointed out by POWELL, J. (at p. 304), such a creditor could sue the heir in case of failure of assets.

- G We should add that in the argument before this court it was assumed that the debt from the wife to the husband continued to exist after the husband had become the wife's executor and vested on his subsequent bankruptcy in his trustee. In the view we take of the case, it becomes unnecessary to decide
- H whether this assumption was correct. If the point is raised in the future in some other case, it may become necessary to consider the judgment of CHANNELL, J., in *Wilson v. Wilson* (16).

For these reasons we are satisfied that the new point raised in this court by the plaintiff is not sound. It follows that the appeal fails, with the usual result as to costs, and the judgment of BENNETT, J., dismissing the action will stand.

Appeal dismissed with costs.

Solicitors: Woolfe & Woolfe (for the appellant); Hopwood, Mills & Lonsdale (for the respondent). [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re A CONTRACT BETWEEN THE CORPORATION OF WATFORD AND WARE.

[CHANCERY DIVISION (Simonds, J.), **December 18, 1942.**]

Sale of Land—Rights of parties pending completion—Outgoings—War damage contribution—Contract of sale providing for payment by instalments and conveyance when instalments fully paid—Incidence of contribution.

A contract of sale of freehold property made in 1927 provided that the purchaser should pay £50 deposit and pay the balance of the purchase money, together with interest thereon at $5\frac{1}{2}$ per cent. per annum, by 25 equal annual instalments of £50 5s. 10d. The purchaser was let into possession on the payment of the deposit and the vendor covenanted that when the purchase money was fully paid, he would convey the property to the purchaser. The contract also provided for payment by the purchaser of all rates, fire insurance, premiums, the expenses of external painting and the costs of the administration of the scheme under which the property was sold, but there was no general provision as to the apportionment of outgoings. The vendor paid the contributions under the War Damage Act, 1941, and a summons was taken out to determine whether the purchaser was liable to indemnify the vendor in respect of such contributions or any part thereof:

HELD: neither the War Damage Act, 1941, nor any provision in the contract, nor the general principles of equity gave the vendor any right to recover from the purchaser the payment made under a statutory liability arising before the time fixed for completion.

[EDITORIAL NOTE.] The general position as to apportionment of the instalments of contribution payable under the War Damage Act, 1941, is dealt with in *Re Jacobs and Stedman's Contract* (1). The position here arises under a form of contract which has not been generally adopted in England, though more common in the Dominions. Where a purchaser is to pay the purchase price by instalments, the usual practice in England has been to convey the property to the purchaser in the manner usual where the full purchase money is paid at once, the payment of the instalments being secured by a mortgage of the property. It is believed that this method is preferable to that here adopted, where the conveyance of the property is deferred until the payment of the last instalment of the purchase price. Where the latter method is adopted there is a period of years during which the rights of the parties are those known as the rights of vendor and purchaser pending completion. Such rights have often been litigated, but always upon the footing that the position is a temporary one lasting only a few months and such authorities can only with difficulty be applied to a contract designed to extend over a stated period of years. The result in the present case is that the parties are bound by the precise terms of the contract and in that there is no provision affecting the particular point raised. The vendor, therefore, as the owner of the fee simple is held liable for the war damage contribution, a result probably the opposite of that which would have been the case had the matter been foreseen and a special clause dealing with this matter inserted in the contract.

As to OUTGOINGS, see HALSBURY, Hailsham Edn., Vol. 29, p. 348, para. 465; and FOR CASES, see DIGEST, Vol. 40, pp. 194-196, Nos. 1629-1640.]

Case referred to:

(1) *Re Jacobs and Stedman's Contract*, [1942] Ch. 450; [1942] 2 All E.R. 104; Digest Supp.

SUMMONS to determine a question arising between vendor and purchaser under the War Damage Act, 1941. All the facts are set out in the judgment.

L. M. Jopling for the applicant, the purchaser.

Raymond Jennings for the respondent corporation, the vendor.

SIMONDS, J.: This is a summons which has been issued in the matter of a contract dated Oct. 19, 1927, and made between the mayor, aldermen and burgesses of the borough of Watford, of the one part, and Arthur Sidney Ware, of the other part.

The applicant is Arthur Sidney Ware, the purchaser under that contract, and he claims a declaration that he is not liable to pay to or indemnify the corporation against any part of the contribution which the corporation are liable to pay under the War Damage Act, 1941, in respect of the property comprised in the above-mentioned contract. The contract, which, as I have said, was dated Oct. 19, 1927, was for the sale and purchase of certain property then known as 57, The Harebreaks, in the borough of Watford, the corporation being

the vendor and the applicant the purchaser. The purchase price was the sum of £750, of which the purchaser paid £50 as a deposit, and the balance was to be paid with interest at the rate of $5\frac{1}{2}$ per cent. per annum by 25 equal annual payments of £50 5s. 10d. each, made up of principal and interest combined, in the manner shown in Sched. I to the contract. In addition, the purchaser agreed to pay to the corporation in each year such a sum as would cover (a) all rates payable in respect of the premises and water charges, (b) fire insurance premiums, (c) external painting undertaken by the corporation under cl. 10 of the contract, and (d) the costs of the administration of the scheme. The "scheme" refers to this fact: that this house was one of a number of houses which the corporation was erecting under a housing scheme. The amount of those several extra charges was estimated at £12 3s. 8d. per annum, which made, with instalment of principal money and interest, a yearly sum of £62 9s. 6d.; and the arrangement was that the purchaser should pay that sum in weekly instalments.

The agreement further provided that the corporation would deliver possession of the premises to the purchaser, who should at once proceed to occupy them. It also provided for certain remedies in the event of any weekly instalment not being paid. It provided expressly for the personal occupation by the purchaser of the premises and for the execution by him of the necessary repairs, painting and so on to keep the premises in good and tenable repair. It provided, as indicated in the part of the document to which I have already referred, that the corporation would keep the premises insured against loss or damage by fire and would bear, in the first place, the cost of external painting. It further provided that the corporation should pay all tithe rentcharges. It is noticeable, perhaps, that there was no right in regard to tithe rentcharge to any recoupment. It is noticeable further that in this document there is no general provision for the apportionment of any outgoings. Finally, the document provided that, as soon as the purchaser should have paid the whole of the purchase money and interest thereon, together with the rates and water charges, the expenses of external painting and cost of administration as provided by the clause which I have already read, the corporation should execute a conveyance to the purchaser in the form contained in Sched. II to the contract.

The contract being dated in the year 1927, the final instalment, if all the instalments were paid in due course, would, I suppose, be paid in the year 1952. All the instalments up to date have in due course been paid.

The question which now arises, as appears from the statement which I have already made, is: who is liable as between the vendor and the purchaser to pay the contributions which have to be paid under the War Damage Act, 1941? It is necessary to refer to one or two sections of that Act. Sect. 1 of the Act sets out the statutory provision to which I am going to refer. Sects. 2 and 3 provide for the nature and amount of the payments which are made by the commission. The payments are of two kinds, which are called by the Act "payment of cost of works" and "value payment." Value payment is, by sect. 3 (4), defined as:

... an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage ...

Sect. 9 (2) of the Act provides:

Subject as hereinafter provided, a value payment and the interest thereon shall, if no proprietary interest other than the fee simple was subsisting in the damaged hereditament or in any part thereof immediately before the occurrence of the war damage, be paid to the person who was then the owner of the fee simple therein ...

Sect. 19 is one of a number of sections which deal with the contribution to be made by owners of property. By sect. 19 (1), the properties which are liable to contribute are called "contributory properties." The property the subject of the contract here in question was a contributory property. Sect. 20 provides as follows:

(1) The contribution in respect of any contributory property shall be payable by five annual instalments becoming due in the year 1941 and each of the four subsequent years.

(2) The instalment for each of the said years shall become due on the first day of July in that year, but in relation to any such instalment regard shall be had, in so far as the provisions of this part of this Act and of Sched. IV thereto expressly so provide, to the circumstances prevailing on the first day of January in that year (hereinafter referred to as the relevant date).

Then subsect. (3) refers to the amount of the instalment which is to be paid by the owners of contributory properties in respect of the contributory value. Sect. 23 deals with the persons who are primarily liable for instalments. It provides by subsect. (1) :

An instalment of contribution becoming due in any year in respect of any contributory property shall, save as otherwise provided in this Part of this Act (a) if there is at the relevant date only one proprietary interest subsisting in the whole of that property, be payable by the owner at that date of that interest.

I pause there from reading the Act to say this. It is common ground between the parties that the owner of the only proprietary interest at the relevant date was the corporation and the corporation was, therefore, primarily liable to make that payment. I am told that the payment was in fact made by the purchaser, who was in possession ; but it is conceded that, if he did make that payment, it was as agent for the corporation, which was primarily liable ; and I deal with this case upon the footing that the corporation was primarily liable for the payment and made it.

There is only one other section to which I need refer for the purpose of this case. Sect. 46 (3) provides :

Where a hereditament sustains war damage at a time when an interest therein is the subject of a contract of sale or of a notice to treat served under an enactment authorising the compulsory acquisition thereof, any value payment in respect of the damage, or share of such a payment, or payment under sect. 15 of this Act, payable to the vendor in respect of that interest, shall, unless the contract is rescinded or the notice ceases to have effect, be held by him upon trust for the purchaser : Provided that any lien upon that interest to which the vendor is entitled by virtue of the contract shall extend to that payment or share.

That, presumably, refers to the vendor's lien, although it may be said that the vendor's lien arises not so much by virtue of the contract as by virtue of the general equity.

I have now to consider whether the corporation, having, as it was bound to do, made the payment, is entitled as against the purchaser to recoupment. That right can only arise in one of three ways. It must be provided by the statute or it must be provided by the contract or it must arise under some general principle of equity. First, it is clear that, although the Act provides for many contingencies, it does not provide for recoupment by the purchaser to the vendor of the contribution made by the vendor. It is, perhaps, noticeable that, while sect. 46 (3), which I have read, specifically provides that as between vendor and purchaser, the vendor shall hold the value payment, if made to him, upon trust for the purchaser, subject to his lien, there is no complementary provision for indemnity by the purchaser in respect of the contribution which the vendor has made. Secondly, it is clear that there is no right of recoupment under the contract itself, which, while making express provision in regard to foreseen expenditure, does not provide in general terms for any unforeseen expenditure. Thirdly, therefore, if there is any right of recoupment, it must be based upon some general principle of equity.

I know of no equitable principle which enables a vendor, independently of any statutory provision or contractual right, to recover from a purchaser, even if he has gone into possession, a payment which he, the vendor, has made under a statutory liability arising before the time fixed for completion. It is commonly said (see WILLIAMS, VENDOR AND PURCHASER, 4th Edn., Vol. 1, p. 546), that in the interval between contract and conveyance the property sold belongs in equity to the purchaser. So it does ; and the vendor is, therefore, during that time constructively a trustee for him ; but this statement must not be pressed too far, so as to give to the vendor all the rights of indemnity to which a trustee in the full sense is entitled from his trust estate, for the vendor has his own personal and substantial interest in the property, which he is entitled to protect, and it is, in my judgment, impossible to concede to him in respect of payments made by him, whether voluntarily or compulsorily as this payment was made, the right of indemnity which an ordinary trustee can claim. It is a payment which might in certain circumstances inure for his own benefit, as for example, if the purchaser made default in completion and the contract was rescinded.

The result is that neither the statute nor the contract nor any general principle of equity gives the vendor a right of recoupment from the purchaser and, accordingly, this application succeeds.

The decision of FARWELL, J., in *Jacobs and Stedman's Contract* (1), does not exactly cover the point that I have had to decide, for he had only to consider whether there should be an apportionment of the contribution made under the Act upon the footing that it was an "outgoing" within the meaning of certain conditions of sale. He decided against apportionment upon this footing, but, if there is a general equity to indemnity, I do not see why that should not be equally the case whether the claim is in respect of the whole or an apportioned part. It was not, however, in that case suggested to the court that any such equity existed.

Declaration accordingly. Costs agreed between the parties.

Solicitors: *Shaen, Roscoe & Co.* (for the applicant); *A. N. Schofield*, Town Clerk, Watford (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

TICKLER v. TICKLER.

[COURT OF APPEAL (Scott, MacKinnon and du Parc, L.JJ.), December 1, 2, 18, 1942.]

Divorce—Desertion—Alleged agreement to live apart—Effect of letters written by husband to wife—Conduct of parties.

On July 20, 1936, the wife, through her solicitors, informed the husband that she was unwilling any longer to live with him and that she required him to leave her house which had been the marital home. The parties did not live together afterwards. It was contended, on behalf of the wife, that an agreement, entered into on Mar. 16, 1937, between her husband and herself, and indorsed on counsel's briefs, amounted to an agreement to live separate and apart. By that agreement the husband agreed not to assert any right or claim for any purpose to come upon or reside with the plaintiff, and the parties mutually agreed not to molest one another. It was also contended that two letters, dated May 16, 1937, and July 14, 1938, respectively, sent by the husband, made it clear that the husband was unwilling to resume conjugal relations and, therefore, the wife's desertion could not be said to be "without cause" :—

HELD: (i) there was nothing in the agreement of Mar. 16, 1937, to excuse the continuance of the desertion.

(ii) the letters in question had no effect upon the conduct of the wife who had never done anything which showed a disposition to resume marital relations.

[EDITORIAL NOTE. The importance of this case lies in the consideration of a dictum of LORD MACMILLAN in *Pratt v. Pratt* (2) to the effect that it is inherent in the conception of marital desertion that it must be persisted in without the consent and against the wishes of the deserted spouse. The fact is, as a long line of authorities shows, that desertion is a matter which defies definition and can only be left to be decided on the facts of any particular case. The Court of Appeal are clearly of opinion that this sentence from the opinion of LORD MACMILLAN can easily be pushed too far and it is pointed out that it went beyond what the other learned Lords stated to be the law in the same case and in *Cohen v. Cohen* (1).]

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 657, 658, para. 967; and FOR CASES, see DIGEST, Vol. 27, pp. 312-315, Nos. 2901-2929.]

Cases referred to:

- (1) *Cohen v. Cohen*, [1940] A.C. 631; [1940] 2 All E.R. 331; Digest Supp.; 109 L.J.P. 53; 163 L.T. 183.
- (2) *Pratt v. Pratt*, [1939] A.C. 417; [1939] 3 All E.R. 437; Digest Supp.; 108 L.J.P. 97; 161 L.T. 49.
- (3) *Harriman v. Harriman*, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557.
- (4) *Herod v. Herod*, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 108 L.J.P. 27; 159 L.T. 530.
- (5) *Shipman v. Shipman*, [1924] 2 Ch. 140; 27 Digest 259, 2282; 93 L.J.Ch. 382; 131 L.T. 394.
- (6) *Sifton v. Sifton*, [1939] P. 221; [1939] 1 All E.R. 109; Digest Supp.; 108 L.J.P. 131.
- (7) *Pardy v. Pardy*, [1939] P. 288; [1939] 3 All E.R. 779; Digest Supp.; 108 L.J.P. 145; 161 L.T. 210.

(8) *Ettenfield v. Ettenfield*, [1940] P. 96; [1940] 1 All E.R. 293; Digest Supp.; 109 L.J.P. 41; 162 L.T. 172.

(9) *Williams v. Williams*, [1939] P. 365; [1939] 3 All E.R. 825; Digest Supp.; 108 L.J.P. 140; 161 L.T. 202.

APPEAL by the wife from an order of HENN COLLINS, J., dated June 26, 1942. The facts are fully set out in the judgment.

C. Gallop for the appellant.

Noel Middleton, K.C. and *E. Holroyd Pearce* for the respondent.

Gallop: Two points arise on this appeal. In the first place, the wife says that by reason of an arrangement which is recorded on the briefs of counsel on the compromise in certain proceedings in the King's Bench Division, if ever there was any desertion, it thereafter ceased. It was an agreement for separation, and thereafter the parties lived apart by consent. The second point is that, by reason of letters dated May 16, 1937, and July 14, 1938, written by the husband to the wife, the wife was no longer absenting herself from the husband without cause. The letters showed the state of the husband's mind at the time and, if the wife had proposed returning to the husband, he would not have entertained the proposal. When a petitioner seeks a divorce on the ground of desertion, the authorities show that the state of mind of the petitioner is a matter for consideration. It is always possible for a party to put an end to desertion by a change of mind. If the court should find that the spouse complaining of desertion would have refused to resume cohabitation, the petitioner does not discharge the obligation of showing that the continued absence of the deserting spouse was against the petitioner's consent. In *Pratt v. Pratt* (2), it was said that the mind of the spouse seeking the remedy must be regarded. It was said by HENN COLLINS, J., that unless he could find an overt act, the desertion continued. That is not so, but the state of mind must always be regarded. [DU PARCQ, L.J., referred to *Harriman v. Harriman* (3).] Where the period of 3 years is interrupted by the husband writing 2 letters of the character of those which were written by the husband in the present case, it cannot be said that the husband was willing during all that period to put an end to the desertion. If the judge had found as a fact that the state of mind of the petitioner fulfilled the requirements laid down in *Pratt v. Pratt* (2), the court would, I suppose, be reluctant to disturb the judgment. *Herod v. Herod* (4) is authority for saying that the conduct of the aggrieved spouse is a relevant consideration when determining what the deserting spouse ought to have done. A wife has no right to object to a husband residing in her house with her. *Shipman v. Shipman* (5) decided that the court will only grant an injunction to restrain a husband from forcing himself upon a wife if financial injury would result. There the wife obtained an injunction to prevent the husband from intruding himself upon her at a boarding house which she kept. In *Cohen v. Cohen* (1), all the Law Lords expressly approved the words of LORD MACMILLAN in *Pratt v. Pratt* (2). [Counsel referred to *Sifton v. Sifton* (6), *Pardy v. Pardy* (7), and *Ettenfield v. Ettenfield* (8).]

Middleton, K.C.: The wife deserted the husband and I submit that the desertion continues until it is terminated. There must be some step on the part of the deserting spouse to put an end to the desertion. Otherwise, the desertion continues unless the deserted spouse, by some act of his own, has given the deserting spouse some reasonable cause to believe that the deserted spouse would not have the other back. If the husband consents to the desertion, that may be regarded as reasonable ground for the wife not attempting to resume cohabitation. In the present case, the question is whether or not the husband consented to his wife living apart. We are entitled to say, on the judge's words, that the judge has found that there was no consent on the part of the husband to the wife's remaining apart. In *Williams v. Williams* (9), SIR WILFRID GREENE, M.R., stated what elements were necessary to constitute the act of desertion. On the side of the deserted spouse one element was required, namely, the absence of consent. [Counsel referred to *Pratt v. Pratt* (2).] [He was stopped by the court.]

SCOTT, L.J. [delivering the judgment of the court]: This is an appeal by a wife from a decision of HENN COLLINS, J., who granted her husband's petition for divorce on the ground of desertion. On July 20, 1936, the wife, through her

solicitors, informed her husband that she was unwilling any longer to live with him. She required him to leave her house, which had been the marital home. From that time the spouses ceased to live together. It was conceded that the wife brought about the separation and had never taken any step towards terminating it. Her appeal to this court was based on two grounds, which had been the principal grounds of her defence.

A First, it was contended on her behalf that on Mar. 16, 1937, an agreement was entered into between herself and her husband, through their counsel acting on their behalf, which amounted to an agreement to live separate and apart. Secondly, it was argued that two letters which the husband wrote to the wife, one dated May 16, 1937, the other dated July 14, 1938, made it manifest that he was unwilling to resume conjugal relations, and that it would be hopeless for her to seek a reconciliation. It was accordingly submitted that from May, 1937 (or, alternatively, from July, 1938) her desertion of her husband could not be said to be "without cause."

B The decision on the first point depends on the true construction of a written agreement indorsed on counsel's briefs by way of settlement of an action concerned solely with rights of property. Counsel for the appellant relied on two clauses in the agreement, one (ungrammatical but intelligible) whereby the husband agreed that he would not :

C . . . assert any right or claim for any purpose to come upon or reside with the plaintiff [the wife] at Upton Court or any other residence of the plaintiff or elsewhere. By the other the husband and wife mutually undertook not to molest one another. It was contended that these clauses taken together were effective to release the wife from any obligation to resume cohabitation with her husband. In our opinion, they amount at most to a promise by the husband that he will not force his presence upon his wife so long as she maintains her resolve to keep
D away from him. It is to be observed that no corresponding promise was exacted from the wife, who remained free to request her husband to return and share her home with her, or to offer to join him in a home to be chosen by himself, or, indeed, to require him to provide such a home. The mutual undertaking "not to molest one another" could certainly not be read, in this context, as precluding a friendly attempt at reconciliation by either spouse. There was, therefore, nothing in the agreement to excuse the continuance of the desertion. For
E these reasons we are of opinion that HENN COLLINS J. came to a right conclusion on this point.

As to the second ground of appeal, it is essential to remember that, as was said by LORD ROMER in *Cohen v. Cohen* (1), at pp. 645, 646 ([1940] 2 All E.R., at p. 339) :

F The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact, and the determination must depend upon the circumstances of the particular case.

In order to decide this question, it is necessary to give due weight to any facts which tend to prove, or to negative, the conclusion that the deserted spouse has so acted as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation will be rejected. Ultimately, the question
G for the court is whether, in the light of all the circumstances, the language or the conduct of the deserted spouse has been such as to excuse the deserting spouse from making any attempt to put an end to the desertion. Has he "made it plain to his deserting wife that he will not receive her back"? (See *Cohen v. Cohen* (1), at pp. 638, 639 ([1940] 2 All E.R., at p. 335). In pursuing this inquiry regard must be had to the intentions and conduct, not only of the deserted
H spouse, but also of the spouse who is *prima facie* guilty of desertion (*Ibid*, per LORD ROMER, at pp. 641, 642 ([1940] 2 All E.R., at pp. 336, 337).

It was contended on behalf of the wife that it was for the husband to show that he was at all times ready and willing to resume cohabitation with his wife. In support of this contention, counsel for the appellant relied strongly on a passage in the opinion of LORD MACMILLAN in *Pratt v. Pratt* (2), at p. 422 ([1939] 3 All E.R., at p. 439), in which he referred to Scots law in order to expound what he declared to be :

. . . an element . . . inherent in the conception of marital desertion, namely, that

the desertion must be persisted in without the consent and against the wishes of the deserted spouse.

In our opinion, the argument based on these *dicta* of LORD MACMILLAN was pressed too far. It is to be observed that the opinion of LORD ROMER, at pp. 423-429 ([1939] 3 All E.R., at pp. 440-443), with which the majority of their lordships concurred, contained nothing to the same effect, and that LORD WRIGHT and LORD PORTER expressed their concurrence with the opinion of LORD ROMER, and not with that of LORD MACMILLAN. We have no doubt in these circumstances that it is proper to regard the statement of the law which is contained in *Cohen v. Cohen* (1) as both authoritative and, for the present purpose, complete. That statement is in part founded on another passage from the opinion of LORD MACMILLAN in *Pratt v. Pratt* (2), in which the principle to be applied was stated in a form which commended itself to all the learned Lords who heard the appeal in *Cohen v. Cohen* (1), at pp. 638, 639 ([1940] 2 All E.R., at p. 335).

It cannot be denied that the language used by the husband in the two letters to which we have referred was, to say the least of it, insulting and provocative. On the other hand, it is true to say that his words were in the main an expression of the grievances of which he complained, including the fact and the circumstances of the desertion. Intemperate complaints of a spouse's desertion and the circumstances leading up to, or accompanying, it do not of necessity afford an excuse for its continuance, nor do we think that every angry expression used by a husband, from which a reluctance to resume cohabitation might be inferred, can necessarily be treated as making (in the words of LORD MACMILLAN, at p. 420), "it plain to his deserting wife that he will not receive her back." The importance to be attached to the written word in such a case as this depends partly on the intention of the writer, but partly also (as has been said) on the disposition and inclination of the person to whom the communication is addressed. Nobody can come to a satisfactory conclusion on such a matter who has not had the advantage of seeing and hearing the parties. HENN COLLINS, J., having enjoyed that advantage, came to the conclusion that, notwithstanding the letters, the husband was to be believed when he said that he would, or, at least, might, have considered favourably any suggestion of a reconciliation on the part of the wife. Further, HENN COLLINS, J., found, and this finding certainly cannot be questioned, that the wife had never done anything which showed a disposition to resume normal relations. It is not, we think, an unreasonable inference from these findings that, if the wife had ever been disposed to resume normal relations with her husband, she would not in all the circumstances have been deterred from so doing by these two grossly insulting letters from an angry man, and that the receipt of those letters had no effect on her conduct. We understand that this was the view taken by HENN COLLINS, J., and we are by no means prepared to say that it was a wrong view or that he arrived at it by any misapplication of the law.

Much criticism was directed to the statement of HENN COLLINS, J., that "the burden is on the defaulter to show, by some overt act, a disposition to resume normal relations." If he intended by this statement to enunciate a general proposition, we are unable to assent to it, since, as we have said, a deserted spouse may so act as to make it clear that nothing which the other party can do will lead to a reconciliation, and may thus provide good cause for his spouse's continuing desertion. In such a case the "overt act" would be a mere formality and it is not desirable that the rights of the parties should be made to depend on the observance of meaningless forms. It is sufficiently clear, however, from the judgment of HENN COLLINS, J., read as a whole, that his decision does not depend upon the accuracy of any such general proposition, and he was, in our view, right to attach importance to the fact that there had never been any indication by the wife of a willingness to rejoin her husband.

For these reasons, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Edward Montague Lazarus & Son* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister at Law.]

THE BISHOP OF GLOUCESTER v. CUNNINGTON.

[COURT OF APPEAL (Lord Greene, M.R., Scott and MacKinnon, L.JJ.),
November 22, December 11, 1942.]

Ecclesiastical Law—Parsonage house—Lease by incumbent—Whether tenant protected by Rent Restrictions Acts.

Landlord and Tenant—Rent restriction—Lease of parsonage house—Whether Rent Restrictions Acts applicable—Pluralities Act, 1838 (c. 106), ss. 32, 33, 36, 43, 46, 59.

By a lease dated Oct. 9, 1939, an incumbent demised a vicarage to the respondent for a term expiring 1 month after the termination of the war, with a proviso that the lease should cease and be void in the event of the lessor ceasing to be the incumbent of the living. In Mar., 1942, the incumbent, on his appointment to a bishopric, resigned the living. By deed dated Mar. 5, 1942, he surrendered the vicarage to the appellant who, accepted the surrender on Mar. 6, 1942. It was admitted that the vicarage was within the Rent Restrictions Acts if those Acts applied to a parsonage house:—

HELD: the relevant statutory provisions in force when the Rent Restrictions Acts were passed showed that parsonage houses were placed by the legislature in a category by themselves. By the Pluralities Act, 1838, s. 59, every lease of a parsonage house can be avoided and the tenant evicted whenever the bishop orders the incumbent to reside in the house, and that section has not been impliedly repealed by the Rent Restrictions Acts, and the restrictions on recovering possession imposed by those Acts do not apply to parsonage houses.

[EDITORIAL NOTE. The only question here is whether the legislation affecting parsonage houses was so special that it could not be assumed that it was impliedly repealed by the Rent Acts. The Court of Appeal have adopted this view, holding that there were certain provisions of the Pluralities Act, 1838, which could not be deemed to be repealed by the later legislation. That this result may work some apparent injustice is seen from the argument submitted by counsel for the respondent.

AS TO HOUSES WITHIN THE RENT ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 562, 563, Nos. 7097-7107.]

Cases referred to:

(1) *Seward v. Vera Cruz, The Vera Cruz* (1884), 10 App. Cas. 59; 42 Digest 769, 1959; 54 L.J.P. 9; 52 L.T. 474.

(2) *Butler & Goodale's Case* (1598), 6 Co. Rep. 216; 19 Digest 411, 2460; *sub nom. Goodale v. Butler*, Moore K.B. 540.

(3) *Rickard v. Graham*, [1910] 1 Ch. 722; 19 Digest 505, 3624; 79 L.J.Ch. 378; 102 L.T. 482.

(4) *Garnett v. Bradley* (1878), 3 App. Cas. 944; 43 Digest 770, 1968; 48 L.J.Q.B. 186; 39 L.T. 261.

(5) *Blackpool Corp'n. v. Starr Estate Co., Ltd.*, [1922] 1 A.C. 27; 42 Digest 770, 1974; 91 L.J.K.B. 202; 126 L.T. 258.

(6) *R. v. Minister of Health, Ex p. Villiers*, [1936] 2 K.B. 29; [1936] 1 All E.R. 817; Digest Supp.; 105 L.J.K.B. 792; 154 L.T. 630.

(7) *Wilkinson v. Allot* (1776), 2 Cowp. 429; 19 Digest 411, 2462; 5 Burr. 2725, n.

APPEAL by the plaintiff from an order of His Honour JUDGE KENNEDY, K.C., Cheltenham County Court, dated May 26, 1942. The facts are fully set out in the judgment.

A. T. Denning, K.C., and Kenneth Diplock for the appellant.

R. C. Hutton for the respondent.

Denning, K.C.: Parsonage houses are a special class and the legislature did not have them in mind when passing the Rent Restrictions Acts. Therefore, according to the principle *generalia specialibus non derogant*, those Acts cannot apply to parsonage houses. An incumbent is a corporation sole and each incumbent has a freehold estate in the parsonage house for the period of his incumbency and no longer. A parson is bound to reside in the parsonage house unless the bishop grants a licence permitting him to reside elsewhere. A parson cannot let the parsonage house so as to relieve himself of his duty to reside therein or, in any case, for a period beyond his own incumbency. The general position under the Rent Restrictions Acts is that a tenant cannot be ejected, so long as he pays the rent, unless the court is satisfied that alternative accommodation is available. That general legislation does not derogate from the particular law in force in regard to parsonage houses. When one examines the

Rent Restrictions Acts, one sees that the legislature cannot have had parsonage houses in mind when passing that legislation. Cases in which the principle applicable has been considered are *Garnett v. Bradley* (4), *Blackpool Corpn. v. Starr Estate Co., Ltd.* (5) and *R. v. Minister of Health, Ex p. Villiers* (6). When a benefice is vacant the bishop is entitled to possession of the parsonage house so that he can provide for the cure and for the successor. [Counsel referred to *Butler & Goodale's Case* (2), *Wilkinson v. Allot* (7), *Rickard v. Graham* (3), to MAXWELL'S INTERPRETATION OF STATUTES, 8th Edn., ch. 7 s. 3, to BURN'S ECCLESIASTICAL LAW, 9th Edn., Vol. 3, p. 478, and to COKE'S INSTITUTES, pt. II, p. 625.]

Hutton : The purpose of the Increase of Rent and Mortgage Interest Restrictions Acts, as the name shows, is to restrict the raising of rents of small dwelling-houses. Necessarily, there must be a restriction upon the power to take possession. The argument for the appellant is that certain property is outside the purview of these Acts altogether. That involves that an incumbent has a right to charge a rent without any regard to a standard rent. As regards residence, it may be just as important for a minister of a nonconformist church or of the Church of Rome to be near his charge as it is for a minister of the Church of England. If, however, the appellant's argument is correct, only parsonage houses of the Church of England will be excepted from the Acts. Also, if the argument is correct, parsonage houses in England will be exempt from the Rent Restrictions Acts and similar houses in Wales will not be by reason of the Welsh Disestablishment Act, 1914. A bishop has power to licence an incumbent to reside either outside the parsonage house or outside the parish. The Pluralities Act, 1838, s. 33, says, "if the house is unfit." This must mean unfit by reason of size or of adaptability. It is common knowledge that many parsonage houses are not suitable for the purpose to-day. All over the country one finds that large parsonage houses are let and that the incumbents are living in smaller houses. Many of the large parsonage houses have been sold. There is nothing in the Rent Restrictions Acts which would enable the court to say that Parliament did not intend to place parsonage houses on the same footing as other dwellinghouses. The Pluralities Act, 1838, is not a private Act, and an ecclesiastical lease is well-known. There are no grounds upon which the maxim *generalia specialibus non derogant* can apply when one is dealing with a general Act such as the Rent Restrictions Act.

LORD GREENE, M.R. [delivering the judgment of the court] : This appeal raises the important question whether a house of residence belonging to an ecclesiastical benefice is affected by the Rent Restrictions Acts. The house in question (which we will call the vicarage) belongs to the perpetual curacy of Charlton Kings, in the diocese of Gloucester. Its rateable value is £48 per annum; and accordingly, if it had been a dwelling-house of a different kind, the Acts would unquestionably have applied to it. In the year 1939, after the outbreak of war, the then incumbent, the Rev. Arthur Michael Hollis, who had become a chaplain in the Royal Air Force, obtained from the appellant, the Bishop of Gloucester, a licence to reside outside the limits of the benefice. By a lease, dated Oct. 9, 1939, he demised the vicarage to the respondent for a term expiring 1 month after the termination of the war, with a proviso that the lease should cease and be void in the event of the lessor ceasing to be the incumbent of the living. In Mar., 1942, the incumbent was appointed to be Bishop of Madras and resigned the living of Charlton Kings. By a deed, dated Mar. 5, 1942, he surrendered the vicarage into the hands of the appellant, who accepted the surrender on Mar. 6, 1942. On the same day sequestrators were appointed to act during the vacancy of the living. No new incumbent has been appointed, since the appellant is not willing to institute a new incumbent while the vicarage is not available as his residence. The object of the proceedings out of which this appeal arises is to obtain possession of the vicarage from the respondent, who relies upon the Rent Restrictions Acts. The county court judge, with evident reluctance, decided that the Acts apply to the vicarage and dismissed the appellant's action.

It is not disputed that there is no express provision in the Acts which exclude a parsonage house from their operation. Such a house is clearly a dwelling-house; and, as such, falls within the actual language of the Acts. The only question which arises is whether the Acts are to be construed as being by implica-

tion inapplicable to a parsonage house upon the principle *generalia specialibus non derogant*. This principle has been expressed in various ways, not differing in substance, in a number of authorities. It is sufficient for present purposes to quote the language of the EARL OF SELBORNE, L.C., in *Seward v. Vera Cruz* (1), at p. 68 :

A Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

B It is necessary, therefore, to consider briefly the legislation affecting parsonage houses. The ancient rule, both of the canon law (see BURN'S ECCLESIASTICAL LAW, 9th Edn., Vol. III, pp. 477, 478), and of the common law (*ibid.*, p. 478, and see COKE'S INSTITUTES, Part II, p. 625), that a person having the cure of souls must reside upon his cure, was given statutory force by the Stat., 21 Hen. VIII, c. 13, under which it was held in *Butler and Goodale's Case* (2), probably in accordance with the meaning of the ancient rule, that :

C . . . the parson ought to abide in his rectory, namely, the parsonage house, and not in another house, although it is within the same parish, for the statute intended, not only for serving the cure, and for hospitality, but also for the maintaining of the house and habitation of the parson, not only for himself but also for his successors, that they also may keep hospitality there.

D It is unnecessary for me to refer to any other legislation on the subject previous to the Pluralities Act, 1838, which is now in force and contains the relevant statutory provisions with regard to parsonage houses. Those provisions are as follows : sect. 32 provides that every spiritual person holding any benefice shall keep residence on the benefice and in the house of residence (if any) belonging thereto ; and inflicts penalties on anyone who fails to do so without a licence. Under sect. 33, the bishop of the diocese may grant a licence to reside in some other fit and convenient house in cases where there is no house or no fit house of residence belonging to the benefice. Under sect. 36, the widow of a deceased incumbent is given the right to remain in occupation of the parsonage house for a period not exceeding 2 calendar months after his decease. Under sect. 43, the bishop may grant a licence to the incumbent to reside out of the parsonage house in certain special cases, including the case where there is no house, or no fit house of residence in the benefice, and the special case where the incumbent has a house of his own in the same parish. Sect. 46 provides that no licence for non-residence (which apparently includes a licence to reside out of the parsonage house) is to continue in force after Dec. 31 in the year next after that in which it is granted.

F Sect. 59 has for present purposes a special importance. It provides that any agreement for letting a parsonage house to which an incumbent may be ordered by the bishop (under sect. 54) to proceed and reside therein, shall be null and void unless it contains a condition for avoiding the same upon a copy of the order being served upon the occupier or left at the house. An occupier who fails to give up the house when served with a copy of the order is made liable to a penalty of 40s. per day ; and the incumbent may apply to a justice of the peace for a warrant for the taking of possession of the house. It is to be noted G that the lease granted to the respondent in the present case did not contain the condition of avoidance required by the section ; but this omission only had the effect of making the lease voidable—it would only have become void if and when the bishop had ordered personal residence by the incumbent (*Rickard v. Graham* (3)).

H This review of the relevant statutory provisions which were in force when the Rent Restrictions Acts were passed shows that parsonage houses are placed by the legislature in a category by themselves. Save where a licence is obtained, residence by the incumbent in a parsonage house is compulsory. An incumbent who fails to reside in the house can be ordered to do so and an occupier can be expelled to make room for him. The reasons for this special treatment are of a spiritual nature and are based on the necessity for ensuring that the cure of souls shall be conducted by an incumbent residing not only in the benefice, but in the parsonage house itself which is provided in order to enable him to perform his spiritual duties and (what is important) the duties of hospitality

connected therewith. These considerations make it, in our view, impossible to suppose that the legislature intended that where a parsonage house has been let the tenant should have the protection of the Rent Restrictions Acts. Particular confirmation of this view is to be found by a consideration of sect. 59. Under that section, as has been already pointed out, every lease of a parsonage house can be avoided and the tenant evicted whenever the bishop orders the incumbent to reside in the house. If the Rent Restrictions Acts apply to such a house they must impliedly have repealed the provisions of that section under which possession can be obtained in order to enable the incumbent to reside. It is, in our view, impossible to think that any such implied repeal could have been intended.

The appeal is allowed with costs here and below.

Appeal allowed with costs.

Solicitors: *Armitage, Chapple & Co.*, agents for *Madge, Lloyd & Gibson*, Gloucester (for the appellant); *Smiles & Co.*, agents for *Steel, Lane & Yeend*, Cheltenham (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

THE MAYOR, ALDERMEN AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF STEPNEY v. WOOLF.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J. and Tucker, J.), December 2, 1942.]

Emergency Legislation—Rates—Property damaged by enemy action—Whether distinction to be drawn between applications for issue of warrant and leave to levy—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (a)—Courts (Emergency Powers) (Consolidation) Rules, 1940 (S.R. & O., 1940, No. 408/L.6).

Rates and Rating—Remission of rates—Poverty of ratepayer—War damage to property rated—Remission of Rates (London) Act, 1940 (c. 32).

The respondent's name appeared on the valuation list as the occupier of hereditaments which were partly industrial and partly non-industrial. On Sept. 16, 1940, the industrial part was damaged by enemy action and was vacated by the tenants. The respondent continued to reside in the non-industrial part, paying a rent of 26s. per week to the owner. On Nov. 14, 1940, the respondent was served with a demand note in respect of the second, third and fourth instalments of general rate based on the full rateable value of the hereditaments. On the respondent's representations and in view of the damage to the vacant part, the rate collector acting within the scope of his authority agreed with the owner that the rates should be based on the weekly rent of 26s. in respect of the non-industrial part. The sum of £11 7s. 2d. calculated on this basis was paid by the owner and accepted by the borough treasurer in satisfaction of the third and fourth instalments. The rating authority later applied to the justices for the issue of a distress warrant for the balance of the full amount of the rates. The justices were satisfied that the respondent was unable to pay by reason of circumstances attributable to the war. The respondent contended that the power given by the Remission of Rates (London) Act, 1940, to a rating authority to reduce or remit rates on account of the poverty of the person liable to pay the rates covered the case of an occupier of working class premises which suffer war damage and renders them uninhabitable. The appellants contended that under the Courts (Emergency Powers) (Consolidation) Rules, 1940, r. 17 (1) a distinction must be drawn between the hearing of the summons for non-payment and the application for leave to levy and that on the hearing of the summons for non-payment the justices are only concerned with proof of formal matters and on such proof must issue a warrant, and only then, if the Courts (Emergency Powers) Act, 1939, is relied on, may they exercise their discretion to stay the levying of distress:—

Held: (i) since there was no evidence that the question of the respondent's poverty arose when the agreement was made with the collector, the Remission of Rates (London) Act, 1940, did not apply, and, in the

absence of other statutory authority, the rating authority had no power to remit the rate.

(ii) under the rules made under the Courts (Emergency Powers) Act, 1939, a distinction must be drawn between the application for the issue of the warrant and the application for leave to levy. It is on the latter application that the question of the exercise of the justices' discretion under the 1939 Act arises.

(iii) on the facts the respondent was liable to pay the full amount of the rates claimed and a warrant should issue but, because the respondent was unable to pay by reason of circumstances attributable to the war, the warrant should issue subject to an order staying the levying of distress without further order.

[EDITORIAL NOTE.] This is a case of importance both to rating authorities and ratepayers. The provision of the Remission of Rates (London) Act, 1940, merely make applicable in the London area, a provision which has applied outside London since 1925. The rating authority by the Rating and Valuation Act, 1925, s. 2 (4) is given power to remit the whole or part of the rates due in cases of poverty. That is a discretion given to the rating authority. It applies only to circumstances of poverty and is not applicable to a case of hardship due to war damage where a plea of poverty cannot validly be made. The power to remit is, therefore, limited to cases where the ratepayer can prove that he is too poor to meet the sum due for rates and does not apply where the enforcement of the payment of the sum due merely causes hardship, although the ratepayer has the means to pay. The second point is one of procedure and convenience. It would be very inconvenient for a summons for the issue of a distress warrant to be dismissed under the powers given by the Courts (Emergency Powers) Act, 1939, for that would mean that the rating authority must on a fresh application start *de novo* and prove the matter necessary for the issue of the warrant. The more convenient and the proper method according to the rules is for the warrant to issue but its execution to be stayed.

AS TO REMISSION OF RATES, see HALSBURY, Hailsham Edn., Vol. 27, p. 530, paras. 981, 982; and FOR CASES, see DIGEST, Vol. 38, pp. 626, 627, Nos. 1461-1464.]
Case referred to:

(1) *Potts v. Hickman*, [1941] A.C. 212; [1940] 4 All E.R. 491; Digest Supp.; 110 L.J.K.B. 101; 164 L.T. 346.

CASE STATED by two justices of the peace for the county of London (Tower Division) under the Summary Jurisdiction Acts, 1857 and 1879, dismissing a complaint by the appellants, the rating authority, against the respondent as to the non-payment of £24 10s. 6d., the rates in respect of 129 Hanbury Street, in the borough of Stepney. The facts are fully set out in the judgment.

C. R. Havers, K.C., and *S. Lincoln* for the appellants.
Erskine Simes for the respondent.

TUCKER, J. [delivering the judgment of the court]: The material facts appearing from the case are as follows. At all material times the respondent's name appeared in the valuation list and rate book as the occupier of the premises in question which were entered in Part 2 of the valuation list as industrial hereditaments with a rateable value for industrial purposes of £32 and for non-industrial purposes of £43, making a total rateable value of £75. The general rate, which in the county of London is, by the London Government Act, 1899, s. 10 (2), to be assessed, made, collected and levied as if it were the poor rate, was at all material times prior to the rates in question in these proceedings paid by the owner of the premises. The sum of £24 10s. 6d. claimed was made up of £18 0s. 4d., being the balance of the third and fourth instalments of the general rate made on Apr. 1, 1940, and £6 10s. 2d., being the proportion to May 10, 1941, of the general rate made on April 1, 1941. On Sept. 16, 1940, the industrial part of the premises was damaged by enemy action and was vacated by the three persons who were at that time tenants thereof. The non-industrial part, though damaged, remained habitable and the respondent continued to reside therein, paying a rent of £1 6s. per week to the owner. A demand note for £44 7s. 6d. in respect of the second, third and fourth instalments of the general rate made on Apr. 1, 1940, based on the full rateable value of the hereditaments, namely, £75, was served upon the respondent on Nov. 14, 1940. As a result of representations made by the respondent and in view of the damage to the vacant part of the premises, the rate collector agreed with the owner that rates should be paid based on the weekly rent of £1 6s., giving a rateable

value for the non-industrial part of the premises of £29. A sum of £11 7s. 2d., calculated on this basis, was accordingly paid by the owner and accepted by the borough treasurer on May 8, 1941, in satisfaction of the third and fourth instalments of rates demanded on Nov. 14, 1940. It does not appear from the case whether the whole or any part of the second instalment was at any time paid. The premises received further damage by enemy action and ceased to be occupied on May 10, 1941. On Mar. 31, 1941, the premises had been inserted in a provisional valuation list at the previous figures set out above. No objection was made to such entry and these figures remained in the valuation list.

The agreement between the owner and the rate collector was made as a result of a resolution of a joint meeting of the finance and parliamentary and valuation committees of the appellants consequent upon the receipt of a circular letter issued by the Ministry of Health to local rating authorities dated Nov. 22, 1940, in which these authorities were given certain advice as to the manner in which they might deal with questions of rating affecting premises rendered temporarily or permanently uninhabitable by enemy action. The paragraph of the letter relevant to the present case reads as follows:

Cases may well arise where, in default of other available accommodation, occupiers continue temporarily to use as essential shelter some part of their damaged premises. It is suggested that rating authorities might well regard many such cases as justifying the exercise of their discretion under the Rating and Valuation Act, 1925, s. 2 (4), or in London under the Remission of Rates (London) Act, 1940, as to the total or partial remission of rates.

On receipt of this letter the borough treasurer and the town clerk made reports thereon to the joint meeting of the committees above-mentioned, and on Dec. 22, 1940, the joint meeting resolved that the borough treasurer be instructed to deal with questions affecting the rateability of properties affected by air raid damage on the basis of the recommendations contained in these reports, which recommendations, so far as material, were to the effect that where a tenancy was restricted to part only of the premises and a reduced rental demanded from the tenant a corresponding temporary reduction in rateable value should be made based upon a figure obtained from the valuation officer, the reduction to be treated in the rate books as "part void." In accepting the payment of £11 7s. 2d. from the owner the rate collector was acting in pursuance of this resolution and the justices have found that in so doing he was acting for the appellants within the scope of his duties and in conformity with the authority vested in him.

It was not contended before us or before the justices that the respondent was not in occupation of the hereditaments, but the payment of £11 7s. 2d. and the receipt thereof were relied upon as amounting to a discharge in full of his liability in respect of the third and fourth instalments of the rate made on Apr. 1, 1940. The justices decided in favour of this contention and, further, held, as to the balance claimed, that they were satisfied on the facts that the respondent was unable to pay by reason of circumstances directly or indirectly attributable to the war, and that accordingly, under the Courts (Emergency Powers) Act, 1939, and the rules made thereunder, they had a discretion to refuse to allow the issue of a warrant of distress and they accordingly dismissed the complaint.

Two points, both of considerable importance, were argued before us. (i) As to whether the agreement made by the rate collector was binding in law upon the appellants so as to preclude them from seeking to recover the balance which would be due on the basis of the entries in the valuation list and rate book in respect of a rate duly made and demanded. (ii) If not, or in any event as to so much of the sum claimed as was not covered by the agreement and payment, whether, on being satisfied as to the respondent's inability to pay due to the war, the justices were entitled to refuse the issue of a warrant, or whether they were bound, on proof of the necessary formal matters, to order the warrant to issue, subject only to an order staying the levying of distress under the warrant without further order by the court.

As to the first point, counsel for the respondent relied on the Remission of Rates (London) Act, 1940, which applies to London the provisions of the Rating and Valuation Act, 1925, s. 2 (4), which reads as follows:

A rating authority shall have power to reduce or remit the payment of any general rate on account of the poverty of any person liable to the payment thereof.

It was argued that the word "poverty" should be given a liberal interpretation which would include a case such as the present where an occupier of premises of low rental value in a working class district suffers damage to his premises which renders them in part uninhabitable. We are unable to accept this contention. There is no evidence in the case that the appellants or their rate collector

A ever applied their minds to the question of the wealth or poverty of the respondent. His case was dealt with pursuant to a resolution empowering the borough treasurer to deal with war damaged premises in certain categories in a uniform manner regardless of the means of the occupiers. In the absence of some statutory authority—and none was suggested other than the subsection quoted above—it is, in our view, clear that a rating authority has no power to release in whole or in part any person liable to pay a rate which has been lawfully made. B It is unnecessary to express any view as to the exercise by rating authorities of their discretion to refrain as a matter of grace in proper cases from enforcing the payment of rates legally due. Nothing in our decision in this case in any way affects any such question.

In our opinion, therefore, subject to the effect of the Courts (Emergency Powers) Act, 1939, the justices were, on the facts found in this case, bound to C order the issue of a warrant of distress.

As to the second point, we were informed that its importance in practice is that, if the justices were right in dismissing the complaint, it follows that, if at any future date the respondent's financial position improves, it would be necessary for the appellants to make a fresh complaint and, on the hearing thereof, to call evidence not only as to the respondent's means, but to prove again the necessary formal matters which must be established before a warrant can issue. As D many hundreds of cases are often dealt with at a time these considerations are not without importance to rating authorities. The answer to this question depends upon the true construction of the Courts (Emergency Powers) Act, 1939, s. 1 (2) (a), and rr. 5 and 17 of the rules made under that Act. Sect. 1 (2) (a) of the Act is as follows :

E (2) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (a) to proceed to exercise any remedy which is available to him by way of (i) the levying of distress.

Rules 5 and 17 of the Courts (Emergency Powers) (Consolidation) Rules, 1940, read as follows :

5. The appropriate court for giving leave to levy a distress for rates shall be the court having jurisdiction to issue the warrant of distress.

F 17. (1) In proceedings for the recovery of rates, the application for leave to levy a distress may be made at the hearing of the summons for non-payment of rates if a notice to the effect of Form No. 9 has been served on the defendant in the manner in which such a summons may be served not less than 2 clear days before the hearing of the summons.

(2) No warrant of distress for rates shall issue unless the court is satisfied that a notice has been served in accordance with the provisions of the last preceding paragraph.

G (3) If a warrant of distress for rates had, whether before or after the commencement of the Act, been issued without leave having been given under the Act, and the distress has not been levied, an application for leave to levy the distress may be made to the court at the hearing of a summons in a form adapted from Form No. 4 and served on the defendant in the manner in which a summons for non-payment of rates may be served.

H It is to be observed that in r. 17 (1) a distinction is drawn between "the application for leave to levy" and "the hearing of the summons for non-payment of rates." Again in sub-rule (2) the issue of the warrant of distress is spoken of, and in sub-rule (3) there is a clear distinction drawn between the issue of the warrant and the application for leave to levy. This variation of phrase was relied upon by counsel for the appellants as indicating that on the hearing of the summons for non-payment of rates the justices are, in the first instance, concerned only with the proof of the requisite formal matters and that on proof thereof their duty is to order the warrant to issue, and only then, if the Courts (Emergency Powers) Act, 1939, is relied upon, are they required to determine whether or not in their discretion they will refuse or stay the levying of distress under the warrant.

Much reliance was placed by counsel for the respondent on the form of the warrant, which is to be found in Form (C. 1) in the schedule to the Distress for Rates Act, 1849, by which the overseers are commanded "forthwith to make distress." It was said that the making of the rate corresponds to judgment and the issue of the warrant to execution, and in this connection we were referred to certain passages in the opinions of their Lordships in *Potts v. Hickman* (1) as tending to support this argument. It was contended that in the Courts (Emergency Powers) Act, 1939, and the rules thereunder the words "levy a distress" and "the issue of a warrant of distress" have the same meaning, save only in r. 17 (3), which, it is said, provides for the exceptional case where a warrant has been issued, but not executed, before the coming into operation of the rules.

In our view, the language of the rules indicates a distinction between the application for the issue of the warrant and the application for leave to levy, and it is on the latter application, which can, of course, be dealt with at the same time as the application for the warrant, that the question of the exercise of the justices' discretion under the Courts (Emergency Powers) Act, 1939, to refuse or to stay the levying of distress arises. We think the justices were wrong in dismissing the complaint. On the facts proved or admitted, the respondent was liable to pay the full amount of the rates claimed, but, in view of the justices' finding that he was unable to pay by reason of circumstances directly or indirectly attributable to the war, their proper course was to direct the warrant to issue, subject to an order staying the levying of distress thereunder without further order.

The case will, accordingly, be remitted to the justices to deal with in the manner indicated above.

Case remitted to justices.

Solicitors: *J. E. Arnold James*, Town Clerk (for the appellant); *Victor F. Deeks* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

SUMMERS v. SALFORD CORPORATION.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **October 23, 26, December 4, 1942.**]

Landlord and Tenant—Repairs—Statutory obligation—Extent of obligation—Broken sash-cord—"In all respects reasonably fit for human habitation"—Housing Act, 1936 (c. 5), ss. 2, 188(4).

The appellant was the tenant of the respondent corporation of premises to which the Housing Act, 1936, s. 2 applied, so that the corporation impliedly undertook that during the tenancy the premises would be kept in all respects reasonably fit for human habitation. In Feb., 1940, or Mar., 1940, the appellant notified the corporation that one sash-cord of one of the windows in the premises was broken. On Apr. 3, 1940, the other sash-cord broke while she was cleaning the window and she was injured. She claimed damages on the ground that the respondents had broken the covenant implied in her tenancy agreement by the Housing Act, 1936, s. 2:—

HELD: since the only window in one of the two bedrooms in the house could not be opened or could only be opened at the risk of injury to the person opening it, the house was not in all respects reasonably fit for human habitation. The appellant was, therefore, entitled to damages in respect of the injuries sustained.

Decision of the Court of Appeal (MACKINNON, L.J., and STABLE, J., LUXMOORE, L.J., dissenting) ([1941] 2 All E.R. 237) reversed.

[**EDITORIAL NOTE.** The decision in this case is to some extent dependent upon the facts, but those facts seem typical of what must be the case of most houses within the Housing Act, 1936. Only houses let at a rent not exceeding £40 in the county of London and £26 elsewhere are within the Act for this purpose and such houses must necessarily be small ones, of which all the rooms are of necessity occupied. If one room is uninhabitable, the house thus becomes not in all respects reasonably fit for human

habitation. The defect was in itself a minor matter, but one which would inevitably restrict the access of light and air to the room, if danger to the occupants was to be avoided. On the other hand, if the window was to be put to its normal use, there was a high probability of danger to the occupants. The House has construed this statutory provision not as a covenant in a lease, but as a statutory obligation akin to those in the Factory Acts. Its construction is therefore somewhat stricter than that applied to repair covenants and nearer to that of those provisions imposing absolute duties. It will be noticed that the question was argued whether the tenant did not by her own act bring her injuries upon herself. In *Porter v. Jones*, [1942] 2 All E.R. 570, such an allegation was answered by an argument based on the reasonableness of the tenant's act. The question in such cases is whether the act of the tenant or the defendant's fault is the direct cause of the damage. If the tenant's act is legitimate, reasonable and in the ordinary course of things, it does not prevent the defendant's fault from being the direct cause of the damage, and, therefore, in such circumstances, the plaintiff can recover, although it can be said that, but for the act of the plaintiff, the injury would not have been suffered. Looking at the matter from another point of view, it is said that the plaintiff owes no duty to the defendant not to do any act which is in the ordinary course of things. Such an act is, therefore, legitimate, not being in any way negligent, because there is no duty not to do it. Thus, in the present case, the plaintiff was entitled to continue to use the room in question and to do all things necessarily involved in such user which included the cleaning of the window. It should be noted that the House of Lords have reserved the question whether *Morgan v. Liverpool Corpn.* (1) was rightly decided on the question of the necessity of notice to the landlord of want of repair.

AS TO IMPLIED COVENANT TO REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 204-206, paras. 223, 224; and FOR CASES, see DIGEST, Vol. 31, p. 348, Nos. 4900-4904.]

Cases referred to:

- (1) *Morgan v. Liverpool Corpn.*, [1927] 2 K.B. 131; Digest Supp; 96 L.J.K.B. 234; 136 L.T. 622.
- (2) *Proudfoot v. Hart* (1890), 25 Q.B.D. 42; 31 Digest 328, 4707; 59 L.J.Q.B. 389; 63 L.T. 171.
- (3) *Belcher v. M'Intosh* (1839), 2 Mood. & R. 186; 31 Digest 326, 4677; 8 C. & P. 720.
- (4) *Smith v. Marrable* (1843), 11 M. & W. 5; 31 Digest 179, 3122; Car. & M. 479; 12 L.J.Ex. 223.
- (5) *Stanton v. Southwick*, [1920] 2 K.B. 642; 31 Digest 181, 3158; 89 L.J.K.B. 1036; 123 L.T. 651.
- (6) *The City of Lincoln* (1889), 15 P.D. 15; 36 Digest 30, 162; 59 L.J.P.1; 62 L.T. 49.
- (7) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A.C. 16; 36 Digest 120, 798; 95 L.J.P. 135; *sub nom. The Paludina*, 135 L.T. 707.

APPEAL by the tenant from a judgment of the Court of Appeal (MACKINNON, L.J. and STABLE, J., LUXMOORE, L.J., dissenting) and reported [1941] 2 All E.R. 237, affirming a decision of CROOM-JOHNSON, J. at Manchester Assizes on Dec. 5, 1940, reported in [1941] 1 All E.R. 153. The facts are fully set out in the opinion of LORD ATKIN.

Neville Laski, K.C., and *C. G. Armstrong Cowan* for the appellant.
Humphrey H. Edmunds for the respondents.

LORD ATKIN: My Lords, this is an appeal from the Court of Appeal affirming by a majority a decision of CROOM-JOHNSON, J. at Manchester Assizes in a case where the plaintiff claimed damages for breach of the statutory undertaking imposed by the Housing Act, 1936, on her contract of tenancy that the house would be:

... kept by the landlord during the tenancy in all respects reasonably fit for human habitation.

CROOM-JOHNSON, J. found that the facts did not disclose a breach of the undertaking. The facts are not in dispute. The plaintiff, an elderly woman aged about 64, had been for 34 years the tenant of a house in Salford at a rent of 10s. per week, a house, therefore, to which the provisions of the Housing Act, 1936, applied. It was an old house of two storeys with two rooms back and front on the ground floor, and two bedrooms back and front on the first floor. It does not appear of what the household consisted, but the front bedroom was occupied by an invalid daughter of the plaintiff. In Feb., 1940, one of the sash-cords of the top sash in the only window in the front room broke, and plaintiff gave notice of this to the corporation rent collector who appears to be the person authorised to receive complaints of lack of repair. Nothing was done. The window jammed when it was moved, but it appears that it was capable of being

opened to some extent. On Apr. 3, 1940, the plaintiff was cleaning the window and drew it down a few inches. She placed her hand on the top of the lower sash when, as she was cleaning the upper sash, the second cord broke and the upper sash fell, crushing her left hand as well as her right between the two sashes. She was thus imprisoned for 20 to 30 minutes before she was released. Both hands were lacerated; the left hand had to receive eight stitches. She has lost the use of her left hand, and her general health has seriously suffered. CROOM-JOHNSON, J. in the event of liability being established assessed the damages at £260, and as to this figure there is no appeal. A

The case raised what is an important question to owners and tenants of houses to which the Housing Act, 1936, applies, viz., the meaning and extent of the phrase "keep in all respects reasonably fit for human habitation." The test of the obligation cannot simply be whether with the disrepair complained of the tenant can live in the house. The present war has shown how ineffectual such a test may be. It must not be measured by the magnitude of the repairs required. A burst or leaking pipe, a displaced slate or tile, a stopped drain, a rotten stair tread may each of them until repair make a house unfit to live in, though each of them may be quickly and cheaply repaired. I find myself in complete agreement with the judgment of LUXMOORE, L.J., in the Court of Appeal, and perhaps all the more so because he relies on a dissenting judgment of my own in a similar case, *Morgan v. Liverpool Corpn.* (1), which I am glad to think also appears to have the approval of my noble and learned friends in the present case. B

I will only cite one passage from my own judgment in *Morgan's* case (1) at p. 145, because I know no better way of expressing my present opinion after a lapse of 15 years: C

... if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation. D

In the present case the breaking of one sash-cord necessarily involved the strong probability that its fellow cord, especially with the extra strain imposed upon it, would also break, with the further certainty of danger to anyone handling the window at the time of the break; and with the further certainty that until repair that window must either remain permanently closed or permanently open. E

Either event would prevent that room from being reasonably fit for occupation; and as this room was one of only two bedrooms it appears to me clear that until repair the whole house would properly be described as unfit for occupation by a working class family. I accept the view that notwithstanding the provisions in the Housing Act, 1936, s. 2 (3), that the expression house includes part of a house, disrepair to a single room will not be sufficient unless the effect of it is to render the whole house "not reasonably fit for human habitation": but I F

should suppose that in houses to which the Act applies it would be difficult to confine the effects to one room alone.

I wish to add that since the argument I have looked at the decision in *Proudfoot v. Hart* (2), a leading case on repairing covenants, and there I find a reference in the judgment of LORD ESHER to a definition by ALDERSON, B. in *Belcher v. M'Intosh* (3), at p. 189, of "habitable repairs." G

It is difficult to suggest any material difference between the term "habitable repair" used in this agreement, and the more common expression "tenantable repair"; they must both import such a state, as to repair, that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied. H

Referring to that passage LORD ESHER, M.R., said in *Proudfoot v. Hart* (2) at p. 51: H

That is the whole definition, and, so far as it goes, it is a good one.

I agree, and I am bound to say that I find it difficult to draw a distinction between an obligation to put premises into habitable repair and so deliver them up, and to keep premises in all respects fit for human habitation. Too much emphasis should not be laid upon "comfort," but taking a reasonable view of the meaning of "comfort" in the definition it affords a useful test of liability. It is perhaps to be regretted that neither in *Morgan's* case (1) nor in the present were *Belcher v.*

M'Intosh (3) or *Proudfoot v. Hart* (2) cited. I entertain no doubt that the damage to the plaintiff was the direct consequence of the defendants' breach of their repairing obligation. She was engaged in a normal use of the house in respect of which there had been a failure to repair.

A In the present case the point upon which the Court of Appeal in *Morgan's* case (1) decided for the defendant does not arise, viz., that notice of the lack of repair complained of must be given to the landlord before his statutory obligation arises. I can see that different considerations may arise in the case of an obligation to repair imposed in the public interest; and I think that this question must be left open, and I reserve to myself the right to reconsider my former decision if the necessity arises. In the result the judgments of CROOM-JOHNSON, J. and of the Court of Appeal should be set aside and judgment entered for the plaintiff for £260 with costs. The plaintiff should have the ordinary costs in the Court of Appeal up to the time when the order permitting her to proceed *in forma pauperis* was made. After that date she should have such costs in the Court of Appeal and in this House as are appropriate to appeals proceeding *in forma pauperis*.

C LORD THANKERTON: My Lords, I have had the opportunity of considering the opinion which has just been delivered by LORD ATKIN and I agree with it entirely. I also desire to reserve the question whether or not the decision of the Court of Appeal in *Morgan's* case (1) as to the necessity of notice of the lack of repair is correct.

LORD RUSSELL OF KILLOWEN (read by LORD ROMER): My Lords, I also am of opinion that this appeal should be allowed.

D One is rather inclined to associate the idea of a house being unfit for human habitation with its being in such a condition, structurally or otherwise, as to call for demolition under the relevant provisions of the Housing Acts; and at the first brush it seemed to me difficult to say that the existence of a broken sash-cord in the window of one of the four rooms of the appellant's house caused the house not to be "in all respects reasonably fit for human habitation"; but a closer consideration has convinced me that the respondents have committed a breach of the undertaking imposed upon them by the Housing Act, 1936, s. 2. One sash-cord had been worn to breaking point and had in fact snapped a month or more before the appellant's accident. The sash-cord on the other side would normally be, and in fact was, in a precarious condition. The result of such a state of affairs was that the window could not be put to its normal use, viz., being opened and shut for the purpose of ventilation or cleaning, without danger to the operator.

E I agree with the view expressed by LUXMOORE, L.J., in the following words:—

F The usual method of providing ventilation for a room in a dwelling-house is by means of a window or windows, so constructed as to open or shut without danger to the person opening or shutting it or them. If a room, especially a bedroom, has only one window and that window cannot be opened or shut without danger to the person seeking to perform that operation, that room may, in my opinion, be said to be not fit for human habitation.

G LUXMOORE, L.J. confines his observations to danger in opening and shutting the window for the purpose of ventilation. I would add, as a further consideration, the danger of opening the window for the purpose of cleaning it. Opening it for such a purpose would be such an ordinary user as was contemplated by ATKIN, L.J., when, in that part of his judgment in *Morgan v. Liverpool Corpn.* (1), which dissented from his colleagues, he used the following language at p. 145:

H . . . if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation.

I would only add that I feel no doubt that the damage sustained by the appellant was a direct result of the landlord's breach; and that I desire to keep open the question whether *Morgan's* case (1) was rightly decided. The question whether giving notice to the landlord is a condition precedent to his liability does not arise in the present case.

I concur in the motion proposed.

LORD WRIGHT: My Lords, I agree with the opinion which LORD ATKIN has just delivered. I agree also with the dissenting judgment of LUXMOORE, L.J.,

in the Court of Appeal. I should not think it necessary to add observations of my own, were it not that the case involves the construction of an important legislative provision passed for the benefit and protection of the poorer classes of the community and not hitherto brought up for the consideration of this House.

There can be no doubt that the appellant, the plaintiff, suffered grievous injury because of the bad repair of the sash-cords of the only window of one of the four rooms in the house owned by the respondent corporation and let by it to the appellant who had occupied it as the responsible tenant for 34 years previously to the unfortunate occurrence. She was cleaning the window when the sash-cord holding the upper part of one side broke: the cord on the other side had been broken some time before: when the second cord broke the upper part of the window fell violently down and jammed the appellant's hand between the upper and lower frame of the window, causing such injuries to her hand and such a shock to her nervous system that the judge assessed the damages on a by no means exorbitant scale at £260. The claim is based on the Housing Act, 1936, s. 2, which is the latest embodiment of earlier legislative measures. The section provided that in any contract for letting for human habitation a house at a rent not exceeding £26 per year (I take the figure which applies in Salford) there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house shall be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation. The section also gives to the landlord power to enter any premises to which the section applies for the purpose of viewing their state and condition.

I am tempted to ask at the outset whether a house like that in question, a very old house with four rooms, two on the ground floor and two on the first floor, is in all respects fit for human habitation if in one of the two bedrooms the tenant cannot clean the only window in the room without sustaining the injuries which affected her on the particular occasion. The most elementary needs of comfort and sanitation require that windows should be opened and shut; in a place like Salford windows in a poor neighbourhood must be cleaned from time to time if people are to live in the rooms at all. These elementary needs must in my opinion be capable of being satisfied if a house is to be regarded as fit in every respect for human habitation. But for the discussion in some earlier cases and but for the difference of opinion in the present case, in which CROOM-JOHNSON, J. and the majority of the Court of Appeal held that the action failed on the ground that there was no breach of the statutory condition, I might have been tempted to regard this as a plain case. I must, however, consider the conflicting views in the courts below. On the one hand MACKINNON, L.J., said he was unable to hold that a failure to put right one broken sash-cord could be treated as a breach of the statutory obligation; STABLE, J., thought it was too trifling a disrepair. It is not the amount but the consequence of the disrepair which determines whether a room is fit for human habitation. In the same way it is not the smallness of a defect—a flaw in a rod, a crack in a pipe, the maladjustment of a valve—which determines whether it constitutes a breach of the warranty of seaworthiness in the case of a ship. LUXMOORE, L.J., however, was of opinion that:

If a room, especially a bedroom, has only one window and that window cannot be opened or shut without danger to the person seeking to perform that operation, that room may, in my opinion, be said to be not fit for human habitation.

The section must I think be construed with due regard to its apparent object, and to the character of the legislation to which it belongs. The provision was to reduce the evils of bad housing accommodation and to protect working people by a compulsory provision, out of which they cannot contract, from accepting improper conditions. Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object. The section only applies to low-rented tenements. In these small houses it may be assumed that every room is in full use, and I think that the statutory condition is intended to ensure that every room is fit for use. It was contended that it is the house and not every room in the house which is required to fulfil the condition. But in my opinion that contention is inconsistent both with the language and the object

of the section. "In all respects" must mean in all respects material to the enjoyment of the tenement, and the unfitness of one room may be a most material detraction from that enjoyment. "Human habitation" is in contrast with habitation by pigs, horses or other animals or with use as warehouses and the like. But I think it also imports some reference to what we call humanity or humaneness. MACKINNON, L.J., observed that the words used are not words of art taken from the usual provisions of covenants in leases and described them as "words of almost journalistic generality." That is natural enough. The measure is a new departure. The construction of usual covenants in leases has often been justified, whether rightly or wrongly, on the ground that the words have acquired a recognised and conventional meaning. But here the condition is not derived from the agreement of the parties. It is imposed compulsorily by Parliament. Older cases, however, have used similar words. Thus in *Smith v. Marrable* (4), the well-known case of a furnished house, the headnote describes the implied condition to be that it is reasonably fit for habitation. The phrase used by PARKE, B. was "fit for decent and comfortable habitation." The words of the Act are meant to be wide and elastic, because they are to be applied to the needs and circumstances of poor people living in confined quarters. The court has to condescend to realise what these are.

Certain authorities were cited. I shall content myself with referring to two. In *Morgan v. Liverpool Corpn.* (1) the case turned upon the provisions of the Housing Act, 1925, which was the Act then in force. These provisions were identical for this purpose with those of the 1936 Act. The tenant there was injured through the breaking of a window sash-cord. The case was decided against the tenant on the ground that the landlord had not received notice of the defect. But the general effect of the statutory condition was discussed, though only by way of *obiter dicta*. The appeal was from SIR FRANCIS TAYLOR, K.C., the very experienced judge of the Court of Passage in Liverpool, who had held that the disrepair of the window cord involved a breach of the statutory condition. ATKIN, L.J., in commenting on that decision, said that he was not satisfied that the conclusion was wrong. He said at p. 145:

... no one would say that the mere fact that one cord, or two cords for that matter, were broken necessarily put a house in a state in which it is unfit for human habitation, yet when you take into consideration the class of house and the people with whom you are dealing and the particular circumstances of the case, you may be forced to a different conclusion. The standard which was suggested by Mr. Batt in his argument is one which commends itself to me, which is that if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect to personal injury to life and limb or injury to health, then the house is not in all respects reasonably fit for human habitation.

I think these are wise words which give the true test in interpreting a remedial enactment like that in question, intended as it is to safeguard humble and poor people against evils which they are themselves less capable of avoiding. "Reasonably" imports reference to an appropriate standard. Nor as I have indicated must the condition be construed in the same way as conditions in ordinary cases in the law of landlord and tenant. LORD HANWORTH, M.R., and LAWRENCE, L.J., took a different view from that of ATKIN, L.J. LAWRENCE, L.J., thought it fantastic to say that because one room was rendered less comfortable by the fact that the window cord was broken, the house was not in all respects fit for human habitation. He referred to the defect as a slight want of repair. That it was slight in one sense may be true, but to repair it was a skilled joiner's job. But the real question is how it affects the tenant's reasonable enjoyment of the premises.

There may be difficult cases in which the line of division is not easy to draw. But I think that this is a clear case. I should have thought the same of *Stanton v. Southwick* (5). The house there was overrun with rats, which came up from a hole in a sewer. The county court judge held that it was unfit for human habitation within the meaning of the statutory condition. A divisional court set aside his finding as wrong in law. The house, the court held, would have been unfit if it had been found to be infested by rats, but as the rats did not live and breed there but came up from the sewer outside, the position was different. When I try to put myself in the position of the tenant of that house, I cannot do other than agree with the county court judge. Once the scope and meaning

of the section is realised, these cases are seen to turn each on its particular circumstances. The definitions in the Act do not seem to me to give any real assistance.

The appellant in this case was held to have given due notice of the disrepair to the respondent's agent. It is not, therefore, necessary to consider whether the statutory obligation to provide and keep the premises fit, which is absolute in terms, is subject to an unexpressed condition that the tenant must give notice of the defect before he can complain of damage from it. I merely wish to say here that, if the question were to come before me, I should desire to give it careful consideration. It is open to this House. It has been further contended that in any case the appellant cannot recover here because it is said (as I understand it) that, if she had not been opening or cleaning the window, her hand would not have been injured. It is said that her conduct was *novus actus interveniens*, which broke the chain of causation between the respondent's default and the appellant's hurt. I do not criticise the Latin phrase or the mechanical metaphor, because both have been regularly used by the highest authorities. Nor do I wish here to seek to exhaust the discussions which have centred round these and similar phrases. Whatever refinements may be imagined, I take it to be clear that, if a plaintiff suffers damage by the defendant's fault, the damage may be directly due to that default and recoverable, even though the accident and damage would not have happened but for some action of the plaintiff, so long as his action was in the ordinary course of things and at least generally speaking was not blameworthy. The same may be true of the action of a third party. The plaintiff's damage may still be the direct and natural consequence of the defendant's default, notwithstanding the co-operation of human conduct, whether of the plaintiff or of a third party. Such action may be said to be in the ordinary course of things. As LINDLEY, L.J., observed in *The City of Lincoln* (6), at p. 18 :

So far as I can see my way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss.

But I think the general proposition is not necessarily subject to that qualification. The proposition which I have stated does indeed ignore refinements which may be considered in the authorities, as, for instance, in *S.S. Singleton Abbey v. S.S. Paludina* (7). But I think it is sound so far as it goes and is sufficient for the decision of this appeal. The negligent motorist cannot escape liability for injuring a pedestrian, merely by pointing out that, if the pedestrian had stayed at home and not ventured out into the streets, he would not have been injured. The co-operation of his deliberate conduct was indeed necessary if the accident was to happen. But his conduct, though deliberate, was legitimate, reasonable and free from blame. In the same way the appellant's conduct in opening and cleaning the window was lawful, reasonable and free from blame. It was in the ordinary course of things. She was doing what any intelligent observer, knowing exactly how she was circumstanced, would have expected her to do. Her injury was thus the direct and natural consequence of the respondent's default.

In my opinion the appeal should be allowed.

LORD ROMER : My Lords, the facts of this case have been fully stated by LORD ATKIN, and it is unnecessary for me to repeat them. From these facts the question which emerges for determination is this : On Apr. 3, 1940, when the appellant sustained the injury to her hands, was the house, 23, King Edward Street, "in all respects reasonably fit for human habitation" within the meaning of the Housing Act, 1936, s. 2 (1) ? The true scope and effect of these words must necessarily depend upon the context in which they are found. In a statute which empowers a local authority to make a demolition order in respect of premises which are "unfit for human habitation," it is plain that there must be a serious degree of unfitness before such an order can be made. It would be ridiculous to suppose that the existence of a broken sash-cord or of many broken sash-cords in a house could of itself justify an order for the demolition of the building. The Housing Act, 1936, s. 2, is not an enactment designed for the purpose of clearing slum areas but is, as I read it, a provision designed for the purpose of compelling landlords of small dwellings such as are normally inhabited by

the working classes to see that their tenants are properly and decently housed. That this is so appears clearly from the heading of that part of the Act in which sect. 2 is found. It is in these words :

Provisions for securing the repair, maintenance and sanitary condition of houses.

A The word "sanitary" is of importance in connection with the present case, for by sect. 188 (1) sanitary defects are stated to include, amongst other things, lack of ventilation and darkness and dampness. It is, therefore, legitimate and proper to treat sect. 2 (1) of the 1936 Act as imposing upon the landlord a duty to keep the house in all respects reasonably ventilated. It equally imposes upon him the duty of seeing that the house does not get too much ventilation or get in such a damp condition by the impossibility of keeping the windows closed when necessary, and that the rooms of the house do not in course of time become too dark for comfort by reason that the windows cannot be cleaned. If the windows in a room cannot be opened or shut or cleaned that room is not, in my opinion, reasonably fit for human habitation. It is even more unfit for human habitation if the occupant of the house can only open or shut or clean the windows at the risk of serious injury to himself. Further, if the room forms a substantial part of the house, it must be held that the house as a whole is not in all respects reasonably fit for human habitation.

C Turning to the facts of the present case, the first result of the breaking of the sash-cord was that the top part of the window jammed in its frame. The next and inevitable result was that the moment that the window was freed from the jam, the whole of its weight was thrown on the other sash-cord. The third and very probable result was that this other sash-cord also gave way under the strain, and that the upper window fell down. The position therefore after the breaking of the first sash-cord was this : If and so long as the landlords continued their policy of masterly inactivity, either the top window in the front bedroom would have to remain permanently closed and remain permanently and increasingly darkened with dirt, or, if an attempt were to be made to open it for the purpose of ventilation or in order to clean it, the attempt could only be made at the risk of serious bodily injury to the person making it. Even if that person were fortunate enough to escape injury, the window would remain permanently open at the top, giving the rain and snow and fogs of Salford uninterrupted access to the room. My Lords, in view of this condition of affairs in one of the only two bedrooms in the house, I am satisfied that the house was not, on Apr. 3, 1940, in all respects reasonably fit for human habitation. This was the view taken by LUXMOORE, L.J., in the Court of Appeal, and I respectfully agree with him.

F The attention of your Lordships was quite properly drawn to the decision of the Court of Appeal in *Morgan v. Liverpool Corpn.* (1). That was a case arising under the Housing Act, 1925, s. 1 (1), a sub-section that was in the precise words of the Housing Act, 1936, s. 2 (1). It was there held that, before a landlord could be made liable for his omission to keep a house reasonably fit for human occupation, it was necessary that he should have been given notice of the defects that constituted the alleged unfitness. In the present case such notice was in fact given upon two occasions. The question whether *Morgan's* case (1) was rightly decided does not therefore arise upon the present appeal and accordingly I express no opinion upon it. I would only add this. The observations made in that case by the Court of Appeal upon the merits were in the circumstances merely *obiter dicta*. But I prefer those of ATKIN, L.J., as he then was, to those made by his learned colleagues.

G My Lords, for the reasons which I have given, I am of opinion that this appeal should be allowed and I concur in the motion now before the House.

H Solicitors : J. H. Milner & Son, agents for Leslie M. Lever & Co., Manchester (for the appellant) ; L. Bingham & Co., agents for James Chapman & Co., Manchester (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

V/O SOVFRACHT v. GEBR. VAN UDENS SCHEEPVAART EN
AGENTUUR MAATSCHAPPIJ.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton,
Lord Wright, Lord Porter), **July 24, 27, 28, 29, December 3, 1942.**]

Aliens—Enemy alien—Company incorporated and carrying on business in enemy-occupied territory—Whether company enemy alien—Continuation of arbitration proceedings—Trading with the Enemy Act, 1939 (c. 89)—Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092). A

Arbitration—Claimant in enemy-occupied territory—Proceedings commenced before enemy occupation—Continuation of proceedings—Whether solicitor's retainer determined.

The respondents, a company incorporated under the law of the Netherlands, and carrying on the business of shipowners with their principal place of business at Rotterdam, chartered one of their vessels to the appellants, a Russian company. A clause in the charterparty provided for arbitration in London. Disputes having arisen between the parties, in Apr., 1940, each party appointed an arbitrator, but, before the matter could proceed further, the German invasion of the Netherlands took place, and the country was occupied by the enemy in May, 1940. The appellants and their arbitrator subsequently refused to proceed with the arbitration, on the ground that the respondents had, in the circumstances, become enemies. On June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. It was contended for the appellants that the summons should be dismissed because : (i) by reason of the German occupation of the Netherlands, the respondents had become enemy aliens at common law ; (ii) the retainer of the respondents' solicitors determined as soon as the Netherlands became enemy-occupied territory :— B

HELD : (i) at common law a company incorporated under the laws of a neutral or an allied country which has been occupied by the enemy so that that country is provisionally under the effective control of the enemy is, by reason of the mere fact that it continues to carry on its business in that country, to be treated as an enemy alien to the extent that it is incapacitated from taking proceedings in the English courts to recover a trade debt. C

(ii) the retainer of the respondents' solicitors was determined when the respondents became enemies for the purpose of the Trading with the Enemy Act, 1939. D

Decision of the Court of Appeal ([1941] 3 All E.R. 419) reversed. E

[EDITORIAL NOTE.] The question at issue here is the definition of an enemy alien at common law. There was a time when in time of war every British subject was deemed to be at war with every subject of the state with which Great Britain was at war; but the question of who is an enemy alien has long since been treated as a question of public policy. The question here is complicated by the fact that the Netherlands, once a neutral country, have since become an allied country, and by the fact that Netherlands subjects resident in Holland are so completely under the control of the enemy that they must be treated as enemy subjects, however distasteful that may be both to ourselves and to them. The matter is fully explored in the opinions of LORD WRIGHT and LORD PORTER and a summary of the conclusions of the House is given in the concluding part of the opinion of VISCOUNT SIMON, L.C. In short, the result is that the control of the enemy over the Netherlands is such that any company having a commercial domicile there must with reluctance be treated as an enemy. F

AS TO ENEMY ALIEN, see HALSBURY, Hailsham Edn., Vol. 1, pp. 447-448, paras. 754, 755; and FOR CASES, see DIGEST, Vol. 2, pp. 139-146, Nos. 144-199.] G

Cases referred to :

- (1) *Porter v. Freudenberg, Kreglinger v. Samuel (S.) & Rosenfeld, Re Merton's Patents*, [1915] 1 K.B. 857; 2 Digest 156, 260; 84 L.J.K.B. 1001; 112 L.T. 313. H
- (2) *O'Mealey v. Wilson* (1808), 1 Camp. 482; 2 Digest 145, 192.
- (3) *M'Connell v. Hector* (1802), 3 Bos. & P. 113; 2 Digest 144, 187.
- (4) *Rodriguez v. Speyer Bros.*, [1919] A.C. 59; 2 Digest 160, 306; 88 L.J.K.B. 147; 119 L.T. 409.
- (5) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 2 Digest 145, 195; 85 L.J.K.B. 1333; 114 L.T. 1049.
- (6) *Van Uden v. Burrell*, [1916] S.C. 391; 2 Digest 144, 183i.
- (7) *Benzen v. Boyle, The Thirty Hogsheads of Sugar* (1815), 9 Cranch. 191.

- (8) *The Gerasimo, The Aspasia, The Achilles* (1857), 11 Moo. P.C.C. 88; 2 Digest 143, 177; 29 L.T.O.S. 269.
- (9) *The Gutenfels*, [1916] 2 A.C. 112; 37 Digest 643, 957; *sub nom. The Gutenfels, The Barenfels, The Derfflinger*, 85 L.J.P.C. 116; 114 L.T. 95.
- (10) *Blomart v. Roxburgh (Earl)* (1664), Mor. Dict. 16091.
- (11) *Arnauld and Gordon v. Boick* (1704), Mor. Dict. 10159.
- (12) *Carron v. Cowan (Charles) & Co.* (1809), 15 Fac. Coll. (1809-1810) 435.
- (13) *Wright v. Hutcheson* (1810), 15 Fac. Coll. (1809-1810) 435 n.
- (14) *Burgess v. Guild* (1813), 17 Fac. Coll. (1812-1814) 55.
- (15) *Orenstein and Koppel v. Egyptian Phosphate Co., Ltd.*, [1915] S.C. 55; 2 Digest 173, 392ii.
- (16) *Gist v. Mason* (1786), 1 Term Rep. 88; 2 Digest 166, 361.
- (17) *Brandon v. Nesbitt* (1794), 6 Term Rep. 23; 2 Digest 165, 355.
- (18) *Bristow v. Towers* (1794), 6 Term Rep. 35; 2 Digest 165, 356.
- (19) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest 155, 253.
- (20) *The Bella Guidita* (1785), cited in 1 Ch. Rob., at p. 206.
- (21) *The William* (1797), cited in 1 Ch. Rob., at p. 214.
- (22) *The Bolletta* (1809), Edw. 171; 37 Digest 591, 279.
- (23) *The Fama* (1804), 5 Ch. Rob. 106.
- (24) *The Foltina* (1814), 1 Dods. 450; 37 Digest 573, 45.
- (25) *United States v. Rice* (1819), 4 Wheat. 246.
- (26) *United States v. Hayward* (1815), 2 Gall. 485.
- (27) *The Dart* (1805), cited Edw., at p. 1.
- (28) *The Happy Couple* (1808), cited Edw., at p. 1; 37 Digest 576, 74.
- (29) *The Manilla* (1808), Edw. 1; 38 Digest 6, 6.
- (30) *The Santa Anna* (1809), 1 Edw. 180; 37 Digest 583, 183.
- (31) *Donaldson v. Thompson* (1808), 1 Camp. 429; 37 Digest 646, 976.
- (32) *Hagedorn v. Bell* (1813), 1 M. & S. 450; 2 Digest 143, 176.
- (33) *The Amy Warwick* (1862), 2 Black. 635.
- (34) *The Leonora*, [1919] A.C. 974; 37 Digest 595, 327; 88 L.J.P. 180; 121 L.T. 527; *affg.*, [1918] P. 182.
- (35) *Societe Anonyme Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency, Ltd.*, [1915] 2 Ch. 409; 2 Digest 146, 198; 84 L.J.Ch. 854; 113 L.T. 583.
- (36) *Re Deutsche Bank (London Agency)*, [1921] 2 Ch. 291; Digest Supp.; 90 L.J.Ch. 449; 126 L.T. 20.
- (37) *Wells v. Williams* (1697), 1 Salk. 46; 2 Digest 130, 61; 1 Ld. Raym. 282.
- (38) *Le Bret v. Papillon* (1804), 4 East. 502; 2 Digest 161, 316.
- (39) *Candilis & Sons v. Victor & Co.* (1916), 33 T.L.R. 20; 2 Digest 160, 305.
- (40) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 2 Digest 128, 49; 71 L.J.K.B. 857; 87 L.T. 372.
- (41) *Fender v. St. John-Mildmay*, [1938] A.C. 1; *sub nom. Fender v. Mildmay*, [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.
- (42) *The Hamborn*, [1919] A.C. 993; 37 Digest 579, 112; 88 L.J.P. 174; 121 L.T. 463.
- (43) *Birge-Forbes Co. v. Heyl* (1920) 251 U.S. 317.
- (44) *Tingley v. Muller*, [1917] 2 Ch. 144; 2 Digest 142, 163; 86 L.J.Ch. 625; 116 L.T. 482.
- (45) *The Anglo-Mexican*, [1918] A.C. 422; 2 Digest 144, 183; 87 L.J.P. 33; 118 L.T. 260.
- (46) *Schmitz v. van der Veen & Co.* (1915), 84 L.J.K.B. 861; 2 Digest 161, 308; 112 L.T. 991.
- (47) *Flindt v. Waters* (1812), 15 East. 260; 2 Digest 162, 317.
- (48) *Sparenburgh v. Bannatyne* (1797), 1 Bos. & P. 163; 2 Digest 143, 172.
- (49) *Esposito v. Bowden* (1857), 7 E. & B. 763; 2 Digest 168, 371; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295.
- (50) *Mitsui v. Mumford*, [1915] 2 K.B. 27; 29 Digest 420, 3280; 84 L.J.K.B. 514; 112 L.T. 556.
- (51) *The Rapid* (1814), 8 Cranch. 155.
- (52) *Bromley v. Hesselstine* (1807), 1 Camp. 75.
- (53) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 12 Digest 241, 1973; 63 L.J.Ch. 908; 71 L.T. 489; *affg.* S.C. *sub nom. Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630.
- (54) *Stevenson (Hugh) & Sons v. Akt fur Cartonnagen Industrie*, [1918] A.C. 239; 2 Digest 177, 416; 87 L.J.K.B. 416; 118 L.T. 126.

APPEAL by the Russian company from the decision of the Court of Appeal (LORD GREENE, M.R., GODDARD and DU PARCQ, L.JJ.), reported [1941] 3 All E.R. 419, affirming a decision of ASQUITH, J., who had dismissed an appeal from an order of MASTER BALL, appointing an umpire in the arbitration.

D. N. Pritt, K.C., and *Gerald Gardiner* for the appellants.

Sir Robert Aske, K.C., and *A. J. Hodgson* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, the respondents are a ship-owning company incorporated before the war under the law of the Kingdom of the Netherlands, with their principal place of business at Rotterdam. By a charter-party, dated Aug. 11, 1939, the respondents chartered one of their vessels to the appellants, who are a Russian company; disputes arose between the parties and the respondents sought arbitration under a clause in the charterparty which provided for arbitration in London. During Apr., 1940, each party appointed an arbitrator. Before the matter could proceed further, the German invasion of the Netherlands took place and by the second week of May, 1940, that country, including Rotterdam, was completely occupied by the enemy and has ever since been entirely under enemy control. In these circumstances, the appellants and their arbitrator refused to proceed with the arbitration on the ground that the respondents had become enemies and ultimately on June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. MASTER BALL, after hearing argument from each side, made the order, and this order was confirmed by the judge in chambers, ASQUITH, J., who gave to the present appellants leave to appeal to the Court of Appeal. The Court of Appeal (LORD GREENE, M.R., GODDARD and DU PARCQ, L.JJ.) dismissed the appeal and affirmed the view that the respondents were not in the position of alien enemies at common law and thus still enjoyed the right to resort to the King's courts. This is the principal question to be decided in the present appeal. A subsidiary question as to the validity of the retainer of the solicitors for the respondents becomes irrelevant if the appeal on the main point succeeds.

On the main question, it is, of course, common ground that an "alien enemy" cannot sue in the King's courts or otherwise take up the position of an actor in British litigation, save under royal licence. An alien enemy, in this connection, does not mean a subject of a state at war with this country, but a person, of whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy's country: *Porter v. Freudenberg* (1), at p. 869. That case was the decision of a specially constituted Court of Appeal at the beginning of the last war. It confirmed the view which was taken by our courts during the Napoleonic wars, e.g., in the King's Bench in *O'Mealey v. Wilson* (2), where LORD ELLENBOROUGH, said at p. 483:

If a British subject resides in an enemy's country without being detained as a prisoner of war, he is precluded from suing here and by the court of common pleas in *M'Connell v. Hector* (3), at p. 114, when the court declined to support a commission of bankruptcy granted at the suit of three partners, all British subjects, on the ground that two of them resided and traded at an enemy port. The port was the Dutch port of Flushing, described as "a port belonging to the enemies of this country"—the relevant date is not given, but, as Professor McNair points out in an article on the "Procedural Capacity of Alien Enemies" in the *LAW QUARTERLY REVIEW* of April last, the time was probably during the period when Holland under a Francophil puppet government was at war with Great Britain. In that case *ALVANLEY, L.C.J.*, said at p. 114:

... I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of an hostile state, and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an English subject in an English court of justice.

This decision was approved by this House in *Rodriguez v. Speyer Bros.* (4), when LORD FINLAY, L.C., said of it, at p. 73:

All that was decided by the court was that enemy character results from residence in the enemy country, and there is no doubt as to the correctness of this proposition. There can be no doubt that the respondent company must be treated as "resident" in Rotterdam. Their commercial domicile was there, and there is no indication that it has changed. The case must be dealt with as though they were an individual subject of the Queen of the Netherlands living there. I share to the full the feeling of distaste, expressed by LORD GREENE, M.R., at the idea that loyal Netherland subjects, who have suffered so cruelly at the hands of a brutal enemy and whose fellow countrymen are none the less maintaining from this country all the resistance they can to the invaders of their native land,

should be regarded by English law, for any purpose, as alien enemies. But for the purposes of the statute law prohibiting trading with the enemy, they would plainly be so regarded, for "enemy territory" is defined, by the Trading with the Enemy Act, 1939, s. 15 (1), so as to include "any area which is in occupation of a power with whom His Majesty is at war". Here, however, we are concerned with the common law. Even a British subject, if voluntarily resident in enemy territory, would be treated at common law as unable to sue (see, for example, the opinion of LORD PARKER, in the *Daimler* case (5), at p. 339), for the denial of *persona standi in judicio* does not turn on allegiance, but on locality. The question is, therefore, simply whether residence in territory which has been invaded and is forcibly occupied by the enemy disqualifies (apart from royal licence) from bringing or pursuing a suit in the King's courts.

I have had the advantage of perusing the opinions prepared by LORD WRIGHT and LORD PORTER, in which most of the relevant earlier decisions, both in this country and in the United States, are collected and analytically examined, and this relieves me from lengthening my own opinion by attempting any elaborate citation of authorities. To the cases cited I will add a reference to a Scottish decision given during the last war—*Van Uden v. Burrill* (6). There the Court of Session (LORD PRESIDENT STRATHCLYDE, LORD SKERRINGTON and LORD ANDERSON) held that a Dutch firm (I do not know whether the firm was the precursor of the respondent company, but the name is the same and it was a firm of steamship owners in Rotterdam), which was an enemy within the meaning of the Trading with the Enemy Act, 1914, because the partners also carried on business in Germany, could be defeated as pursuers by the plea of alien enemy. My own conclusions, deduced from the authorities, are in general accord with those of LORD WRIGHT and LORD PORTER, and may be summarised as follows:

(i) The test of "enemy character" is fundamentally the same as far as areas occupied by an enemy power are concerned, whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law.

(ii) The test is an objective test, turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled: it is not a question of nationality or of patriotic sentiment.

(iii) If the enemy power invades and forcibly occupies territory outside his own boundaries, residence in that territory may disqualify from bringing or maintaining a suit in the King's courts in the like manner as residence in the enemy power's territory would. The same applies to a company commercially domiciled or controlled in occupied territory.

(iv) This is not always or absolutely so. It depends on the nature of the occupation and on the facts of each case. If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time, and is exercising some kind of government or administration over it, the area acquires "enemy character." Local residents cannot sue in our courts and goods shipped from such an area have enemy origin—see *per* MARSHALL, C.J., in *Bentzen v. Boyle, The Thirty Hogsheads of Sugar* (7). If, on the other hand, the occupation is of a slighter character, for instance, if it is incidental to military occupations and does not result in effective control, the case is different, as in *The Gerasimo* (8). I would, in particular, adopt the observations of LORD WRIGHT on this decision, for I agree that, while the statement of the law by DR. LUSHINGTON went too far in one direction, LORD KINGSDOWN in delivering the judgment of the Privy Council, reversing the decision of the prize court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind.

(v) It is not irrelevant to bear in mind the reason why a resident in enemy-occupied territory is in certain circumstances subject to the same disability as a resident in enemy territory. LORD READING, L.C.J., in *Porter v. Freudenberg* (1), referring to the denial to alien enemies of a right to sue, said at p. 867:

This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the state at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts which will be or may be to the advantage of the enemy state by increasing its capacity for prolonging

hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state.

This consideration equally applies to a claim sought to be established in our courts by a resident in enemy-occupied territory, for, if the claimant succeeds, an asset in the form of an award or a judgment is created which the occupying power can appropriate and which is calculated to increase the enemy's resources.

(vi) The common law disability to sue in such cases cannot be regarded as got rid of because emergency regulations would prevent the transmission abroad of the sum recovered. The asset would be created, even though it necessarily remained here till the end of the war. Such an asset might well operate as security for an advantage to the enemy from a neutral lender. A

(vii) The operation of the rule refusing *persona standi in judicio* is always subject to permission being given by royal licence. In the present case, no application for a royal licence has been made.

For these reasons, I find myself obliged to differ from the Court of Appeal and to move that the appeal be allowed with costs here and below. As I have said, this conclusion makes it unnecessary to deal with the other ground of appeal touching the retainer of the respondents' solicitor. On this point also I agree with the view expressed by LORD PORTER. B

LORD ATKIN (read by LORD THANKERTON): My Lords, having had the opportunity of reading in advance the opinions about to be delivered by LORD WRIGHT and LORD PORTER, and agreeing with them as I do, I add but a few words. The rule precluding an alien enemy from the right of suit is based upon public policy: the protection of the state in time of war. But the need of the state for protection varies with the increasing dangers of modern war as compared with the warfare of earlier days. The result is that earlier decisions have to be measured in the light of this consideration. "Total war" is a more or less modern development of civilisation; but its practice and effects have an important bearing on the problem of the position of the resident in an occupied country. The question that is in dispute is the right of the resident in enemy-occupied country to enforce by suit in this country civil rights whether by contract or otherwise, a question that will generally concern rights claimed that arise from commercial transactions. When a British court has to consider what is the nature and extent of the enemy occupation that makes the resident an enemy, I think that in these days one of the most important tests would be the extent to which the enemy while in occupation assumes to control the civil rights of the subjects of the occupied country. If that control be for the material time effective, I am inclined to think that it matters not that the enemy contemplate to withdraw that control at some future time or on some future event whether distant or not. I have no doubt in this case that the enemy effectively control the commercial operations of the appellants in Holland; and that a successful judgment in this action would directly or indirectly enure to the enemy benefit, and that the plaintiffs are precluded as enemy aliens from suing in these courts without the licence of the Crown. I need only add a few words as to the decision of the Privy Council in prize in *The Gerasimo* (8), which has the great weight of the authority of LORD KINGSDOWN. The decision itself can plainly be supported upon the facts; but the opinion goes further than was necessary; and it would appear that LORD KINGSDOWN took the view that to constitute an alien enemy it was necessary that the territory either by cession or conquest or some other means should either permanently or temporarily be incorporated with and form part of the dominions of the invader. My Lords, it seems to me quite inconsistent with the public policy on which the rule is based that an invader should assume complete control of the government of a territory, but, by disclaiming any intention to incorporate it or make it part of his dominions, free its residents from the disabilities of enemy character in these courts. I have no doubt that, if LORD KINGSDOWN had had to appreciate the methods of modern warfare, he would have framed his sentence differently. It is expressed more widely than was necessary for the particular case; it is inconsistent with the subsequent decision of the Privy Council also in prize, *The Gutenfels* (9). I doubt whether it would be followed in prize in these days. It certainly is not binding upon this House and I cannot agree with it. I am of opinion that the appeal should be allowed. C
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LORD THANKERTON : My Lords, I have had the privilege of considering the opinions about to be delivered by LORD WRIGHT and LORD PORTER, and I agree with them, and in particular with their careful review of the authorities and their comments on the *dicta* of DR. LUSHINGTON and LORD KINGSDOWN in *The Gerasimo* (8). I should, however, like to add a reference to some of the few early Scottish cases, as I am satisfied that there is no difference on this matter between the law of England and the law of Scotland.

A In *Blomart v. Earl of Roxburgh* (10) the defender alleged that the pursuer :

... need have no process, being of the United Provinces. It was answered, that there was no denunciation of war by His Majesty as King of Scotland, nor any proclamation in Scotland to that purpose. It was replied, that there was a warrant by the King and council to seize upon all the Dutch vessels in Scotland. The Lords found that this was but an embargo, and no denunciation of war in Scotland, and, therefore, found process.

B This expresses the difference between a *casus belli* and a state of war, though recent history has at least obscured this distinction.

In *Arnauld and Gordon v. Boick* (11) Arnauld a merchant in Rouen, and his attorney in Edinburgh, Gordon, sued Boick, a merchant in Edinburgh, for the price of some hats and counterfeit pearls sent home to him. The report states :

C Boick alleged no process at Arnauld's instance, because, being a subject of the French King's, with whom we are at war, they can pursue no action during the dependence and continuance of the war, for *hostes publici*, as they have not *jura commerciorum*, so neither have they *leg(it)imam personam standi in judicio*, nor *jus persequendi actiones*. And, if this were the cause of a Scotsman pursuing a Frenchman before the Parliament of Paris, he would not only be denied action, but the sum would be confiscated to the public ; which is not here craved. Answered, whatever the authors of the war may deserve, or merchants suffer by captures of their goods and ships at sea, yet it is hard to extend it to private persons craving their just debts, the denying whereof is against the faith of trade ; and by the late Act of Parliament, 1703, allowing an indirect trade with France for importation of wines, this rigour seems to be dispensed with. The Lords refused to sustain process at the French merchant's instance.

D Then Gordon produced a bill of exchange giving him right to the sum, which the Lords likewise repelled, because the summons was not pursued in his name on that proper right of his own, but only as factor for Arnauld, and would not let him transform his summons thus by way of reply. The reference to the Act of Anne, 1703, cap. 11, is interesting as it appears to be an illustration of a statutory modification of the general rule, though it does not expressly mention importation from enemy countries. The War of the Spanish Succession had begun the previous year, and there can be little doubt that French wines were the popular ones in Scotland. It leaves it uncertain whether the exporting French merchant could have recovered his debt in the Scottish courts during the war.

E During the Napoleonic wars three cases are reported. In *John Carron v. Charles Cowan & Co.* (12), a foreigner resident in Denmark charged on a bill and the Scottish debtor was ordained by the Lord Ordinary in a suspension of the charge to consign the amount ; at the time of the charge war between Denmark and this country had broken out. On a reclaiming petition by the suspender the court remitted to the Lord Ordinary to sist procedure. In *Wright v. Hutcheson* (13), reported in a note to *Carron's* case (12), and with facts similar to those in *Carron* (12), the court, *ex proprio motu*, followed the same course, and, in both these cases, the court refused to allow the enemy alien the advantage of consignment or security during the dependence of hostilities. The third case was that of *Abial Burgess v. William Guild* (14), in which Guild, owner of the Nimble, brought action in the Judge Admiral's court against Burgess, American owner of the Hannibal, which, on entering Leith harbour, had collided with the

G H Nimble. The latter vessel sank in fifteen minutes, and the owner sued for the value of the ship and cargo, and arrested the Hannibal in security. The Judge Admiral decided in favour of Burgess, who then raised a counter action for damages for the detention of his ship, and the Judge Admiral again decided in his favour. Guild raised a reduction of both decrees in the Court of Session, and Burgess also raised a reduction in so far as he had not got enough damages. Then hostilities broke out between America and Great Britain, and the Lord Ordinary reported the case to the court, who desired and obtained the opinion of His Majesty's Advocate-General, SIR CHRISTOPHER ROBINSON, and, in

accordance with that advice, allowed Burgess to proceed in respect that his action was a counter-action. As regards recent cases in Scotland, I need only add a reference to *Orenstein & Koppel v. Egyptian Phosphate Co., Ltd.* (15), and *Van Uden v. Burrell* (6), and, in particular, to LORD SKERRINGTON'S opinion in both cases. I agree with the comments of VISCOUNT SIMON, L.C. on *Van Uden's* case (6).

There can be no doubt that the prohibition of intercourse with an alien enemy rests upon public policy, which requires that no act shall be done or permitted that may injure the interests of the state either directly, or indirectly by benefiting the enemy state. The means by which such injury may arise will naturally vary to some extent from age to age; for instance, the effect of scientific discovery in the last century on means of communication in many differing forms has been revolutionary, and it is clear that the court is bound to consider these changes in applying the general doctrine. You can define the general doctrine, but you cannot stereotype the cases in which it is to be applied. One other observation I desire to make; the question of an enemy-occupied country in relation to the doctrine must depend on the nature and extent of the occupation in the particular case; it may be said to be a question of degree. In the present case I have no doubt that the enemy occupation is of such a high degree as to place Holland—for the purposes of the doctrine—in the same position as enemy territory. The Netherlands sovereign and government, in any effective sense, are outside Holland, and the enemy are fully in both civil and military control.

I concur in the motion proposed by VISCOUNT SIMON, L.C.

LORD WRIGHT: My Lords, the respondents in this case are a Dutch company with a principal place of business at Rotterdam. The facts in the case are very inadequately stated. There is no evidence as to the constitution of the company, the character of its membership, of its regulations, of the exact nature of its business. It is not known where its directors are.

It is clear, however, that the respondents owned at least one steamship, the *Woolhaven*, which was chartered before the war to the appellants. The respondents made claims under the charterparty which were referred to arbitration early in Apr., 1940. Shortly afterwards, about the second week of May, 1940, Holland was invaded and forcibly occupied by the Germans. The solicitors who had been acting for the respondents in the matter then applied to the Custodian of Enemy Property for his formal approval that the arbitration should be proceeded with, on the understanding that any sums recovered from the appellants would be accounted for to him "in accordance with the Trading with the Enemy Regulations." The Custodian on May 22, 1940, replied that he had no objection to that course. It was not contended, at least before the Court of Appeal, that the Custodian's letter had any legal validity as a licence to the respondents or the solicitor on their behalf to proceed. While the case was being argued before the Court of Appeal, an adjournment was granted to enable an application to be made to the Trading with the Enemy Branch (Treasury and Board of Trade) who gave an authority dated Oct. 15, 1941, to the solicitors purporting to act for the respondents to continue to represent and act in their behalf. The authority was given under the Trading with the Enemy Act, 1939, s. 1 (2), proviso (1). It was so expressed as to operate retrospectively to cover the solicitor's actions since May 22, 1940. It added that:

... it is for the court in the arbitration to decide whether the owners being in enemy-occupied territory are entitled to proceed with the dispute in existing circumstances. It is a condition of this licence that any money which may become payable to the owners [i.e., the respondent] as a result of the proceedings must be reported to the Custodian of Enemy Property.

This authority distinguishes between the two main principles under English law which apply to the position of the enemy subject in time of war. These principles are separate but are closely related. One is that he is denied access to the English courts, the other is that British subjects are prohibited from trading with him and from all intercourse or communication across the line of war. Both principles depend on rules of English municipal law, and both have their foundation in the ancient common law. In the eighteenth century LORD MANSFIELD relaxed the latter principle in commercial matters, at least as regards insurances on enemy goods against British capture; he seems to

have preferred business convenience to the national policy in war, though he records the view of the judges declared to LORD SOMERS and later reported by him to LORD HARDWICKE that trading with the enemy was a misdemeanour at common law. So this is stated in his judgment in *Gist v. Mason* (16). But LORD MANSFIELD's heresy was explicitly and finally rejected in 1794 by the Court of King's Bench in *Brandon v. Nesbitt* (17), and in *Bristow v. Towers* (18), both actions on marine policies for loss by British capture. In the latter case

A particularly the elaborate arguments of counsel may still be read with profit, especially that of the defendant's counsel, Mr. Park (afterwards PARK, J.), who quotes Valin's observation that by these insurances one part of the nation rendered back to France what had been taken by the other by the right of war. LORD KENYON, in delivering the judgment of the King's Bench, said that an action will not lie either by or in favour of an alien enemy. The action there was brought by the broker for the enemy, who urged that, as he had a set-off

B greater in amount than the claim, no money would pass to the enemy; but that plea did not avail him. The enemy's credit and resources would inevitably be increased by the judgment. The facts showed a trading with the enemy in that the voyage from London to France was prosecuted after the outbreak of war.

In all cases of this character the fault may be cured by a licence or authority from the Crown. The authority given in the present case which I have quoted

C deals only with the matter of trading with the enemy, not with the inability of the enemy to proceed in court. The Court of Appeal rightly held that it was bad in that it could not operate retrospectively to legalise acts which at the time they were done were unlawful as being in breach of the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940, by which the special criminal offences are defined for the present war.

D After the occupation of Holland by the Germans, the arbitrator appointed by the appellants refused to proceed or to appoint an umpire. Application was then made to the court in the name of the respondents to appoint an umpire. The master made an order appointing an umpire. This order on appeal was affirmed by the judge in chambers. On an appeal from that order, the Court of Appeal held that the respondent company was entitled to proceed as it was not an enemy at common law, but that it was an enemy corporation for the purposes

E of the Trading with the Enemy Act and the Defence (Trading with the Enemy) Regulations, 1940. By these regulations "enemy" is defined as including:

... as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or incorporate) carrying on that business ...

Enemy territory is defined by sect. 15 (1) of the 1939 Act, to include

F ... any area which is under the sovereignty of, or in occupation of, a power with whom His Majesty is at war ...

It followed (so the court held) that it was illegal for the solicitor to act for the respondents in England without a licence. But, though the Court of Appeal held that the authority could not operate retrospectively, that court held that the difficulty was overcome by the concession on the part of the appellants' counsel that all the proceedings should be deemed to have taken place before

G Oct. 13, 1941.

By this transparent fiction it was, it seems, held that the parties could by their agreement waive a breach of the public and criminal law of the nation, so as to render lawful what was illegal. I cannot bring myself to think that this was a proper or permissible course for a court to take, but I need not pursue it further, as I am prepared to decide the appeal against the respondents on the other ground that it is incompetent for the respondents, being an enemy corporation,

H to, proceed in court.

I feel, I confess, a natural repugnance to describing as enemies of this country those loyal and patriotic subjects of the Netherlands who have the misfortune to be forced to reside there after the German occupation. But this distasteful appellation has already been attached to all residents in Holland, as the Court of Appeal have rightly and indeed inevitably held, by Parliament under the appropriate Act and regulations, and matters are not made worse if under the common law the respondents are also to be deemed an enemy corporation. It is true that the statutory definitions dealing with trading with the enemy and the custody

of enemy property are limited to the purposes of the Act and regulations and do not impinge on the common law in regard to the separate question of an enemy's competence to sue. On the whole, however, I think that these definitions, at least in their latest form, do substantially agree with the definitions of enemy and enemy-occupied territory reached by the common law in the authorities which I shall cite.

The general question of law to be determined is whether enemy character as against one belligerent attaches to a person by reason of the fact that the previously neutral or friendly territory in which he resides or carries on business, that is, has his place of residence or commercial domicile, is subjugated and occupied by the other belligerent. Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality, but domicile in the sense of settled residence or, in the case of traders, commercial domicile. Domicil in the strict legal sense is not necessarily relevant. Some of these cases were decided in the prize court, others in courts of common law. However, the right to sue or prosecute an action in court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense. The test is objective and depends on facts, not on the person's prejudices or passions, his patriotism, or his determination to free his country whenever he can.

It is, I think, clear both on principle and on authority that a person resident or domiciled in enemy-occupied country, is in English law to be deemed to be an enemy and as such subject to the same disabilities as an enemy in the ordinary sense while the occupation continues. It is, however, necessary to define what is meant by enemy-occupied country in this context, and determine whether the facts justify the description being applied in any particular case. It might be better if the epithet applied were enemy-subjugated territory. This would show that a mere temporary occupation, for instance, by a military force in the conduct of belligerent operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and to show the intention to keep it. I do not think that the cases require that there should be formal acts, such as cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact, with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised. All acquisitions in war may be temporary. They may be abandoned on peace being declared and surrendered or retaken under the pressure of superior force. But there is a sharp distinction between an occupation of territory by armed forces for strategical and temporary purposes and an occupation of territory as being a settled acquisition.

The Anglo-American authorities seem to confirm this view. I shall cite certain decisions which seem to me representative. I shall begin with *The Hoop* (19). In that case LORD STOWELL condemned goods shipped in Rotterdam to merchants in Glasgow who had for many years been in the habit of procuring such goods from Holland before the irruption of the French into that country. The merchants had got the impression that, in virtue of 35 Geo. 3, c. 15, no licence was necessary, and had been so advised by the customs officials at Glasgow, and had not sought or obtained a licence. The goods were captured and were condemned by LORD STOWELL in prize in 1799, though, as he confessed, with great private regret. But, he said, at p. 198 :

... if there is a rule of law on the subject binding the court, I must follow where that rule leads me.

I particularly dwell upon the judgment of LORD STOWELL, because he made an elaborate survey of earlier cases in prize, out of which I select two as illustrating how he understood the rule extending to enemy-occupied countries. One is *The Bella Guidita* (20), decided by the Lords of Appeal in 1785, relating to a cargo of provisions shipped from Ireland to Grenada. Grenada had been captured from Britain by the French in 1779, and was not restored to the British until 1783. The shipment and capture took place while the island was held by the French. The single question was :

... whether it was so unlawful for a British subject to send supplies to the British plantations in the Grenada islands [i.e., without a licence from the Crown] whilst under the misfortune of a temporary subjection to the French as that a confiscation of the supplies so sent should be the just and legal consequence of his misconduct.

The proprietors, LORD STOWELL quoted from the record, were British in principle and affection. Their position as British proprietors of the estates was so meritorious that an Act (20 Geo. 3, c. 30), was passed to protect from British capture in prize shipments from Grenada of the produce of the island. But it did not apply to shipments to the island, like the cargo in question which was of stores and the like necessary to work the plantation. The case was treated as one of trading with the enemy without a licence. The condemnation of the cargo as French property (because of the enemy destination) was upheld by their Lordships. A similar decision was given in *The William* (21), which related to a shipment from Guadeloupe while in French occupation. I think it is clear from these citations that LORD STOWELL treated the Lords of Appeal as drawing no distinction in this context between enemy territory in the ordinary sense and territory in the effective occupation of the enemy while that occupation lasted.

In *The Bolletta* (22) the question was whether cargo, the property of merchants residing in the Ionian Islands, shipped in a Danish ship from Zante to Copenhagen was liable to capture on the ground that Zante was French territory. LORD STOWELL stated the issue to be whether the possession of the island by the French was "more than a temporary possession." LORD STOWELL held, at p. 174 that it was not because

... it was not as an hostile occupation by force of arms liable to be lost again the next day.

The capture of the cargo had taken place on Aug. 31, 1807. Under the Treaty of Tilsit, concluded in the previous July, it had been agreed between Russia and France that France should have possession of the Ionian Islands. Possession of the island under the treaty had been effectively taken by France before the cargo was seized. It was held that the cargo was properly confiscated as being French property.

On the other hand, in *The Fama* (23), the goods had been shipped for Louisiana after the date of the Treaty of Idelphonso under which Spain transferred the settlement to France. But LORD STOWELL held that the nationality of the colony did not change until the actual possession had been changed under the treaty, and that actual possession had not been taken by the French before the seizure of the cargo was effected. Spain at the material time was still neutral and the goods accordingly could not be condemned as French property.

It is, I think, clear that in these and other like cases, the opinion of LORD STOWELL was that a territory changed its national character and acquired that of the conqueror, if there were effective subjugation and firm possession with the intention of keeping the conquest, even though in the event the dominion of the conqueror was temporary, and even though there was not either formal annexation or cession. What had to be considered was the nature of the occupation; a mere occupation in the course of and for purposes of military operations did not change the national character. These were cases in prize in which the issue was enemy or not enemy; but the same test was applied in a different connection in *The Foltina* (24). The question there was whether the ship and cargo which were captured in 1811 in a haven or roadstead in Heligoland, which had surrendered to the British in 1807, had been captured in a British port so as to be properly treated as droits of Admiralty. LORD STOWELL said, at p. 451, that the chief point to be considered was whether at the time when the capture was made Heligoland formed part of the dominions of the Crown of Great Britain.

The island, it appears, had been conquered and taken possession of by British forces, but the conquest had not been confirmed to this country by a treaty of peace. It was a firm capture in war, but was still subject to a kind of latent title in the enemy, by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution.

As he later observed, it might be reacquired *flagrante bello* by the state from which it was taken. He held that the vessel was captured in a British port. This illustrates the principle on which national character, in LORD STOWELL's view, depends. In another place he requires for the change in national character,

annexation or cession or possession for a sufficiently long time, which I presume must depend on the facts, in particular on the nature of the occupation.

The position of territory occupied by an enemy was discussed in the courts of the United States in connection with the war between that country and England which lasted from 1812 to 1815. In one of these cases the question whether the nationality of the place had been changed was raised in order to determine whether the seizure of cargo was justified in prize. That was *Bentzen v. Boyle, The Thirty Hogsheads of Sugar* (7). The sugar was seized while on a voyage from Santa Cruz after the island had been captured by the English from Denmark and before it was restored to Denmark by the peace of 1814. The Supreme Court decided that the cargo was liable to confiscation on the ground that it had an enemy origin, because it was shipped from British territory. MARSHALL, C.J., giving the judgment of the court, thus stated the principle.

Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the dominions of the conqueror so long as he retains the possession and domain of them. The island of Santa Cruz remained a British island until it was restored to Denmark.

Another of the three cases was *United States v. Rice* (25), where the enemy character was raised in a different context. The question there was whether the acts of the British collector of customs at Castine during the occupation were invalidated by the subsequent restoration of the port. Castine, a port in the Penobscot district of Maine, had been taken from the United States during the war of 1812, and was held by the British until the peace of 1815. It was held by the Supreme Court that during the occupation, Castine was a British port, subject to the British revenue taxes. STORY, J., delivering the judgment of the court observed that by the conquest and firm possession the fullest right of sovereignty was vested in the British; the sovereignty of the United States was suspended and their laws no longer ruled in Castine. The surrender of the port to the British created a temporary allegiance of its inhabitants, who were bound by such laws as the British chose to impose. There could be no allegiance where there was no protection of the laws. Castine was, therefore, a foreign port. To much the same effect, STORY, J., in *United States v. Hayward* (26), held that Castine during the period of British occupation was no longer to be considered as a port of the United States with reference to their non-importation laws, and that so far as respected the obligatory force of the laws of the United States it was a port *extra ligantiam reipublicae*. STORY, J., relied on what LORD STOWELL said in *The Foltina* (24) in the passage quoted above; but he pointed out that the allegiance and sovereignty of the British were temporary and that the territory could not be regarded as incorporated (that is permanently incorporated) in the dominions of the British Sovereign. He did not, I think, question that while the temporary allegiance continued the territory was within the dominion of a foreign power and outside the dominion of the United States. He was, I apprehend, considering whether, having regard to the possibility of recovery, what LORD STOWELL called a latent title, *jus post-liminis*, whether according to international or municipal law, would apply.

In 1857 the Privy Council decided the appeal in *The Gerasimo* (8). It arose out of the Crimean war. The question was what was the national character of the principalities of Wallachia and Moldavia. The main issue was whether a cargo which had been seized, belonged to firms who could be considered as alien enemies, and that question turned upon the nature of the possession which the Russians held of these principalities when the cargo was shipped from Galatz. The vessel was sailing under Wallachian colours. The cargo was condemned in the prize court. DR. LUSHINGTON stated that Galatz, in which port the claimants resided, was in Moldavia, and that Moldavia was in possession of the enemies, and went on:

... so long as any territory is in possession of the enemy, I apprehend that the law declares that all the inhabitants thereof and all the persons resident therein and carrying on trade are to be considered as enemies with respect of that trade.

I think that on the authorities, this statement of law was too wide and unqualified. It is necessary to define the character of the possession. The condemnation was reversed in the Privy Council. LORD KINGSDOWN, who delivered the judgment of the Board, cited *The Dart* (27), *The Happy Couple* (28), and *The*

Manila (29). These were cases dealing with the peculiar position of St. Domingo after the negro insurrection. He cited also *The Santa Anna* (30), which was a case in which Cadiz was held not to be an enemy port, though the French armies were dominant in Spain. But the Spaniards were engaging in guerilla warfare and the British were supporting the insurgent Spaniards. The Crown had made a public declaration of amity with Spain and, therefore, it was held that property of persons resident in those parts of Spain which were then under French control could not be condemned save for breach of neutrality. These were special cases heard on their particular facts. LORD KINGSDOWN also cited from the common law courts, *Donaldson v. Thompson* (31), a case relating to Corfu at the time anterior to the Treaty of Tilsit, when a Russian garrison was quartered on the island, a case to be contrasted with *The Bolletta* (22). LORD ELLENBOROUGH gave the operations of Sir John Moore's army as an instance of belligerent and temporary occupation, not changing the national character. Another case which he cited was *Hagedorn v. Bell* (32), in which there was an elaborate review of the orders and declarations of the government in respect of Hamburg, which, it was held, prevented the court from treating that port as an enemy territory, notwithstanding its occupation by the French. LORD KINGSDOWN did not, however, refer to the statements of the principle by LORD STOWELL in the decisions cited above, or by MARSHALL, C.J., in *The Thirty Hogsheads of Sugar* (7). The conclusion at which LORD KINGSDOWN arrived was that the mere possession of a territory by an enemy force does not in itself necessarily convert the territory so occupied into hostile territory or its inhabitants into enemies. This became, he thought, simply a question of the nature of the Russian occupation of Moldavia. This, I think, is unexceptionable so far as it goes. The Privy Council on the evidence held that the occupation was not such as to change the national character of the country. It was in effect merely provisional, connected with strategical considerations and not with the object of conquest. The cargo was accordingly released. But the principle stated by LORD KINGSDOWN in one part of his judgment goes further than is necessary for the decision of the case and is not, in my opinion, consistent on one construction with the authorities to which I have referred. What LORD KINGSDOWN said, at p. 96, was :

... what are the circumstances necessary to convert friendly or neutral territory into enemy's territory ? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control ; or is it necessary that, either by cession or conquest, or some other means, it should either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises ?

He accepts the latter alternative as correct.

The former sentence may be taken to describe what has been called belligerent occupation, which would not generally be regarded as changing the national character of the territory. But one reading of the alternative contained in the second sentence would seem to exclude cases like the occupation by the British of Heligoland, and of the captures in the West Indian islands in the French war, or the subjugation of European countries by the Germans in the present war. A conquest during war may in a sense be temporary, as was that of Demerara by the French, and may be reversed either by reconquest or by surrender ; but, if while it lasts there is what is called firm possession for a sufficient period with the intention of keeping it unless it is reconquered or surrendered, the national character of the place will generally at least for the time be changed. Perhaps LORD KINGSDOWN's language means no more than that when he speaks of a territory being temporarily incorporated with and forming part of the dominions of the invader at the material time. If it is so construed, it is in harmony with the earlier decisions and is unexceptionable. It is clear on the facts that the Russian occupation of Moldavia was no more than a temporary military and strategical occupation. If LORD KINGSDOWN makes the change in national character depend on formal acts or declarations, it would not, in my opinion, be consistent with recognised authorities. The issue depends on fact, not on form.

In 1862 the same principle was again affirmed by a majority of the Supreme Court of the United States in *The Amy Warwick* (33). The case arose out of the

Civil War in America. A ship belonging to the confederates had been seized by a northern cruiser and was condemned in the prize court. The court differed on the question whether the principles of the belligerent rights of capture applicable to external wars applied to internal or civil wars. The majority of the court held that they did. The ship was condemned, the court saying that the seceding states should be regarded as being enemy and that all persons residing in the territory occupied by the insurgent government should be treated as enemies, though not foreigners.

Two authorities decided during the last war require to be noticed. In *The Gutenfels* (9), one issue was as to the national character of Port Said. It was there necessary to decide as one issue whether Port Said was, as regards Germany, an enemy port within the Hague Convention of 1907, Convention VI, art 2. The Judicial Committee held that it was,

... having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain.

The Board held that it was an enemy port *vis-a-vis* Germany by reason that it was a port under enemy control for purposes of the war. The German ship-owners accordingly succeeded in claiming the benefit of the convention. The occupation there was not a mere temporary occupation for military purposes. The Board approved the language of HALL, INTERNATIONAL LAW, 6th Edn., p. 505 :

When a place is militarily occupied by an enemy, the fact that it is under his control and that he consequently can use it for purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil.

This was said no doubt in reference to questions of public international law, but the same principle for determining enemy character would apply to questions of municipal law such as whether there is a right to claim a *persona standi in judicio*, whether there is a liability for the offence of trading with the enemy, and also whether property is subject to arrest or condemnation in a prize court.

In *The Leonora* (34), one issue was whether a cargo of coal, mined from collieries in Belgian territory, which was at the time in German occupation, was of enemy origin within the meaning of the British retaliatory orders in council of 1915 and 1917. The coal was seized when being carried in a neutral ship from Rotterdam to Sweden, both places being neutral. The main issue was whether the orders were valid according to international law. The evidence did not merely show German occupation of the Belgian territory, but that the whole enterprise of getting the coal and selling and shipping it to the neutrals was conducted by a comprehensive system for the exploitation of the occupied territory and its produce under the control and for the advantage of the Germans. This illustrates what may be meant by German occupation in this and like cases. The issue was, therefore, not the bare question whether the coal was of enemy origin in the sense of being the produce of enemy-occupied territory. In the Privy Council LORD SUMNER, delivering the judgment of the Board, observed that it was not necessary to inquire whether within the terms of the order a Belgian origin could, as such, be regarded as an enemy origin for this purpose or what the effect, if any, of the German occupation might be on the view to be taken of the nationality of persons resident in Belgium. The judgment emphasises the nature of the German control and the exploitation of Belgium.

Certain cases, in which the national character of Belgium during its occupation by the Germans came into question, do not seem to me to help towards the elucidation of the common law relevant in this case, because they were mainly devoted to considering the various Trading with the Enemy Acts and regulations which were in force during the last war. One was *Societe Anonyme Belge des Mines d'Aljustrel v. Anglo-Belgian Agency, Ltd.* (35). The company there was incorporated under the laws of Belgium and had its registered office in Antwerp, which was within the territory occupied by the Germans; but the office at Antwerp had been closed and the business, which was the operation of mines in Portugal, was carried on *de facto* in London by three out of the five directors. It seems that, as the company was not commercially domiciled in Belgium, the common law point was very slightly touched on. *Re Deutsche Bank (London Agency)* (36) does not seem to me to examine the relevant common law in any detail.

The principles which I deduce from these authorities are that the inhabitants of enemy-occupied countries in the sense which I have explained, who before the subjugation were neutral or were enemies of the occupying belligerent, become so long as the occupation continues enemies of those to whom they previously stood in a relation of allegiance or alliance. This enemy character depends on objective facts, not on feeling or sentiment, or on birth or nationality. They have been described as territorial or technical enemies. Their status is based on residence, or if they are traders, on what has been called commercial domicile, which has the peculiarity that it may be attached to a trader who is not personally present in the occupied territory, but resides, for example, in a neutral country. He is an enemy *vis-a-vis* the other belligerent in respect of the particular affairs of trade in the occupied or conquered territory which gives him a commercial domicile there. The occupied territory may merely be part of a larger territory which, so far as unoccupied, retains its national character. LORD STOWELL's instance of the Isle of Wight which he gives in the *Foltina* (24) aptly illustrates the general rule.

As to the actual status of the Netherlands, no evidence was given. It might perhaps have been better if an application had been made for information to the Foreign Office, but the case proceeded up to this House on the footing of what was matter of common notoriety. It was accepted that metropolitan Holland had been occupied by and was under the dominion of the Germans. It is true that the Netherlands Government has been established in and recognised by Great Britain and is the government to which, in theory, all Netherlands subjects owe obedience. But in Holland itself that obedience cannot be enforced nor can that government protect its subjects resident there. Allegiance is generally dependent on reciprocal protection by the state. The Netherlands Government can give no such protection to its subjects in Holland. They are under the dominion and control of the Germans, who exploit them, plunder them and tyrannise over them for the benefit of the German Reich. It is clear that the Germans do not intend to relinquish their possession unless forced to do so. However high may be the patriotic fervour of that loyal and valiant race and their devotion to the allied cause, the Dutch, so far as they are in Holland, must until the day of deliverance submit to the German yoke, and also accept the comparatively minor affliction of being described for limited purposes and occasions as being in law enemies *vis-a-vis* Great Britain. Such is the effect of the common law of England. They cannot sue or appear as actors in the English courts, they cannot trade with England, their property in England is subject to the Trading with the Enemy Act and regulations. They are shut off from intercourse with Britain. The reason is that, while the occupation lasts, they are on the wrong side of the line of hostile demarcation, the line of war which shuts off those on that side of the line from communication and intercourse and commercial dealing with those on our side, in substantially the same way as if they were originally enemies as nationals of, or resident in, the enemy state. This rule is only concerned with relations across the line of war; so far as concerns the internal commerce and ordinary activities of those in the occupied territory, such as those activities which LORD GREENE, M.R., enumerates, the rule has no application, even though these activities go to promote the advantage of the German state and strengthen its war effort.

This may seem a harsh and irrational rule as against those of the Dutch who are heart and soul in favour of the allied nations. But a general rule is necessary because for one thing there must be many traitors in Holland and many German nationals, who have settled and taken up their residence and their commercial domicile in a great port like Rotterdam for business purposes before and since the war began. Such may be in every sense of the word enemies of the allies. But there is the more fundamental reason which is explained by LORD STOWELL. The harshness, however, is mitigated, because from early times it has always been the King's prerogative to grant permits and safe conducts or licences to enemies, which will relieve them from disabilities which would attach to them in their capacity of territorial or technical enemies. As LORD STOWELL said, as it is the Crown which declares war or makes peace, the Crown may exempt from the enemy status particular territories or classes of the enemy state, or exempt particular individuals. The former course was adopted in the cases decided by LORD STOWELL in reference to St. Domingo or Spain or Ham-

burg by means of various statutes or public declarations. The latter course is adopted whenever a safe conduct or licence or permit is granted by the executive to an individual or individuals. In all these cases the disabilities of enemy status are *pro tanto* removed. The classic statement of the rule and its justification is given by LORD STOWELL in *The Hoop* (19), at p. 199 :

He alone, therefore, [i.e., the Sovereign, acting by his constitutional advisers] who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interests of the state. It is for the state alone, on more enlarged views of policy, and on consideration of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted and under what regulations . . . Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit ?

If this was true in the time of LORD STOWELL, it is enormously truer now, when the radiations of the modern credit system and of international trade are world-wide and when the possibility of international intercourse have been indefinitely increased by wireless and air transport. What LORD STOWELL said is equally pertinent to the case of a temporary or territorial enemy who is resident or trading in an occupied country and to the case of an enemy in the ordinary sense. LORD STOWELL adds, at p. 200 :

. . . where is the inconvenience on the other side, that the merchant should be compelled in such a situation of the two countries to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of public safety.

In the present case, it seems, no difficulty need have arisen if the respondent company had made a proper application for a licence to pursue his claim. LORD STOWELL went on to consider the question whether an enemy had any right to appeal as an actor to the tribunals of this country, which is the primary matter in issue in this proceeding. He said, at pp. 200, 201 :

In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour.

LORD STOWELL met in advance the contention of the respondents that this is a separate and less stringent rule than the rule as to trading with the enemy. He said, at p. 201 :

A state in which contracts cannot be enforced, cannot be a state of legal commerce. Indeed the rule that an alien enemy cannot sue in our courts seems to be more ancient and more stringent than the rule against trading with the enemy, though both rules are equally corollaries of the status of enemy. POLLOCK & MAITLAND, HISTORY, Vol. I, p. 459, state the mediaeval basis of the rule and also state how Littleton understood this disability : they also state the more limited rule accepted by COKE ON LITTLETON, 129b, which was that no alien can bring a real action, that no alien enemy can bring a personal action, but that an alien whose sovereign is in league with our own may bring personal actions. In 1697, TREBY, C.J., as reported in *Wells v. Williams* (37), at p. 283, laid down as settled law that :

. . . an alien enemy, who is here in protection, may use his bond or contract ; but an alien enemy abiding in his own country cannot sue here.

BULLEN & LEAKE, 3rd Edn., p. 475, give the stereotyped plea in abatement which was that the plaintiff was an alien enemy or became an alien enemy after the commencement of the action, quoting *Le Bret v. Papillon* (38). The court was held to be bound to take the objection, even if it was not pleaded, as soon as it came to the notice of the court.

It is unnecessary to resurvey the law on this topic, because that has been done finally by LORD SUMNER in *Rodriguez v. Speyer* (4). That was indeed in a dissenting judgment, but the matter of dissent does not go to his general statement of the law, which Sir William Holdsworth (History, Vol. IX, p. 98) has described as the best modern account of the position of the alien enemy at common law. I

must, however, refer a little more fully to that case, because it was relied on by the respondent for the proposition that the ancient rule denying a *persona standi* to an alien enemy at common law had been reduced to a rule of public policy. A rule of public policy seems to be used in this connection as meaning a rule which is one which can be moulded by the court to suit the facts of the particular case and be rejected if the instance discloses to the judge no mischief from the point of view of public policy as understood by the judge. This is quite contrary to the statement of LORD STOWELL that the common law applies this principle with great rigour and to the whole tenor of authority as set out in the judgment of LORD SUMNER and also that of LORD ATKINSON. I cannot think that the majority of their Lordships in *Rodriguez* case (4) intended so sweeping a departure from settled law. The case must, I think, be limited to its special facts, which were that a partnership of six, of which five members were English and one German, had been dissolved in 1914 by the outbreak of war; in winding up the firm it was necessary to sue to recover a debt. The action was brought in the names of all the partners, including the alien enemy. PETERSON, J., dismissed the action for defect of parties on the ground that the German partner could not sue. His decision was reversed by a majority of the Court of Appeal, composed of BANKES, L.J., and SARGANT, J., PICKFORD, L.J. dissenting, and their decision was affirmed in this House by LORD FINLAY, L.C., VISCOUNT HALDANE and LORD PARMOOR, LORDS ATKINSON and SUMNER dissenting. LORD SUMNER caustically protested against the ancient rule being impinged upon to save the alien enemy from the extra cost due to his advisers not obtaining the necessary licence or vesting the claim in the Custodian of Enemy Property. I do not think the decision is an authority beyond its precise facts; such I take to have been the view of LORD FINLAY from his observations at pp. 76, 77. LORD FINLAY did not overrule *M'Connell v. Hector* (3) (in which there were three partners, all British by nationality, but two domiciled in Flushing described as a port belonging to France, and an action by the firm was held to be incompetent) or *Candilis v. Victor* (39). In any case, the decision is not one to be extended or treated as giving the court a general liberty to exercise the discretion which appertains to the Crown alone to give or refuse a licence in such cases. The discretion is for the executive and is not for the court. The observations of their Lordships in *Janson v. Driefontein, etc.*, (40), must not be ignored even though they have to some extent been qualified by subsequent pronouncements of their Lordships in this House. The precise limits of the doctrines of public policy have been much debated both before and since the opinions in *Rodriguez* case (4). The observations of any one Lord cannot be regarded as fixing the law. Indeed, on an examination of the opinions of the majority in *Rodriguez* case (4) considerable differences may be discerned. It would be impossible here to discuss these general questions. But I am tempted to ask whether the rule expounded by LORD STOWELL does not differ from the familiar rules of public policy. These deal with internal affairs, contracts, dispositions of property, morality and the like. The statement of LORD STOWELL deals with matters of national policy, of affairs of state in international and belligerent relations. These in particular should be regulated by settled rule of law subject to the responsible organs of government only, if a discretion is to be exercised at all, and should not be left to "the idiosyncratic inferences of a few judicial minds" (to borrow a phrase from LORD ATKIN, in *Fender v. St. John-Mildmay* (41), at p. 12). I need do no more than refer to the authority of *Porter v. Freudenberg* (1). It may indeed be tempting to say that it is unjust that a Dutch company like the respondents should be debarred from prosecuting its proceeding to secure payment of a pre-war debt, but the answer is that, if it is debarred in fact in this action, it may be only because proper steps have not been taken to obtain a licence and that, if that is granted, as it may well be, a fresh proceeding can be initiated. The plea is not in bar, but in abatement.

But whatever may be the view of the executive on consideration of a proper application, so far as concerns the court no particular reason appears on the evidence for distinguishing the respondent company from any other Dutch company with a principal place of business at Rotterdam. The decision of the Court of Appeal would involve that any such company and indeed any Netherlands national resident in Holland was free from any disability at common law and

free to have intercourse and communication with and to trade with this country during the war except for the Trading with the Enemy Act and regulations. The same would be true of Northern France, Belgium, Norway and other occupied countries. The evils which might result from such untrammelled intercourse and trading are too serious and too obvious to need to be expatiated upon. Information helping the enemy's war effort, trading increasing his war resources, could go on unimpeded save in so far as not touched by the statute. The common law existed before and irrespective of the statutory provisions now in force. A

I may, however, note that a corporation differs from an individual in that the latter can, in theory at least, withdraw himself from the enemy country, whereas a corporation formed under the laws of a foreign state depends for its functions and existence on the laws of the state under which it is incorporated. This makes it at least difficult to apply to such a corporation, as the test of enemy or other character, the character of its agents or the persons in *de facto* control of its affairs. This was the test proposed by LORD PARKER in the *Daimler* case (5), and applied by the Privy Council to a Dutch shipping company during the last war in *The Hamborn* (42). Holland was then neutral. In *Janson v. Driefontein, etc., Ltd.* (40), the House treated a company incorporated under the laws of the Transvaal for the purpose of working gold mines there and carrying on business though not exclusively there as a subject of the Transvaal, ignoring the nationality of almost all the shareholders and held that it became an alien enemy of this country when war broke out. In the present case the respondent company is subject to the control of the effective government in Holland, that is the German government, which can liquidate the company, appoint a sequestrator or administrator, eject or dominate the directors, determine what use it makes of its business organisation so as to promote the German war effort. Whatever immediately or prospectively increases the respondents' resources redounds to the benefit of the Germans. The services which it may be capable of rendering may be of great value to the coasting trade along the German occupied regions and to the trade up and down the Rhine. It is not in evidence where the directors are or what is their nationality or what business precisely the respondent company carries on. But it remains vouched as still having its principal place of business at Rotterdam. In my opinion the respondent company became, when Holland was occupied and subjugated, an alien enemy of this country. This is still so even though, as may well be the case, some of its vessels are being navigated by loyal and stout-hearted Dutch seamen in the service of the allied nations. B

I ought finally, in passing, to note an observation of HOLMES, J., in *Birge-Forbes Co. v. Heyl* (43), that : C

. . . there is nothing mysteriously noxious in a judgment for an alien enemy. D

When the case is looked at, the facts are seen to be that the judgment had been obtained by the plaintiff before the war : the plaintiff became an alien enemy, but an appeal against the judgment was permitted on terms that the amount should be paid to the clerk of the local court to be turned over to the alien property custodian if the judgment were affirmed. The enemy was already on the record and all he needed was to defend the judgment which he had got. He was not an actor in the appeal. I venture, however, to think that the English law is correct in considering that the mere fact that any money received could not go out of the country until the end of the war does not exclude the rule forbidding a right of suit to an enemy. It is also clear that to an alien enemy a judgment is a more valuable security than a simple debt and may be valuable for purposes of increasing his credit even during the war. This is pointed out by LORD SUMNER in *Rodriguez* case (4), at p. 114. It is even more obviously true to-day than in 1919. E

In my opinion the decision of the Court of Appeal is contrary to the common law and cannot be supported. F

I ought, in a few words, to notice a further objection to the respondent suit, which is that the solicitor has no retainer. It is assumed that he had a retainer when he began the proceedings, but a retainer, like any other contract or employment, is abrogated when the client who is the principal becomes an enemy. This was so held in the *Daimler* case (5). The respondent relied on *Tingley v.* G

Muller (44). Perhaps it is enough to say that there is no power of attorney here in question as there was in that case. I confess I feel it difficult to follow the reasoning of the Court of Appeal. SCRUTTON, L.J., examines the authorities in a powerful dissenting judgment which as at present advised I think correctly states the law. The precise question does not, however, arise for decision in this appeal.

I concur in the motion proposed.

A LORD PORTER: My Lords, this case exhibits an economy of fact which is almost embarrassing, but is nevertheless, as I think, sufficient to form a foundation upon which your Lordships' conclusions may be grounded. The respondent is a Dutch company incorporated in Holland, which at any rate until Holland was invaded and overrun by the Germans carried on in Rotterdam the business of shipowners. How far that business continued to be carried on after the B Royal Netherlands Government had left Holland does not clearly appear, though the Court of Appeal were on behalf, I believe, of the respondents informed that all its vessels save one were now beyond enemy control. At least it is known that the business was carried on until the invasion of Holland and is still being carried on there by the company to the extent of suing for the sum claimed in this action, and there is no evidence either that it has altered the place of its activities, has ceased to carry on its business, is engaged in winding it up or has made any changes other than those set out above.

C The result seems to be that its residence or as it has been called somewhat loosely, but perhaps with sufficient accuracy, its "commercial domicile" is still to be found in Holland. This, as I understand it, was the view of the Court of Appeal. LORD GREENE, M.R., said:

D The question . . . is whether or not a company incorporated under the laws of an allied country which has been occupied by the enemy is, by reason of the mere fact that it continues to carry on its business in that country, to be treated as an alien enemy to the extent that it is incapacitated from taking proceedings in the British courts with a view to recovering a business debt.

and the words of DU PARCQ, L.J. were to the like effect.

E No doubt both in prize and at common law a person who is engaged in business in a country which becomes hostile, but is not resident there, is given a reasonable time to dissociate himself from that business if he wishes to avoid becoming an alien enemy and, even if he resides in such a country, it may be that he will escape the imputation of hostility by removing himself from it as quickly as is reasonably possible: see *The Anglo-Mexican* (45). But there is no suggestion that such a course has been taken on behalf of the respondent company in the present case.

F The Dutch people and the Royal Netherlands Government are our allies and friends but Holland has been occupied by the German forces: its lawful government and executive are to be found in this country, and there is no evidence than any other authority has replaced that driven out except German force and German executive decree whether civil or military. I think enough is known to enable it to be said that Holland is now wholly controlled by Germany and its territory wholly occupied by that nation.

G It was contended on behalf of the respondents that business life and civil activities were still carried on under the protection of the Dutch, but no evidence was forthcoming of any Dutch substitute for the government which had been driven out and the only suggestion made was that the local authorities still remained and carried out their normal activities. I doubt whether, even if it were true, this would be enough, but in any case activities carried on under the dominating control of an occupying enemy force can hardly be said to follow their normal course.

H The inevitable conclusion must I think be drawn that Holland has been for some two years and is at present enemy-occupied territory controlled and administered by the enemies of this country. If this conclusion be accepted, the question, which your Lordships have to determine, is whether a company incorporated and carrying on business in enemy-occupied territory is what is technically known as an enemy alien and, if it be, whether it has any *persona standi in judicio* which would enable it to sue in this country. There were certain other questions raised in the case presented to your Lordships, but, if this question be answered in favour of the appellants, admittedly the decision

must be against the respondents, and it is unnecessary to enter upon any further inquiry.

Before your Lordships no question arises as to the validity of the contract sued upon. It was made with a company incorporated and carrying on business in a friendly state in time of peace. The only question is as to the procedural capacity of the respondents to sue at the present time. The distinction has been pointed out by ROWLATT, J., in *Schmitz v. van der Veen* (46), at p. 864, quoting from the judgment of LORD ELLENBOROUGH in *Flindt v. Waters* (47), at p. 265. A

Had the respondent company been carrying on business in enemy territory I do not think that it could have been successfully argued that it was not in the position of an enemy alien and so disentitled to sue in the courts of this country. So long ago as 1802, in *M'Connell v. Hector* (3), LORD ALVANLEY, C.J., said, at p. 114 :

... every natural born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct ; but if he live in an enemy's country he forfeits that right. Though these persons may not have done that which would amount to treason, yet there is an hostile adherence and a commercial adherence ; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile state and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an English subject in an English court of justice. C

This language was expressly approved by both the majority and minority of your Lordships' House which sat to hear the appeal in *Rodriguez v. Speyer* (4).

So in *O'Mealey v. Wilson* (2). LORD ELLENBOROUGH said, at p. 483 :

If a British subject resides in an enemy's country without being detained as a prisoner of war, he is precluded from suing here.

It is unnecessary to multiply references to cases inasmuch as the principle that even a British subject voluntarily resident or carrying on business in the territory of a hostile power is to be treated as an alien enemy has generally been accepted since the decision in *Porter v. Freudenberg* (1). Indeed that case only follows what was said by LORD LINDLEY, in *Janson v. Driefontein* (40), at p. 505, and has often been said both before and since that time : D

But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. E

The grounds upon which access to the courts of this country has been denied to such persons and is denied at the present time are more difficult to ascertain.

In 1797 in *Sparenburgh v. Bannatyne* (48), at p. 170, EYRE, C.J., expressed the view that the true ground upon which the plea of alien enemy has been allowed is that a man professing himself hostile to this country, and in a state of war with it

... cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. F

The principle is there stated as *stricti juris* and it is similarly treated in *The Hoop* (19), and later in *Esposito v. Bowden* (49), where WILLES, J., said, at p. 779 :

It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the licence of the Crown, is illegal. G

In *Porter v. Freudenberg* (1), LORD READING, C.J., at pp. 867, 868, says that :

This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the state at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state. H

Originally, I think, the view was taken that sovereigns having declared war upon one another, every subject of the one was the enemy of every subject of the other, but this outlook was gradually modified and altered.

The development appears to have begun by a lessening of the stringency of view in favour of enemy subjects residing in and subjecting themselves to the protection of the Crown in this country as in *Wells v. Williams* (37), where it

was held that an alien enemy commorant here by the King's licence and under his protection may sue. The report in 1 Ld. Raym. says, at p. 283 :

... it was answered and resolved, that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens,

and as the report in 1 Salk. 46, has it :

... suing is but a consequential right of protection.

A It is a tragic commentary that the report in Lord Raymond should continue, at p. 282 :

A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity.

This attitude was accompanied or followed by a corresponding increase in stringency towards nationals of friendly or neutral countries voluntarily residing in or carrying on business in hostile territory. If the meaning of hostile territory

B be confined to the soil of the enemy state, the rule is, I think, clear ; but does "hostile" in this connection include neutral or friendly territory occupied by the enemy ?

To this question I do not think it possible to give a certain answer which will apply to all cases. The solution in my view depends upon the quality of the occupation, to be judged by the time it endures, the amount of control

C exercised, and the extent to which the former government is superseded. These considerations are, in my opinion, the solution of the apparent conflict between the cases in which the inhabitants of occupied territory have been held to be alien enemies and those in which the opposite view has been taken.

Two propositions found in HALL'S INTERNATIONAL LAW, 8th Edn., 1924, on two consecutive pages, state the legal rule, I think accurately. On p. 603 it is said :

D Although the national character of a place and its inhabitants is not altered by military occupation on the part of an enemy, yet for many belligerent purposes they are necessarily treated as hostile by their legitimate sovereign. They are, in fact, under the control of the enemy and to treat them as friendly would be to relieve him from the pressure and losses of war.

The limitation put upon this assertion is to be found on p. 604 :

E The temporary occupation of a territory by an enemy's forces does not of itself necessarily convert such territory into hostile territory or its inhabitants into enemies.

For the former proposition he quotes the authority of an American case, *Bentzen v. Boyle, The Thirty Hogsheads of Sugar* (7), at p. 195. The facts in that case were that the island of Santa Cruz had been captured from Denmark by the British and certain sugar, shipped thence on board an English ship, was captured by an American privateer. In condemning this cargo in prize,

F as being British property, MARSHALL, C.J., said :

Some doubt has been suggested whether Santa Cruz while in the possession of Great Britain can properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror so long as he retains his possession and government of them.

G An English case promulgating the same doctrine is to be found in *The Gutenfels* (9). On Aug. 5, 1914, a German ship had entered Port Said in ignorance that war had been declared between this country and Germany, and the question arose whether an Egyptian port was, in reference to a German ship, an enemy port so as to bring it within the ambit of the Hague Convention of 1907, r. VI. The Privy Council sitting in prize decided that it was, and LORD WRENBURY in delivering the opinion of their Lordships, said, at p. 118 :

H Having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, their Lordships do not doubt that it was. In HALL'S INTERNATIONAL LAW, 6th Edn., p. 505, the learned author writes : "When a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil". Their Lordships think this to be right.

That these cases were decided in prize does not, in my view, prevent the application of the principle to questions involving the common law. In *The*

Hoop (19), also a case in prize, LORD STOWELL said, at pp. 217, 218 :

What the common law of England may be, it is not necessary, nor perhaps proper for me to inquire ; but it is difficult to conceive that it can by any possibility be otherwise, for the rule in no degree arises from the transaction being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country. But when an enemy existed in the other part of the island (the only instance in which it would occur upon the land) it appears, from the case referred to by that noble person [LORD MANSFIELD] to have been deemed equally criminal in the jurisprudence of this country.

The words already quoted from *M'Connell v. Hector* (3) support this view, and in the European war of 1914 BAILACHE, J., in *Mitsui v. Mumford* (50), discussed the truth of the contention that Antwerp after seizure by the Germans on Oct. 9, 1914, was alien enemy territory and that business intercourse with persons in it was forbidden by common law. Though it was not necessary for him to decide these points, he thought both contentions sound—the latter in spite of the fact that, as he says, at p. 35 :

It amounts to this, that a person, a subject of a friendly power, who at the beginning of the war traded here and at Antwerp, cannot write and send a business letter from this country giving instructions to his Antwerp agent as to his business there. As authorities he quotes an American case, *The Rapid* (51), and *M'Connell v. Hector* (3).

Another American authority to the same effect, which also was not a prize case, *United States v. Rice* (25), was decided by STORY, J., in 1819. During the war of 1812 the British Government were for a time in military occupation of part of the province of Maine, and exacted import duties from the inhabitants, who, it was held, could not be compelled to pay import duties over again to the United States Government when it had recovered the territory. The headnote is as follows :

By the conquest or military occupation of a portion of the territory of the United States by a public enemy that portion is to be deemed a foreign country so far as respects our revenue laws. Goods imported into it are not imported into the United States : and are subject to such duties only as the conqueror may impose. The subsequent evacuation of the conquered territory by the enemy and resumption of authority by the United States cannot change the character of its past transactions. The *jus postliminii* does not apply to the case and goods previously imported do not become liable to pay duty to the United States by the resumption of their authority over the conquered territory.

STORY, J., said at p. 253 :

During this period the British Government exercised all civil and military authority over the place : and established a custom house and admitted goods to be imported according to regulations prescribed by itself. By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government and were bound by such laws and such only as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience.

These cases are, I think, sufficient to establish the truth of Hall's first proposition.

The qualification placed upon the doctrine which I have quoted above is taken in terms from the opinion of their Lordships of the Privy Council delivered by LORD KINGSDOWN (then the Rt. Hon. T. Pemberton Leigh) in prize in *The Gerasimo* (8), at p. 101. One of the questions in that case was whether the owners of cargo were alien enemies at a time when the Crimean war was being waged between this country and Russia. The owners carried on business at Galatz in Moldavia, and Moldavia was militarily occupied by the Russians. But Moldavia and also Wallachia, though under the suzerainty of Turkey at the time of the occupation, yet enjoyed an independent administration and, notwithstanding that the Russian occupation amounted to a temporary suspension of the suzerainty of the Porte and a temporary assumption of that

suzerainty by Russia, yet the national character of these countries remained unaltered and any intention to alter it was disclaimed by Russia.

The Russian Minister, indeed, stated that :

... the occupation of the principalities ... had been for Russia only a military position, the maintenance or abandonment of which was entirely a matter connected with strategical considerations. Our august Master, he continued, has no desire ... either to prolong indefinitely the occupation of the principalities or to establish himself there in a permanent manner, or to incorporate them in his dominions, still less to overthrow the Ottoman Government.

As LORD KINGSDOWN pointed out on p. 165 :

Moldavia and Wallachia were not treated by the Porte as enemies; and it would be singular if these countries, though not held to be enemies by Turkey, should be held to be enemies of the allies of Turkey.

My Lords, I have set out these facts somewhat fully in order to mark the exact circumstances which led to the decision of the Judicial Committee whose spokesman, at p. 96, pointed out that it was necessary to examine carefully both the principles of law which were to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of the shipment.

It is in the light of these considerations that this statement of law so much relied upon by the respondents must be read.

LORD KINGSDOWN, at p. 96, set out the legal principles applicable as follows :

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory ? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control ; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises. It appears to their Lordships that the first proposition cannot be maintained.

In terms this statement would seem to require a formal cession or conquest followed by a permanent or temporary incorporation of the occupied territory with the enemy state in order to make the inhabitants of the occupied territory enemy aliens as regards a country at war with the occupying power, and would seem to assert that in order to bring about this result it is not enough that the territory is occupied and controlled by the enemy however complete the occupation and unlimited the control. If this be the meaning of the words of LORD KINGSDOWN I should not agree with them, but he was speaking with reference to the facts of the case under consideration in which it could not be said that there was even an attempt at civil control of the occupied provinces.

It is enough in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers. Indeed, I can imagine a case where though lip service was paid to the legal government of a country, yet in practice control was so exercised by an occupying power that in substance the territory formed part of the dominion of the enemy. At the present time when in international affairs formal acts have been largely dispensed with either as a preliminary to or during the course of a war, when declarations of war have ceased to be made and invasion follows immediately upon declarations of friendship or neutrality, it is, in my view, essential to regard substance and not form.

There are a number of cases reported or mentioned in the reports which follow the same principle as *The Gerasimo* (8), most of which are referred to in that case.

In *Bromley v. Hesseltine* (52), the question was whether a neutral resident in a place occupied by the enemy must therefore be regarded as an alien enemy. LORD ELLENBOROUGH held not, saying, at p. 77 :

I don't know that merely because an alien happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port, are on that account uninsurable. Suppose a British merchant to be entrapped and confined in an enemy's country, it can scarcely be said that all the trade he may still carry on is in aid of the King's enemies, illegal and incapable of being insured.

Whatever may be said of this doctrine today, it at least goes no further than to deal with the case of a merchant who for all the evidence shows may have been detained against his will in occupied territory.

In *Donaldson v. Thompson* (31), a Russian prize court sitting in Corfu purported to condemn an American ship for breach of blockade and the question was whether the sentence of that court sitting under a commission from the Czar was valid, Corfu being then occupied by Russian troops. LORD ELLENBOROUGH held that it was not. The headnote says :

... that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority. A

The judgment of LORD ELLENBOROUGH commences as follows, at p. 432 :

It is impossible to say that the Government of the Ionian Republic was superseded, at a time when its institutions subsisted, and its supremacy was recognised. How, then, was Corfu a *co-belligerent*—only because it endured a hostile aggression. Will any one contend that a government which is obliged to yield in any quarter to a superior force becomes a *co-belligerent* with the power to which it yields.

The case, however, deals only with the position of a prize court sitting in an occupied state in which the forms of an independent state were preserved, and it might well be held that the occupying country could not at the same time preserve the forms of neutrality and yet claim jurisdiction for a prize court in the country so treated. B

In *Hagedorn v. Bell* (32) Hamburg was in the military occupation of an overwhelming French force. Nevertheless all the powers of civil government were administered in the same manner as they had formally been before the arrival of the French. LORD ELLENBOROUGH said, at pp. 458, 459 : C

... I know of no case where a country, maintaining its civil government *proprio jure*, has been considered as conquered. That Hamburg was, at the time when this insurance was effected, under French dominion, and had committed acts to warrant this country to consider her as hostile, there can be little doubt . . . But . . . still it belongs to every state to pronounce upon the continuance either of amity, hostility, or neutrality as between itself or any other state. D

He then goes on to consider whether this country had elected to treat Hamburg as hostile and decided that she had not. The opinions of the other learned judges who heard the case were to the same effect. The decision primarily depended upon the attitude of this country to the French domination. If, however, it be contended that the quality of French dominance came in question the case may even assist the appellants rather than the respondents as indicating that the control of an occupying power may in circumstances other than those then in question turn the inhabitants of the occupied territory into persons hostile to the enemies of the occupying power. Indeed in the course of his judgment LE BLANC, J., said, at pp. 466, 467 : E

The principle, upon which the policy of the law interferes, is this, that all trading with an enemy tends to strengthen and assist the enemy, and is, therefore, calculated to defeat the object for which war is entered into . . . F

Finally, in *Soc. Anon. Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency, Ltd.* (35), the Court of Appeal held that a company incorporated under the laws of Belgium and having its registered office at Antwerp was not an alien enemy at common law nor under the then subsisting Trading with the Enemy Acts and proclamations.

The company's business at Antwerp was closed and the books were removed to London where the business was then wholly carried on, but the chairman of the company was still at Antwerp, and although he might still have been acting there on the plaintiff company's behalf, the business or some of the business of the company was *de facto* being carried on from London by three of the five directors of the company, all of them Belgians and resident in England. The plaintiff company owned mines in Portugal, which were then being worked and the whole of the output being sold in England and in France. Its managing director drew, as I understand, upon its funds deposited with the defendants in respect of that business a cheque of which payment was refused on the ground that the company was an alien enemy. G H

In the court below YOUNGER, J., expressed this view, afterwards supported in the Court of Appeal :

The plaintiff company is not in my opinion an enemy of the King at common law. Although the greater part of it (i.e., Belgium) is occupied by the German army, Belgium has not yet been, and we may hope never will be, annexed to the German Empire ; and

no Belgian is yet the subject of a state at war with His Majesty. No authority was adduced to show that the rule depriving an alien enemy of any right to maintain an action in these courts . . . extends to a person who is not either the subject of, or resident or carrying on business in, a state at war with His Majesty . . .

With this view COZENS-HARDY, M.R., appears to have agreed, and I think all the members of the court accepted the position that the plaintiffs were not enemies at common law. But the company was carrying on its business in England and the question really argued was whether it was incorporated in territory in hostile occupation and, therefore, an enemy alien under the then existing proclamations dealing with what constituted trading with the enemy. YOUNGER, J., thought it was and PICKFORD, L.J., had some doubts, but the other two members of the court held that it was incorporated not in Antwerp but in Belgium, and as all Belgium was not in hostile occupation the proclamation did not apply. The decision so understood is not contradictory of the propositions laid down by Hall.

I have ventured to detain your Lordships by a consideration of those cases most favourable to the arguments presented on behalf of the respondents, because the principle at stake is of great importance and because a somewhat close analysis of the grounds upon which they were decided seemed to be necessary if one was to arrive at what I believe to be their true effect.

The result, as I think, of such consideration is to negative the contention that in no circumstances does the temporary occupation of a territory by an enemy's forces convert such territory into hostile territory or its inhabitants into enemies, and not to disturb the principle that in a proper case such an occupation is sufficient to produce that effect.

In this connection it is not, I think, helpful to ask whether the occupied country is a co-belligerent with the enemy unless one is careful to remember what is meant by that expression.

The will and indeed in some instances the hands of the inhabitants of the occupied country are opposed to the occupiers and the last thing which they or the Royal Netherlands Government desire is to fight on behalf of or give allegiance to a power whose occupation they detest. Nevertheless a country whose ports may be used to shelter and refit enemy ships, whose workshops may equip and supply them and whose inhabitants may be compelled at peril of their livelihood, liberties or even life to assist the enemy may to that extent be loosely described as co-belligerent with the occupying power.

The very residence and carrying on business in such a country may well amount to giving allegiance to the enemy however unwillingly it may be given.

It is true, as GODDARD, L.J., points out, that a national of that country, *residing elsewhere* (the italics are mine), may only be deemed an enemy in respect of the business carried on in the occupied country. He may be guilty of a crime, albeit only of a misdemeanour, if he continues to have intercourse by trading with the enemy or in some other way, but he is not necessarily an alien enemy. But the position appears to me to differ *toto coelo* in a case where he resides and carries on business in the occupied country.

I do not stay to discuss the further contention that a debt due to a business carried on as well as controlled by the enemy is property or interest in such business. For the purpose of this opinion I am prepared to assume that it is not.

With much of the principles set out in the judgment of DU PARCQ, L.J., I find myself in agreement and in particular with the view that the question whether an individual in occupied territory is an alien enemy or not must always depend upon the precise nature of the occupation, upon the control exercised by the occupying power and the obligations, if any, undertaken by, or imposed upon the person whose status is in dispute. Where I differ is in the application of these principles to the facts of the present case.

It is true that the Royal Netherlands Government is still in existence, but it is in this country and is, as I think, prevented by force of arms from exercising its authority in Holland. I have no doubt that the inhabitants of that country as a whole are faithful to that government and would follow its commands if they could, but it is allegiance in fact, not willing allegiance, the fact of control, not the readiness of a country's submission to it which is in question. In my opinion, if *de facto*, the Germans are in complete control of Holland, those who

reside and carry on business there must from that very fact be held to have given allegiance to them despite the fact that such allegiance would gladly have been withheld.

In expressing this opinion I have not forgotten that in certain cases, where alien enemies were interested as "actors," it has been held that they could be, or be joined as, plaintiffs.

Two examples of recent date may suffice, viz.: *Tingley v. Muller* (44), and *Rodriguez v. Speyer* (4). Each case was decided by a majority, SCRUTTON, L.J., dissenting in the former, and LORDS SUMNER and ATKINSON in the latter. Each case was, I think, regarded as an exception to the general rule and followed a line of authorities according to which an alien enemy, who was not personally interested or was a subsidiary party whose interest was slight, was allowed to sue in the courts of this country. In the latter case VISCOUNT HALDANE propounded the question, at p. 77 :

Is the rule which prevents an enemy alien from suing in the King's court a crystallised proposition which forms part of the ordinary common law, and is so definite that it must be applied without reference to whether a particular case involves the real mischief to guard against which the rule was originally introduced? Or is the rule one of what is called public policy, which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy.

After an exhaustive consideration of the authorities he answered the question thus :

While I think the preponderance of authority down to this date has tended to the treatment of the rule as a rule of ordinary law and not as a mere case of applying policy, the courts have been . . . by no means unanimous, and I do not think that the course of subsequent decision has materially affected this conclusion . . . Under these circumstances I am of opinion that it is open to us as a supreme tribunal, unfettered by a decision of our own, to look at the reason of the rule invoked. If we can do this I agree with the majority of the Court of Appeal that it is premature to stop the action at this stage from proceeding.

Though the decision is binding upon your Lordships, I do not think that this reasoning was the *ratio decidendi* of the other two noble and learned Lords constituting the majority of the House. Indeed, in its breadth of statement, as VISCOUNT HALDANE recognised, it trenches upon the observation of LORD HALSBURY in *Janson v. Driefontein Consolidated Mines* (40), that the courts cannot invent new heads of public policy and that, when it is said that things are unlawful because they are contrary to public policy, it is meant that they have either been enacted or assumed to be unlawful by the common law, and not because a court has any right to declare them to be so.

VISCOUNT HALDANE, however, maintained that this observation must be taken with the qualification that what the law recognises as contrary to public policy turns out to vary greatly from time to time. In drawing this distinction VISCOUNT HALDANE evidently accepts the view that anything which assists the enemy is always contrary to public policy, but is careful to point out that on the one hand certain types of act may at a given time be such as to afford assistance to the enemy though at another time they would not have done so, and that on the other hand certain types of act, which on earlier occasions and in other circumstances had been of assistance, may at a later date confer no benefit. Assistance to the enemy is always illegal, but the things which assist him may vary from time to time. Such a view is in accordance with the observations of LORD WATSON in *Nordenfelt v. Maxim Nordenfelt Co.* (53), at p. 554, and of LORD PARKER, in *Daimler Co. v. Continental Tyre & Rubber Co.* (5), at p. 344. Speaking of the functions of English tribunals, LORD WATSON, said, at p. 554 :

Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy 100 or 150 years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time.

LORD PARKER's words, at p. 344, are :

The rule against trading with the enemy is a belligerent's weapon of self-protection. I think it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require.

The question, however, whether a given act is against public policy must, I think, be decided on general principles. It is not permissible to say that a

particular act will not in fact assist the enemy. The proper inquiry is whether that act is of a class which is likely to assist him and it is immaterial to ascertain whether in the individual case he may or may not be found to have profited from it.

In the present instance the respondent company is technically an enemy alien and as such not entitled to sue. As LORD STOWELL said in *The Hoop* (19), at. p. 199 :

A . . . it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly, on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations.

If it were necessary to ask whether in the particular circumstances now under consideration a judgment in his favour would be likely to assist the enemy, I should answer that it would. In the ramifications of modern financial transactions, a recovery by legal action might well benefit an enemy who has shown himself astute to increase his resources by transferring to neutrals debts due to him from British subjects, leaving the former to collect from the British debtor the sums so transferred. I should agree with LORD SUMNER's words in *Rodriguez v. Speyer Bros.* (4), at p. 114 :

C It is a fallacy to suppose that everything turns on not remitting money to Germany during the war . . . Even if judgment only were recovered against Senor Rodriguez without satisfaction, Herr von Speyer would benefit at once by getting an interest in a specialty debt secured by a charge, in lieu of an interest in a debt only due upon a simple contract and unsecured. No order to keep the cash in this country during the war would deprive him of this immediate improvement of his position, nor is it impossible that, in some neutral country where the defendant may have property, he might actually recover satisfaction in respect of some right under the English judgment.

In that sense the judgment will be for the benefit of an enemy during the war and not merely to use LORD PARKER's words, at p. 347 of the *Daimler* case (5) :

. . . the possible advantage he may gain when peace comes.

E It is said, however, that to turn a neutral into an enemy it must be shown that he owes allegiance to a state at war with this country. I am prepared to accept this statement, but the inhabitants of an occupied country may by rising and carrying on business there come under allegiance to the occupying power, none the less that they hate that power and desire its extrusion and destruction. It is the act which counts, not the feeling which accompanies it. If they remain, they put themselves under allegiance to a hostile state, temporarily it may be, but that is enough.

F Such a decision may seem harsh and indeed must be distasteful when applied to a Dutch subject. But in war as now waged many things have to be done and steps taken which would gladly be forborne. Their defence is that they do or may contribute to the downfall of the enemy, an event so ardently desired that even members of a state whose government is our ally, but whose country is temporarily overrun may welcome steps which in other circumstances we should deplore. I would add in the words of LORD STOWELL in *The Hoop* (19) at p. 198 :

G It is said that these circumstances compose a case entitled to great indulgence ; and I do not deny it. But if there is a rule of law on the subject binding the court, I must follow where that rule leads me ; though it leads to consequences which I may privately regret . . .

H Before I close the observations which I venture to put before your Lordships one other matter should, I think, be discussed, viz., the authority of the respondents' agents to continue to represent them after the respondents have themselves become technical enemies. They had, it appears, appointed their arbitrator before the occupation of Holland and presumably their solicitors had been instructed before that time.

The opinions expressed in your Lordships' House in *Daimler Co., Ltd. v. Continental Tyre, etc., Co.* (5), appear to accept the view that it would not be permissible for an enemy alien to appoint an agent after he had become such. Could then such an agent continue to act on behalf of one who was an alien

friend when the appointment was made but had subsequently been placed in a position which compelled him to be treated as an enemy? *Le Bret v. Papillon* (38) is an authority for the proposition that an action commenced by an alien in peace cannot be continued by him in war, and that in that respect he is in no better position than one who did not issue his writ until after war broke out, but it does not decide that the authority of an agent is withdrawn in the same circumstances. *Tingley v. Muller* (44) decided that in certain cases such an appointment continued to be effective since in that instance the Court of Appeal held that though the respondent was an enemy alien, yet his agent validly appointed in time of peace could transfer to a British subject property owned by him in this country. Assuming, however, that that case was rightly decided, still it depends, as I have indicated above, upon its special facts and is an exception, as I think, to the general rule. Ordinarily, when the principal becomes an enemy, the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other; at any moment the necessity may arise; the very relationship requires it even if it is desired only to terminate the mandate itself.

If authority be required for the proposition that the relationship of principal and agent is determined when the parties to the agency agreement become enemies one to the other, it is to be found in *Hugh Stevenson, Ltd. v. Akt. fur Cartonnagen Industrie* (54). In that case an English company was not only the agent for a German company, but was also its partner, and after the partnership was dissolved by the outbreak of war continued to carry on business with the assistance of assets belonging to the latter. Your Lordships' House, affirming the decision of the Court of Appeal, and differing from that of the judge, held the German company entitled to be credited with a proper sum as remuneration for the use of their property. But a decision that enemy property on land cannot be expropriated in time of war has no bearing upon the question of the continuance of the authority of an agent. Both courts below had held the agency determined and the point was not even contested upon appeal to your Lordships. It is true that in that instance the agency was a mercantile one, but the prohibition of intercourse with an enemy is not confined to trade, and would therefore apply to a solicitor, who at any rate in this country, is the mandator of his principal for the purposes of litigation. This view is in accordance with that expressed by SCRUTTON, L.J., in *Tingley v. Muller* (44), at p. 177, and by LORD SUMNER, in *Rodriguez v. Speyer* (4), at p. 130. If the majority of the Court of Appeal took a contrary view in the former case, with all due respect, I am unable to accept their conclusions. LORD SUMNER's opinion is not, I think, controverted in this respect by the views of the majority of your Lordships who sat to hear the appeal, nor is it contrary to the grounds upon which their decision was reached.

I would allow the appeal.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.* (for the appellants); *Constant & Constant* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

JOSS v. JOSS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), November 11, 1942.]

Divorce—Ancillary relief—Variation of post-nuptial settlement—Settlement of contingent benefits for existing children of marriage—Settlement "because of" the marriage—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

A husband made a post-nuptial settlement securing contingent benefits to any children of the settlor. At the date of the settlement there were existing issue of the marriage. An application was made to vary the

settlement on the ground that the settlement was not within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, because it was not made with reference to and because of the marriage in question :—

HELD : the substance and not the form of the settlement had to be regarded, and, taking into account the relevant facts, including the marriage and existing issue, the settlement related to and proceeded on the footing of the then existing marriage, as distinguished from any other marriage, and was within sect. 192.

A

[EDITORIAL NOTE. The jurisdiction of the court to vary settlements is by decision limited to settlements which are made "because of" the marriage. This phrase does not mean that the settlement must be made either in contemplation of the particular marriage or as a result of and to provide for the change of circumstances brought about by the particular marriage. It is sufficient that the marriage was one of the things which the settlor had in mind when making the settlement and this fact need not be proved by recitals in the settlement, but may be evidenced by the state of facts existing at the execution of the settlement coupled with the nature of the provisions made.

B

AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-804, paras. 1274-1280 ; and FOR CASES, see DIGEST, Vol. 27, pp. 520, 521, Nos. 5622-5631.]

Cases referred to :

C

- (1) *Melvill v. Melvill and Woodward*, [1930] P. 159 ; Digest Supp. ; 99 L.J. P. 65 ; 143 L.T. 206.
- (2) *Hargreaves v. Hargreaves*, [1926] P. 42 ; Digest Supp. ; 95 L.J. P. 31 ; 134 L.T. 543.

APPLICATION to vary the registrar's report as to the variation of a settlement. The facts are fully stated in the judgment.

William Latey for the petitioner.

Victor Williams for the respondent.

Clifford Mortimer for the infants.

D

C. L. Fawell for the Public Trustee.

HENN COLLINS, J. : On this application the objection was taken that the settlement of which a variation was sought was not a nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192.

E

It is a settlement made by a husband, after the date of the marriage which was the subject of the suit, and it secures contingent benefits to any children of the settlor. There were, in fact, children of the marriage in question at the date of the settlement, who, in their capacity of children of the settlor, benefit by it. On behalf of the Public Trustee it was argued that the settlement is not within the section because it was not made "because of" the marriage in question, and bears no more specific relation to that particular marriage than would an ante-nuptial settlement which was not related to a marriage with any particular person.

F

As against that it was contended, first, that since it was made, in point of time, after the marriage in question, it is a post-nuptial settlement within the description given by GREER, L.J., in *Melvill v. Melvill* (1), and, secondly and alternatively, that since it confers benefits upon the settlor's children, as such, and since there were, at the date of the settlement, children of the marriage in question, it is a settlement which answers the narrower description propounded by HILL, J., in *Hargreave's case* (2), as being made "because of" the marriage. This narrower description commended itself to ROMER, L.J., as preferable to the wider one. If I thought that GREER, L.J., had really adopted the wider description as anything in the nature of a test, I should have found myself confronted by two conflicting criteria. The tenor of his judgment, however, shows that he was doing nothing of the kind, but was deciding the case upon its own facts, without laying down any new principle.

G

H

I think, therefore, that the settlement in question, in order to come within the section, must answer the narrower test. It is not enough that it should have been made by a spouse after the marriage ; it must also have been made "because of" the marriage. Having regard to the trend of the decided cases, I do not think that that phrase "because of" is meant to invite or require a search for a sole or a prime or proximate cause or even a *causa sine qua non*. If that were necessary it is at least doubtful whether the settlement in *Melvill's case* (1) could have stood the test. What is really meant, I think, is that the particular marriage must be a fact of which a settlor takes account in framing

the settlement. If the particular marriage is recited or referred to, it is patently a factor. Hence, a settlement made before marriage, but not in relation to or contemplation of the particular marriage, is not within the section, but it is within it if from its recitals or substance it is apparent that it is related to a particular marriage. Similarly, in the case of a settlement made after marriage. If the marriage is recited or expressly referred to, it is patently a factor; but, if it is not recited or referred to, it may still be a factor; and, since the marriage is an existing fact which the settlor must have had in mind, the absence of recital makes little difference. This, I think, is what GREER, L.J., meant by the passage in his judgment in which he drew the distinction between an ante-nuptial and a post-nuptial settlement.

What material is there in the settlement now before me, or circumstances in which the settlor was situated, to found that inference? It is said that in the words of LORD HANWORTH, M.R., at p. 174, in *Melville's* case (1), the settlement : . . . is made by one of the parties to the then existing marriage and in favour of the children of the marriage . . .

The settlement in that case recited the marriage, the fact that the settlor was the wife of that marriage, and that there were children of that marriage, and it made those children, though not exclusively of others, beneficiaries, and those matters were apparent on the face of the deed. There are no such indications expressed on the face of this settlement. But does that conclude the matter? I think not. It is the substance and not the form which must be regarded, and for the purpose of construing the settlement, I must put myself in the position of the settlor, and take as, in effect, recited, the relevant facts, including his then existing marriage and the existing issue of that marriage. If those facts had, in fact, been recited by this settlement, it would have been, I think, impossible to distinguish it from that in *Melville's* case (1). Although not recited they must, in my judgment, be taken into account in determining the effect of the settlement, and if, when its effect is ascertained, it is found to be related to and to proceed on the footing of the then existing marriage, as distinguished from, though not exclusive of, any other marriage, I think it should be held to be within the section.

I, therefore, think that the registrar was right.

Costs to be paid by the respondent and in default such costs to be paid out of the fund.

Solicitors: *Dixon, Hunt and Taylor* (for the petitioner and the infants); *Bernard Adler & Co.* (for the respondent); *Ernest Eevir & Son* (for the Public Trustee).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

CONSERVATIVE CLUB v. WESTMINSTER ASSESSMENT COMMITTEE. R. v. COUNTY OF LONDON JUSTICES,

Ex parte WESTMINSTER ASSESSMENT COMMITTEE.

[COURT OF APPEAL (Lord Greene, M.R., Scott and Mackinnon, L.JJ.),
November 23, 24, 25, December 16, 1942.]

Rates and Rating—Metropolis—Reduction in value of club premises due to war conditions—"Cause"—Supplemental list—Valuation (Metropolis) Act, 1869, (c. 67), ss. 46, 47—Rating and Valuation (Postponement of Valuations) Act, 1940 (c. 12), s. 1 (2) (b).

At the quinquennial valuation made in April, 1936, the gross and rateable values of the Conservative Club premises in the rating area of Westminster were fixed at £8,500 and £7,080 respectively. After the outbreak of hostilities the club made a requisition to be inserted in a provisional list at reduced values. The authority inserted the premises in a provisional list at the existing values. An objection by the club was rejected by the assessment committee. The premises were not included in the supplemental valuation list deposited by the rating authority on July 15, 1940, under the Rating and Valuation (Postponement of Valuations) Act, 1940. The club objected and claimed that the values should be £5,000 gross and £4,163 rateable value. The assessment committee reduced the assessment to £6,800 gross value and £5,663 rateable value, and the club then appealed to quarter

sessions. The General Quarter Sessions for the county of London decided that the war and the conditions arising out of it, including the black-out, were a "cause" within the meaning of the Valuation (Metropolis) Act, 1869, s. 47, and that the reduction in value was peculiar to the premises in question and not generally applicable to all hereditaments or substantially all hereditaments in the area. They reduced the assessment to £5,000 gross value and £4,163 rateable value :—

A HELD : the war and the conditions arising out of it, including the black-out, were a "cause" within the meaning of the Valuation (Metropolis) Act, 1869, s. 47, and that the reduction in value was peculiar to the premises in question and not generally applicable to all hereditaments in the area, and there was evidence to justify the reduction of the assessment to £5,000 gross value.

Decision of the Divisional Court ([1942] 2 All E.R. 196) affirmed.

B [EDITORIAL NOTE. In this case the rating authority are no doubt anxious to gain as much enlightenment as is possible upon the construction of the Rating and Valuation (Postponement of Valuations) Act, 1940, so far as that Act allows reductions in the rateable value of property arising out of war conditions. The case stated seems to have given some difficulty and it may be doubted whether this decision is of any value except as a decision upon the particular facts of this case, but it is now clear that, to justify a reduction in rateable value, there must be a reduction in the value of the hereditament apart from any general reduction in the value of all hereditaments in the rating area, although it is not material that the value of other hereditaments of a comparable character is also reduced. That is stated in the Act itself, which is undoubtedly adapted from the statement of LORD PARKER in *London County Council v. Islington Assessment Committee*, [1915] A.C. 762, but the wording of the clause contains a number of words of disputable meaning. The judgment herein points out the difficulties, but the facts of this case seem to be such that little discussion of these difficulties was here necessary. The matter, however, seems likely to be taken to the House of Lords.

D AS TO ALTERATIONS IN PROVISIONAL LIST, see HALSBURY, Hailsham Edn., Vol. 27, pp. 551, 552, para. 1011; and FOR CASES, see DIGEST, Vol. 38, pp. 642, 643, Nos. 1598-1612.]

Cases referred to :

- (1) *Camberwell Assessment Committee v. Ellis*, [1900] A.C. 510; 38 Digest 642, 1610; 69 L.J.Q.B. 828; 83 L.T. 201.
- E** (2) *R. v. Westminster Assessment Committee, Ex p. Junior Carlton Club (Trustees)*, [1940] 3 All E.R. 155; Digest Supp.
- (3) *R. v. Westminster Assessment Committee, Ex p. St. James Court Estate, Ltd.* (1940), Derating and Rating Appeals, 1940, Vol. XI, 118.

APPEAL by the assessment committee from a judgment of the Divisional Court of the King's Bench Division (VISCOUNT CALDECOTE, L.C.J., HUMPHREYS and ASQUITH, JJ.), dated June 15, 1942, reported [1942] 2 All E.R. 196, where the facts are set out.

F *R. M. Montgomery, K.C., Craig Henderson, K.C. and G. D. Squibb* for the appellants.

A. S. Comyns Carr, K.C. and Frederick Grant for the respondents.

MACKINNON, L.J. [delivering the judgment of the court] : This is an appeal from the Divisional Court of the King's Bench Division upon a special case stated by the appeal committee of quarter sessions for the county of London.

G The Valuation (Metropolis) Act, 1869, s. 46, provides for the usual quinquennial valuation of hereditaments for rating purposes. Sect. 47 provides for the increase or decrease of such a valuation within the quinquennial period in circumstances not very precisely defined. It has been held in cases of which *Camberwell v. Ellis* (1) is the best known, that for an application under sect. 47 to succeed, the increase or decrease in value must be proved to be due to a cause specially affecting the hereditament in question, or a particular class of hereditaments, and not a change in value due to some general economic change.

H After the present war had begun seriously to affect the values of hereditaments in London, two attempts by ratepayers to take advantage of this sect. 47 were made in *Ex p. Junior Carlton Club* (2) and *Ex p. St. James Court Estate* (3). In both the attempt failed. It was held that the admitted decrease in value was one of the general results of the war, and not due to a "cause" within the limited provisions of sect. 47 as defined by the above-mentioned cases.

Matters being in this position, on Mar. 21, 1940, the Royal Assent was given

to the Rating and Valuation (Postponement of Valuations) Act, 1940. By sect. 1 (1) and (4) the next quinquennial valuation is postponed until a time, to be announced by an order in council, not later than 2 years after the end of the "present emergency"—which appears to mean the war. Sect. 1 (2) provides a modification or amplification of sect. 47 of the 1869 Act. The material part of it is :

. . . any increase or reduction in value attributable directly or indirectly to the present emergency, to the extent that the increase or reduction (a) is peculiar to a particular hereditament, or (b) affects a particular hereditament and also other hereditaments of a comparable character . . . but does not represent a general alteration in the values of all classes, or substantially all classes, of hereditaments . . . shall . . . be deemed . . . to be such an increase or reduction in value as is referred to in sect. 47 of the said Act.

This passage bristles with words and phrases of doubtful meaning. Everyone seems to agree that "the present emergency" means the war and its concomitants, such as the black-out. But "a comparable character," "general," "classes" and "substantially," are all provocative of contention.

In the valuation list for the quinquennium April, 1936 to 1941, the Conservative Club was assessed at £8,500 gross. After the passing of the 1940 Act the Westminster rating authority, on July 15, 1940, deposited a supplemental valuation list. The Conservative Club was not included therein. Thereupon the Conservative Club made a claim that it ought to be included in that list at the reduced value of £5,000 gross. The Westminster Assessment Committee so far acceded to this that they inserted the club at the value of £6,800 gross. The club thereupon appealed to the County of London Quarter Sessions, who allowed the appeal and reduced the assessment to £5,000 gross. At the instance of the Westminster Assessment Committee they stated a case for the opinion of the Divisional Court.

As originally drafted this special case set out certain facts which had been "proved or admitted." After setting out the various contentions of the two parties, it concluded thus :

We gave our decision in the following words : " (We) are satisfied that the war and the conditions arising out of it . . . are a ' cause ' and in addition that is a question of fact for (us). (We) are also satisfied as to the fact that the reduction in value is peculiar to this hereditament and is not generally applicable to all hereditaments or substantially all hereditaments in Westminster . . . The question of law for the opinion of the court is whether on the facts as found by us we were entitled to come to the said decision, that is, of allowing the appeal and reducing the assessment.

The appellants were dissatisfied with the case as stated. They alleged that there was no evidence before quarter sessions on which they could make their finding of fact. They therefore obtained an order from the Divisional Court pursuant to which the case was amended by adding a paragraph :

Transcripts of the evidence of Mr. P. Faraday in this appeal, and in the Grosvenor House appeal are annexed hereto and form part of this case.

In this form the special case was heard by the Divisional Court ; and the appeal of the Westminster assessment committee was dismissed. They appealed to this court by notice of June 26, 1942. At an early stage of the hearing before us, it became apparent that the special case was defective in form and in substance. In the finding of quarter sessions quoted above the words " that the reduction in value is peculiar to this hereditament " suggest that the contention of the respondents was based on sect. 1 (2) (a) of the 1940 Act, whereas it was agreed by both sides that it was in fact based on sect. 1 (2) (b). Further, the case did not sufficiently specify the questions of law for the opinion of the court. Therefore, at our instance, counsel for both parties drew up in writing the following statement in amplification or amendment of the special case :

It is agreed between the parties as follows : (1) That when the rating committee of quarter sessions found that the " reduction in value is peculiar to this hereditament," this meant that the reduction affected this particular hereditament and also other hereditaments of a comparable character in the area of the city of Westminster. (2) To the question for the opinion of the court appearing in the special case is to be added the question whether there was any evidence before the committee of quarter sessions to justify the findings—(1) appearing in para. 11 (c) of the special case, namely, that " a substantial number of hereditaments and classes of hereditaments in the said city were not affected in value by any of the said factors or circumstances or at all," and

(2) appearing in para. 11 (h) of the special case, namely, that "there was no general reduction in value of all or substantially all hereditaments or classes of hereditaments in the said city by reason of the said factors or circumstances or at all." (3) In deciding this case the evidence appended to the case is the only evidence to which the court is to have regard.

There is no dispute that there was in fact a reduction in value of this hereditament attributable directly or indirectly to the present emergency. In order to be deemed to be such a reduction as is referred to in sect. 47 of the 1869 Act, it must satisfy the requirement of sect. 1 (2) (b) of the 1940 Act, as being a reduction which :

... affects a particular hereditament and also other hereditaments of a comparable character in the rating area in question but does not represent a general alteration in the values of all classes, or substantially all classes, of hereditaments . . .

Quarter sessions, now that their finding has been by agreement amended, has found that the reduction in value was of this nature. Whether it was or was not must be a question of fact. Therefore, the sole question of law propounded by the amended special case must be whether there was any evidence on which quarter sessions could make that finding of fact ?

In the examination of the evidence of Faraday which this involved the appellants chiefly relied upon a contention that he had misconstrued the terms of the relevant section of the 1940 Act. In particular it was said that he had given a wrong meaning to the word "general" and a wrong meaning to the word "classes." There was also criticism of his evidence as to the reduction in value of the club ; for it was said that it was wrong to assess the rateable value of such a club on the amount of business done by it with its members. Of this last criticism we do not appreciate the materiality. For, as we understood the argument, it was admitted that the reduction in rateable value asserted by Faraday would be rightly claimable if this were the end of a quinquennial period ; but it was only argued that it was not the sort of reduction that could be claimed, short of the end of that period, under sect. 47 of the 1869 Act, as amplified by the 1940 Act.

It was more strenuously argued that Faraday had misinterpreted the two words "general" and "classes"—that he had treated "general" as meaning "universal" ; and that his "classes" were too extensive. The latter criticism was because he had treated as a "class" all the West-End clubs in Pall Mall, St. James's Street and Piccadilly, and testified that some of them notably the Service Clubs and the R.A.C., had not suffered a diminution in business or in rateable value. Neither the word "general" nor the word "classes" is a term of legal art. The first definition of "general" in the Oxford English dictionary is :

Pertaining to all, or most, of the parts of a whole ; completely or approximately universal within implied limits ; opposed to partial or particular.

"In general" is defined as "collectively, universally." "Class" is defined as :

... a number of things possessing common attributes, and grouped together under a general or class name ; a kind, sort, division.

We are unable to see that the witness in his evidence did any violence to these words as thus defined. "Class" is, even more than "general," a word of uncertain import. Very likely it would be wrong to treat "clubs" as a class, so as to include in that class everything bearing the name from the Athenaeum to a night club in Soho, or a working mens' club ; but we can see nothing wrong in his treating as a class the clubs in Pall Mall, St. James's Street and Piccadilly, despite the diversity of (say) The Travellers, the R.A.C. and the Guards Club within that "class."

If these criticisms of Faraday's application of the section be unfounded, as we think they are, there can be no doubt that he gave evidence on which the court of quarter sessions could find the facts as they did. In the result we think the appeal fails and must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors : Allen & Son (for the appellants) ; Richardson, Sadler & Co. (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

CRAIG v. KANSEEN.

[COURT OF APPEAL (Lord Greene, M.R. and Goddard, L.J.), **December 8, 11, 1942.**]

Practice and Procedure—Summons for leave to proceed under Courts (Emergency Powers) Act, 1939—Summons not served on judgment debtor—Distinction between nullity and irregularity in procedure—Inherent jurisdiction of court—R.S.C., Ord. 70, rr. 1, 2.

The judgment in an action was dated Jan. 12, 1937, and on Jan. 18, 1940, an order was made giving the respondent, who was the successful plaintiff in the action, leave to proceed. The summons upon which this order was made was not served upon the appellant. The affidavit in support of the summons stated that a copy of the summons had been posted to the appellant's place of business and residence, but that was not the address for service given in the action. Upon an application to the master, the latter set this order aside as irregular, but, on appeal to the judge in chambers, the master's decision was reversed on the ground that the order should have been challenged by appeal and not by an application to set it aside. The appellant, on the appeal, further contended that the order was a nullity and that the court in its inherent jurisdiction should set it aside *ex debito justitiæ* :—

HELD : (i) an order which is a nullity is something which the person affected by it is entitled to have set aside *ex debito justitiæ*. The court, in its inherent jurisdiction, can set aside its own order and an appeal is not necessary.

(ii) the failure to serve the summons upon which the order in the present case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.

[**EDITORIAL NOTE.** The distinction between an order which is a nullity and a mere irregularity has been found difficult to define and the difficulties are well shown by the citations from authorities in the judgment herein. The difficulty here was that a summons in a proceeding which could not, in the circumstances, be an *ex parte* proceeding, was not served on the appellant. The point is, therefore, that proceedings which must be *inter partes* were taken *ex parte*, and it is held that this was not a mere irregularity, but had the effect of making the order a nullity, and the appellant was entitled *ex debito justitiæ* to have it set aside.

AS TO EFFECT OF NON-COMPLIANCE WITH RULES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 60, 61, para. 97; and FOR CASES, see DIGEST, Practice, Nos. 5044-5090. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 1592-1595.]

Cases referred to :

- (1) *Smurthwaite v. Hannay*, [1894] A.C. 494; Digest, Practice, 972, 5066; 63 L.J.Q.B. 737; 71 L.T. 157.
- (2) *Hamp-Adams v. Hall*, [1911] 2 K.B. 942; Digest, Practice, 328, 466; 80 L.J.K.B. 1341; 105 L.T. 326.
- (3) *Anlaby v. Praetorius* (1888), 20 Q.B.D. 764; Digest, Practice 972, 5065; 57 L.J.Q.B. 287; 58 L.T. 671.
- (4) *Hughes v. Justin*, [1894] 1 Q.B. 667; Digest, Practice, 386, 929; 63 L.J.Q.B. 417; 70 L.T. 365.
- (5) *Hewitson v. Fabre* (1888), 21 Q.B.D. 6; Digest, Practice, 972, 5067; 57 L.J.Q.B. 449; 58 L.T. 856.
- (6) *Fry v. Moore* (1889), 23 Q.B.D. 395; Digest, Practice, 969, 5047; 58 L.J.Q.B. 382; 61 L.T. 545.
- (7) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; *sub nom.* *Bartlam v. Evans*, 157 L.T. 311.
- (8) *Fishmongers' Co. v. Donington Finance Co., Ltd.*, [1941] 1 All E.R. 137; Digest Supp.
- (9) *Re St. Nazaire Co.* (1879), 12 Ch.D. 88; Digest, Practice, 815, 3759; 41 L.T. 110.
- (10) *Preston Banking Co. v. Allsup (William) & Sons*, [1895] 1 Ch. 141; Digest, Practice, 815, 3764; 64 L.J.Ch. 196; 71 L.T. 708.

APPEAL by the defendant from an order of CROOM-JOHNSON, J., dated Oct. 23, 1942, reversing an order of MASTER HORRIDGE, dated Oct. 12, 1942, whereby the master set aside an order made on Jan. 18, 1940, giving leave to proceed in the enforcement of a judgment in an action dated Jan. 12, 1937. The facts are fully stated in the judgment of LORD GREENE, M.R.

C. Gallop for the appellant.

W. A. L. Raeburn for the respondent.

Gallop : If the order is a nullity, it can be set aside under the inherent jurisdiction of the court. When the matter came before the judge, he said that I had taken certain steps in the proceedings with knowledge of the irregularity. This is a proceeding which is a nullity and cannot be cured. There is no rule about nullity. If R.S.C., Ord. 70, r. 1, was intended to give discretion to the court, it would give that discretion in all cases. [Counsel referred to *Evans v. Bartlam* (7), *Fishmongers' Co. v. Donington Finance Co.* (8), *Hamp-Adams v. Hall* (2), and *Anlaby v. Praetorius* (3).]

Raeburn : There was an irregularity, but not a nullity. R.S.C., Ord. 67, r. 2, applies to the mode of service and it applied to service under the Courts (Emergency Powers) Acts at the material date. The master had no jurisdiction on the summons before him to do anything but dismiss it. [Counsel referred to *Fry v. Moore* (6), *Hewitson v. Fabre* (5), *Re St. Nazaire Co.* (9), and *Preston Banking Co. v. Allsup & Sons* (10).]

LORD GREENE, M.R. : The appellant is seeking to have set aside an order dated Jan. 18, 1940, giving the respondent leave to proceed to the enforcement of a judgment obtained by the respondent against the appellant, who was the defendant in an action in the King's Bench Division. The order was made under the Courts (Emergency Powers) Act, 1939.

The circumstances leading up to the application are a little complicated ; and I must state them in some detail. The judgment in the action was dated Jan. 12, 1937. The appellant had appeared in the action by solicitors, whose address for service was given in the usual way. Some abortive bankruptcy proceedings took place with which I need not deal, and on Jan. 18, 1940, the order with which this appeal is concerned was made.

On Sept. 27, 1941, a bankruptcy notice was served on the appellant, which recited the order for leave to proceed. On Sept. 29, 1941, the appellant wrote to the respondent's solicitors stating that he had received the bankruptcy notice and saying that he noticed that leave to enforce the judgment had been obtained by the order in question ; and he asked the solicitors to let him have details in regard to the order, as he did not remember having been informed at the time that they were applying for it. He went on to say that his position had been greatly disturbed through enemy action ; and asked them to take notice of his intention to apply to the court with a view to satisfying the court that he could not satisfy the judgment by reason of circumstances directly attributable to the present war. He was not given the details for which he had asked with regard to the order ; and on June 2, 1942, a second bankruptcy notice was served upon him, that notice being dated May 13, 1942.

On July 15, 1942, a receiving order was made against the appellant. On or about Aug. 25, the appellant discovered for the first time, as he now swears, and there is no reason for disbelieving him, that the order had been improperly made, because the summons asking for it had not been served upon him. He swears, and again, there is no reason for disbelieving him, that he was not previously aware that the failure to serve the summons upon him invalidated the order. That advice having been given to him, his counsel attended, on Sept. 7, 1942, an appointment in the bankruptcy proceedings at which it was proposed to ask for an adjudication, and contended before the registrar that the order was bad. The registrar adjourned the case to Sept. 28, in order to give the appellant an opportunity of applying to the King's Bench Division to have the order set aside. That application for some reason was not or could not be effectively made before the date fixed for the adjourned hearing of the petition, namely, Sept. 28. When that day came, an order of adjudication was made, notwithstanding the fact that the application to the King's Bench Division had not yet come before the court. That application was launched, rather late in the day, by a summons dated Sept. 23, 1942, asking that the order giving leave to proceed be wholly set aside as irregular. It stated that the ground of the application was :

... that no summons for leave to enforce the judgment was served upon the defendant as required by the Rules of the Supreme Court.

The summons came before MASTER HORRIDGE, who made an order that the order giving leave to proceed be wholly set aside as irregular ; and giving the present appellant the costs of the application. On appeal to CROOM-JOHNSON, J., that order was reversed.

The judge appears to have taken the view that the procedure adopted was not the right procedure for an application under R.S.C., Ord. 70, r. 1, and that the only way of getting the order set aside under that rule was not by application to the master, but by an appeal from the order for which leave would have had to be obtained to appeal out of time. It was also submitted to him that, quite apart from R.S.C., Ord. 70, r. 1, the appellant was entitled to have the order set aside *ex debito justitiæ* as being a nullity. CROOM-JOHNSON, J., took the view that no such argument could be entertained by him on the ground that the summons did not ask for any such relief. He interpreted the summons as being confined to an application based on an irregularity under R.S.C., Ord. 70, r. 1. He said that the question of giving leave to amend the summons, for which application was made, was a matter for his discretion; and in view of the defendant's behaviour with regard to the judgment in general, he refused to give leave to amend. The only result of that, assuming that the appellant was right in saying that he was entitled to have the order set aside *ex debito justitiæ*, would have been that a fresh summons would have been necessary.

If CROOM-JOHNSON, J., was right in the construction which he placed upon the summons before him, I cannot help thinking that, subject to any order as to costs he might have thought it right to make, he ought to have exercised his discretion by allowing an amendment; but that matter, in my judgment, is not now material to anything which arises in this appeal. Counsel for the appellant argued before us that, if this was an irregularity which could be dealt with under R.S.C., Ord. 70, r. 1, he was entitled on the facts to have the order set aside, because his application had been made within a reasonable time, and he had not taken any fresh step with knowledge of the irregularity which, by r. 2 of the order, would have invalidated his objection.

Upon the view which I take of this case, it is not necessary to discuss in detail the argument based on the view that the failure to serve the appellant with the summons asking for liberty to proceed was a mere irregularity. I need only say this. Had that been the true view of the case, we should have had to consider whether CROOM-JOHNSON, J., was right in deciding that the only method of attacking the order was by way of appeal, and, if not, whether, in all the circumstances, the appellant ought to have relief under R.S.C., Ord. 70. I need express no opinion on this question.

The second argument in the case was of a more serious and substantial nature. It was that the order was a nullity; and, therefore, was of a character with which R.S.C., Ord. 70 was not concerned.

At the outset I think it necessary to say a word on the question whether or not that argument can be put forward on this summons. It is true that the summons is not drafted in a way which suggests with perfect clearness that that was a ground, or the ground upon which relief was being asked. It is provided in r. 3 that in an application under R.S.C., Ord. 70, the grounds on which the application is based must be stated in the summons. The grounds of the application, however, are stated in this summons; and this fact and the use of the words "wholly set aside as irregular" certainly suggest that the main matter which the draftsman of the summons had in his mind was R.S.C., Ord. 70. I do not think that it would be right to construe the summons so narrowly for this reason. The ground of the application as stated in the summons is one which, in my opinion, supports the argument that the order complained of was a nullity and on the face of the summons facts are alleged which, if correct, would make the order a nullity. Moreover, the summons does not in terms refer to R.S.C., Ord. 70. In those circumstances, I do not think it would be right to construe the summons as one upon which an argument based on a nullity could not be raised. Even if that view were wrong, speaking for myself, I should without hesitation have given leave to amend the summons so as in terms to raise the two alternative cases: one under R.S.C., Ord. 70, and one under the jurisdiction to set aside an order which is a nullity.

Therefore, the substantial question with which we have to deal is whether the order was a nullity. Before I go more closely into that matter, it is desirable to examine the distinction between proceedings or orders which are nullities and proceedings or orders in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rules which draws a line between

these two classes, and exactly where that line lies may not, in certain circumstances, be easy to discover. The existence of the distinction is, however, one which has been recognised in the language of many authorities.

The first case to which I need refer is *Smurthwaite v. Hannay* (1). There a number of plaintiffs had been joined in an action against one defendant. The causes of action of the several plaintiffs were separate and distinct; and, accordingly, it was held that there was no authority in the rule for such joinder; but it was argued by counsel for the plaintiffs that the misjoinder was a mere irregularity; and that, since the application was an application to stay the action and had not been made within a reasonable time, the action ought not to be stayed. That argument is referred to by LORD HERSCHELL, L.C., at p. 501, where he says :

I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Ord. 70, could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.

In referring to this point, LORD RUSSELL OF KILLOWEN said, at p. 506 :

This objection is not, in my judgment, well founded. In my judgment, such joinder of plaintiffs is more than an irregularity; it is the constitution of a suit as to parties in a way not authorised by the law and the rules applicable to procedure; and apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process.

Before looking at one or two more authorities, I may refer to DANIELL'S CHANCERY PRACTICE, 8th Edn., Vol. 1, p. 708, where this statement is made :

A judgment may also be set aside for irregularity if the irregularity consists in non-compliance with one of the rules. The court or a judge may either set it aside, or amend or otherwise deal with it in such manner and upon such terms as the court or a judge may think fit.

After referring to R.S.C., Ord. 70, r. 1, he then proceeds :

A judgment obtained by some step not warranted by the rules or capable of being sanctioned is wholly void and may be set aside.

and he cites *Smurthwaite v. Hannay* (1). Then, in referring to the necessity of showing that the application is made promptly in the case of applications under R.S.C., Ord. 70, it is said :

The provision only applies where the irregularity is capable of being waived under R.S.C., Ord. 70, r. 1; but where the proceedings are wholly void, they may be set aside at any time. In such a case no defence need be shown; but it is otherwise where the court has discretion as to setting aside.

and he cites for that *Hamp-Adams v. Hall* (2), to which case I shall refer in a moment. Then the following statement is made :

Where judgment against a party has been signed irregularly, it is worse than a mere non-compliance with the rules, and he is entitled *ex debito justitiæ* to have it set aside; and the court has no power to impose any terms upon him except as a condition of giving him his costs.

Returning to the reported cases, the matter was fully discussed in *Anlaby v. Praetorius* (3). It is true that it was a case where judgment was obtained in default of defence; but the reasoning of the court was not based on any special rule relating to default judgments, but was of general application. FRY, L.J., at p. 768, says :

It follows that the defendant had 10 days from the delivery of the statement of claim, or from the time limited for appearance, within which to deliver his defence; and as the writ was served on Jan. 21, and the time limited for appearance was Jan. 28, the last day for delivering the defence was 10 days from Jan. 28, and the judgment entered on Feb. 7 was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiæ*, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass. We were pressed with the argument that Ord. 70, r. 1, gives a discretion to the court which applies here.

Then he reads Ord. 70, r. 1, and proceeds, at p. 769 :

But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any

judgment at all. I do not think, therefore, that the case comes within r. 1, and we must consider what is the right practice without reference to that rule. There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief. But although the court is bound to set aside an irregular judgment *ex debito justitiae*, it has always exercised a discretion as to costs, and has imposed terms as a condition of the exercise of that discretion—a common term being that the defendant shall not bring any action.

At pp. 770, 771, LOPES, L.J., said this :

I entirely agree that Ord. 70, r. 1, does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late ; but the present case seems to me altogether outside the operation of r. 1, because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, and not an act done within any of the rules. The defendant is therefore entitled *ex debito justitiae* to have it set aside.

The next case to which I wish to refer is *Hughes v. Justin* (4). There, after the issue of the writ, the parties had come to some sort of an agreement, as a result of which a payment was made. In spite of that, judgment was signed for the full amount claimed. It was held that the case fell within the class of case referred to in *Anlaby v. Praetorius* (3), and was one where the defendant had a right *ex debito justitiae* to have the judgment set aside.

An earlier case is *Hewitson v. Fabre* (5). That was a case where the defendant, who was not a British subject, had been served with the writ instead of with notice of the writ, as the rules provide. The service was out of the jurisdiction. It was held, by FIELD and WILLS, JJ., that the effect of that wrong attempt at service was to make the proceedings void *ab initio* ; and that such a service was no service at all.

The next case is *Hamp-Adams v. Hall* (2). That again was a case of default in appearance ; but was not treated, so far as anything appears in the judgments, as being a mere exercise of jurisdiction under the rules relating to default, but as an exercise of an inherent jurisdiction in the court. There the writ was served, but the date of service was not indorsed upon it within 3 days, as required by the rules. The plaintiff signed judgment in default of appearance and a verdict for damages was given by a sheriff's jury. It was held that non-compliance with the rule which required due indorsement of the date of service was not an irregularity which could be waived ; and that the plaintiff, not having complied with the rule, was not entitled to proceed by default ; and that the verdict and judgment must be set aside. VAUGHAN WILLIAMS, L.J., said, at pp. 943, 944 :

It is contended for the plaintiff that the non-compliance with the rule has been waived by the defendant. In my opinion, it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Then it was said that at the most the case should be regarded as one in which there has been a mere irregularity, and Ord. 70, r. 2, was called to our attention as showing how the right of a party to take advantage of a defect in the nature of an irregularity may be limited or taken away. In my opinion, that rule has no application to the circumstances of the present case. It is said that it is a very severe penalty to put on a mistake of this kind that all the subsequent proceedings should be set aside. I am not at all impressed by that argument. Where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Ord. 9, r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ.

The difficulty of defining the precise line which separates an irregularity from a defect which makes the order a nullity is referred to in *Fry v. Moore* (6). There LINDLEY, L.J., said, at p. 398 :

But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular

case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived.

It was a case of substituted service. LOPES, L.J., says, at p. 399 :

It is said that the proceeding was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity.

A Accordingly, the court decided against the application to set aside the judgment.

Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary.

B I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained.

D Before I conclude that part of the matter, I must refer shortly to the rules of procedure relating to orders of this kind and state precisely how the order was obtained. The order was drawn up after the production of an affidavit of service sworn by a clerk in the employment of the plaintiff's solicitors, who stated that he had served on the defendant a true copy of the summons by posting it the same day in a duly pre-paid envelope addressed to the defendant at a specified address, being the defendant's place of business and residence.

E The address stated was not the address for service given in the action, and the defendant has sworn that he was not residing or carrying on business at the stated address; and that he never received the summons at all.

That affidavit was quite irregular; and no order should have been completed on the strength of it. The master in the usual way had made the order "subject to production of an affidavit of service." This was the affidavit which was produced; and it was on the face of it insufficient.

F The provisions as to service in proceedings under the Courts (Emergency Powers) Act, in force at the time, are to be deduced from what was then the only rule affecting the matter, namely, the Courts Emergency Powers Rules, 1939, r. 7, dated Sept. 1, 1939. That rule provided :

In any proceedings under the Act in the High Court the procedure shall be regulated by rules of court subject to the provisions of these rules.

G That refers us back to R.S.C., Ord. 67, r. 2, which in a case where personal service is not requisite, says that service will be sufficient if the document to be served is left at the address for service of the person to be served, or if posted in a pre-paid registered envelope addressed to the person to be served at that address. In the present case, as appears from the affidavit of service, the rule was not complied with. The alleged service disclosed on the face of the affidavit was no service at all.

H The origin of the mistake—because mistake I think it quite clearly was, since there is no suggestion of bad faith about it—lies in the fact that at that time there had been promulgated a direction by the senior master to the effect that :

... in the case of a default judgment, service of any summons under the Courts Emergency Powers Rules should be effected by posting the summons in a pre-paid registered envelope addressed to the residence, or last known place of residence of the defendant, and not by filing under R.S.C., Ord. 67, r. 4.

It seems pretty clear that the method of service adopted was adopted under the mistaken belief that in some way that direction applied; but it is to be

observed that that direction applies only in the case of a default judgment. This is not a default judgment. The object of the direction was to ensure that the summons for leave to proceed should be brought to the notice of the defendant and should not (as might have been thought was the right procedure in the case of a default judgment) merely be filed, in which case the defendant would probably know nothing about it. For that reason, the senior master had thought it desirable to lay down that practice rule. It had nothing in the world to do with the present case. The result, therefore, is that in the present case there was no service at all. It seems to me that the obtaining of an order in such circumstances is obtaining something for which there is no warrant or justification in the rules of court. The order is a nullity; and must be so dealt with. In my opinion, the appeal must be allowed and the order set aside.

GODDARD, L.J.: LORD GREENE, M.R.,¹ has dealt so fully with the matter that I do not think I can usefully add anything, except to say that I agree with all he has said.

Appeal allowed.

Solicitors: *G. F. Wallace & Co.* (for the appellant); *Samuel Tonkin, Booth & Co.* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

WALLIS & CO. (COSTUMIERS), LTD. v. OPPENHEIM.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and DU PARCQ, L.JJ.),
December 17, 18, 1942.]

Emergency Legislation—Landlord and tenant—War damage—Block of property let by three separate leases—Leases to be considered separately—Whether landlord liable to replace tenants' fixtures—Landlord and Tenant (War Damage) Act, 1939 (c. 72)—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (c. 41).

The appellant was the landlord of property let to the respondents under three separate leases. The leases were of one block of property used as a whole. In Dec., 1940, and in Apr. 1941, the premises suffered damage from bomb blast. The measures taken by the appellant to remedy the damage were not satisfactory to the respondents, and in Aug., 1941, they served three notices of disclaimer upon the appellant under the Landlord and Tenant (War Damage) Act, 1939. On Sept. 12, 1940, the appellant issued three applications, under sect. 6 of the 1939 Act, asking to have the validity of the notices of disclaimer determined on the ground that the premises were not unfit at the date of the service of the notices of disclaimer. These applications came before the county court judge on Nov. 24, 1941, and he decided that the ground floor was still unfit but that the remainder of the premises were then fit. He granted an extension of time to the appellant in which to serve notices to avoid disclaimer. On Dec. 12, 1941, the appellant served three notices to avoid disclaimer. The appellant did the work indicated as necessary and it was completed by Jan. 6, 1942, and the appellant notified the respondents that rent would be payable as from that date. The rent due on Mar. 25, 1942, was not paid and the appellant issued a writ in respect of it. The respondents then made three applications under sect. 14 of the 1941 Act, to determine whether the premises were fit. The judge held that the premises were unfit owing to there being a piece of plaster on the ceiling of the first floor which was loose and liable to fall and that its condition was due to war damage, and that this rendered the whole of the premises unfit. For the appellant, it was contended that the respondents were estopped from relying upon the defect in the plaster as they had not relied upon it in the earlier proceedings, and that the three leases must be considered separately. The respondents contended that the landlord had failed to perform his statutory covenant under sect. 11 of the 1939 Act on the ground that he had failed to replace certain fittings which were tenants' fixtures:—

HELD: (i) the leases must be considered separately and the unfitness of premises held under one lease did not entitle tenants to have premises

held under another lease declared unfit although the premises were used as a whole.

(ii) the respondents were not estopped from relying upon the defect in the ceiling on the hearing of their own application under sect. 14 of the 1941 Act on the ground that they did not rely upon that matter at the hearing of the landlord's application under sect. 6 of the 1939 Act.

(iii) the defect in the plaster rendered the upper floors unfit and the respondents were not liable for the rent under the lease relating to them.

(iv) under sect. 11 of the 1939 Act, no obligation is imposed upon a landlord to replace tenants' or trade fixtures.

[EDITORIAL NOTE.] The main points here are that the property included in the separate leases must be treated separately although they had been occupied as a composite whole for a number of years and that tenant's fixtures are not included in the property which has to be rendered fit by the landlord. It may well be that the estoppel point is decided on the particular facts of this case. Since it was decided that the separate leases created separate properties to be dealt with separately and it was apparently decided at the first hearing that two of the properties were fit, it would not seem that that decision could be subsequently challenged; but, in this case, further notices were served in respect of all the three properties, and this may perhaps re-open the question. It is true as the judgment herein states, that the tenants had only to bring forward one defect to obtain a finding that any one property was unfit, but here in respect of two of the properties they failed to bring forward even one defect and the landlord secured a finding that those properties were then fit. In the absence of further damage or proof of some defect which was not then discoverable, it would seem that such a finding should be conclusive.

AS TO MATTERS AVAILABLE IN FORMER PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 441-443, para. 496; and FOR CASES, see DIGEST, Vol. 21, pp. 174-178, Nos. 276-298.]

Cases referred to:

(1) *Boudou v. Thornton-Smith* [1941] 1 K.B. 561; [1941] 1 All E.R. 454; Digest Supp.; 110 L.J.K.B. 348; 164 L.T. 294.

(2) *Kimpson v. Markham*, [1921] 2 K.B. 157; 31 Digest 584, 7327; 90 L.J.K.B. 393; 124 L.T. 790.

(3) *Phosphate Sewage Co. v. Molleson* (1879), 4 App. Cas. 801; 21 Digest 211, 509.

(4) *Henderson v. Henderson* (1843) 3 Hare 100; 21 Digest 174, 276; 1 L.T.O.S. 410

(5) *New Brunswick Ry. Co. v. British and French Trust Corp., Ltd.*, [1939] A.C. 1; [1938] 4 All E.R. 747; Digest Supp.; 108 L.J.K.B. 115; 160 L.T. 137.

APPEAL of the landlord from an order of His Honour JUDGE KONSTAM at Lambeth County Court, dated July 31, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

A. T. Denning, K.C., and W. E. P. Done for the appellant.

R. T. Monier-Williams for the respondents.

Denning, K.C.: The actual order of the court makes no distinction between the three leases and the Landlord and Tenant (War Damage) Acts show that each lease must be considered separately. Sub-division is only allowed in the case of multiple leases. Rendering fit is not a question of putting any particular thing right: it is whether the premises as a whole are fit for occupation. The obligation is defined by the covenant implied by the Act. The question was considered in *Boudou v. Thornton-Smith* (1). The respondents are estopped from setting up in subsequent proceedings defects which were not relied upon in earlier proceedings: *Kimpson v. Markham* (2). In *Phosphate Sewage Co., Ltd. v. Molleson* (3), EARL CAIRNS, L.C., makes it clear that the burden of proof is on the party asserting new matters, and the respondents have not discharged that burden. The defect relating to the plaster was not ascertainable on Jan. 6, 1942, and the premises were then fit within the meaning of the Act. If the tenant discovers a new head of damage, he must serve a new notice of disclaimer. [Counsel referred to *Henderson v. Henderson* (4) and *New Brunswick Ry. Co. v. British and French Trust Corp., Ltd.* (5).]

Monier-Williams: It is quite true that there are three separate leases. On Feb. 28, 1929, a licence was granted to convert the premises so that they might be made suitable for the tenants' business. This matter was put in evidence in the county court. The premises were altered and since then the tenants have used the premises as a whole and the evidence proved that they could not be used except as a whole in the condition in which they were put after the licence had been granted. Both on the original application and on the sub-

sequent application in the county court, there were three applications and three orders were drawn up on each occasion. They might have been included in one series of documents. One must have regard to the meaning of the word "unfit" in sect. 24 of the 1939 Act. The emergency legislation cuts right across the ordinary law of landlord and tenant. On the general point, it is within the implied covenant that the landlord is bound to restore to a reasonable extent those fittings on the premises which one normally calls trade fixtures.

LORD GREENE, M.R. : This appeal raises some rather complicated questions under the Landlord and Tenant (War Damage) Acts. A

The appellant is the present owner of the reversion expectant upon the determination of three leases which are vested in the respondents. Those three leases relate to one block of premises in Rye Lane, Peckham. The first lease relates to the ground floor of No. 161, the second to the ground floor of No. 161A, and the third to the two upper floors of both those premises. The premises at the relevant date were occupied and used by the respondents for the purpose of their business as dressmakers. The ground floor comprised in the first two leases had been remodelled pursuant to a licence granted in the year 1929, and, at the date which we have now to consider, it was arranged purely as a display place where the goods in which the respondents dealt could be seen and inspected through the glass of the show cases. The actual work of their business was carried on not on the ground floor but on the two upper floors of both premises, the first floor being used as sale rooms and fitting rooms, and the second floor as workshops. B C

In Dec., 1940, and perhaps again in Apr., 1941—that does not appear certain—the building suffered damage from bomb blast. The windows were blown out on all the three floors, the fascia board was blown out, some ceilings came down, and so forth. The landlord took certain measures to remedy that damage, but the measures which he took did not satisfy the tenants, and on Aug. 14, 1941, the tenants served three notices of disclaimer under the Landlord and Tenant (War Damage) Act, 1939. On Sept. 12, 1941, the landlord, the present appellant, issued three applications in the county court under which he asked to have the validity of the notices of disclaimer determined, alleging that the notices were bad, because at the date when they were served there was no longer any unfitness in the premises. Those applications came before the county court judge on Nov. 24, 1941. D E

Of the matters relied upon on that occasion by the tenants as constituting unfitness, the judge decided in their favour with regard to the ground floor, but against them with regard to the two upper floors. The ground floor he held to be still unfit, by reason of the fact that the window space which the landlord had provided was insufficient for display purposes. The position, therefore, was that the landlord, who had not yet served a notice to avoid disclaimer, required an extension of time for the purpose of serving such a notice, and that was granted to him by the judge. Pursuant thereto, on Dec. 12, 1941, he issued three notices to avoid disclaimer. Now the effect of issuing those notices was that under sect. 11 of the 1939 Act, the notices of disclaimer became of no effect, and there was imposed upon the landlord the statutory covenant to render the premises fit which is mentioned in that section. The landlord thereupon proceeded to do work for the purpose of remedying the only matter of unfitness which had been found against him on his previous application, namely, the lack of sufficient light in the ground floor for display purposes. That work he completed on Jan. 6, 1942; and on Jan. 9 he served a notice on the tenants informing them that the premises were ready and that rent would run from Jan. 6. The tenants made inspections. They made no complaints, so far as I am aware, but they did not pay the quarter's rent which accrued due on Mar. 25. The landlord thereupon issued a writ in the High Court for the rent on May 4, and on May 18, as a result of that writ, the tenants made three applications in the county court to determine whether the premises were fit. Those applications were made under the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 14, which enables either a landlord or a tenant to apply to the court to determine whether the land has been rendered fit. I should have said that the landlord's original applications, dated Sept. 12, 1941, had not been made under that section but under sect. 6 of the 1939 Act. F G H

When the tenants made those three applications, they alleged unfitness in a number of respects. They did so under an order for particulars, and they tied themselves, acting on expert advice, to those particular specified matters of alleged unfitness. I need not refer in detail to those particulars. I can group them into three broad classes sufficient for the present purposes. One consisted of matters which had been complained of on the previous application by the landlord but which had been decided in the landlord's favour, as I have already stated. Another group of particulars related to certain fittings and fixtures, partitions which had been put up by the tenants and which were admittedly removable by them, and electrical fittings. The third matter complained of was new and was of a structural nature. I forget for the moment whether there was more than one item under that head, but the item which is particularly in my mind relates to an alleged structural defect owing to the cracking of a beam, which it was alleged had let down the level of the floor above. That beam was a beam supporting the ceiling of the first floor and the flooring of the second floor. That was the allegation.

The matter came before the judge, and those particular matters of complaint he dealt with in this way. He held and, in my opinion, rightly held, that it was not open to the tenants to litigate again on this occasion a question which had been decided against them on the previous proceedings in relation to the alleged matters of unfitness. He held with regard to the new matter of complaint, the beam and the sagging in the floor, that there was no unfitness by reason of that circumstance. With regard to the fixtures and fittings he held, as a matter of law, that, being removable by the tenants, they did not fall within the scope of the statutory covenant imposed on the landlord under sect. 11 of the 1939 Act.

If the matter had stood there, the result would have been that the landlord would have succeeded in his applications, because the tenants' attempt to dispute the landlord's claim would have failed on all grounds put forward by them; but a very curious thing happened. In the course of the examination-in-chief of the surveyor called by the landlord—and the landlord in that case, of course, was respondent to the tenants' application, the tenants seeking a declaration that the premises had not been rendered fit—he referred to a matter of disrepair which had not been referred to in any evidence tendered on behalf of the tenants. That matter related to a very small area of plaster, about 18 ins. square, on the ceiling of the first floor, in respect of which the witness said that the plaster had come away from the laths. He said that it might last a long time or it might come down quite soon. He seemed uncertain. At any rate, he did not wish to commit himself as to whether it was due to war damage or not, but he did say it was not improbable that it was due to war damage. Counsel for the tenants very naturally seized upon this gift of fortune and argued that that defect in the plaster rendered the premises unfit. He argued that it was due to war damage.

The question might have arisen whether it was open to the tenants, having regard to their particulars, to rely on that circumstance at all. We have not heard counsel for the respondents on the question of the construction of his particulars, but it would require a good deal of argument to persuade me that the particulars related to this matter at all. They related to the beam and the sagging floor above, and it was to the beam and the sagging in the floor above that the whole of the relevant part of the tenants' evidence was directed. But, assuming in favour of the appellant that the particulars did not leave it open to the tenants to take advantage of that point, it would, of course, have been competent to the judge, if he had been in terms asked to allow that matter to be relied upon, to have allowed it formally, and possibly in the county court he would not have insisted on a formal amendment of the particulars. If the matter had been discussed before him, he might very well have taken the view, having regard to all the circumstances of the case and this obvious last-minute attempt to get out of liability on a point in respect of which they had never complained, that no indulgence should be granted to the tenants, but I think that he must be taken impliedly to have granted that indulgence, because he took the matter into consideration and apparently did so without objection from the bar. He found that the looseness of that piece of plaster was due to war damage, and he held that it still rendered the premises unfit. It was argued before us that there was no evidence upon which he could find that it

was due to war damage. In my opinion there was evidence. It was not particularly strong, but there was evidence which would justify the county court judge in finding as he did. That finding, therefore, must stand.

With regard to the question of unfitness, it was strenuously argued that this could not be a matter of unfitness, because it was not apparent to anybody, the tenant had never complained of it, and it was only 2 days before the hearing that, quite by accident, this surveyor witness happened to discover it. It was said that the implied covenant under sect. 11 was complied with as soon as the landlord had put right all matters of unfitness which he could reasonably be expected to discover. In my opinion that construction is much too narrow. It seems to me that, as the covenant is a covenant to render the premises fit, it means what it says, and there is no justification for writing into it some qualification, such as "as fit as the landlord can reasonably be expected to make it, having regard to the defects which he can reasonably be expected to discover." I can read no such limitation into the section, and it seems to me that the judge is entitled to take into account, subject to questions of amendment and costs, and so forth, any matters which are brought to his notice down to the date of his judgment, and when, having heard all the admissible evidence, he decides that the premises were made fit as from a particular date, fit they then were for the purposes of the Act, and that circumstance cannot be altered by something that may be discovered afterwards. Whether or not a subsequent discovery of some hidden defect due to war damage would entitle the tenant to serve another notice of disclaimer or take some other steps, I do not know. It is not necessary to decide that, and I express no opinion upon it. So far as these proceedings are concerned, the judge, in my opinion, subject to exercising his discretion in allowing this point to be taken at all, was entitled to give effect to it and to find, as he did find, that the existence of this defect in the plaster was an element of unfitness which, so long as it existed, prevented the landlord's statutory covenant from being fulfilled.

The result of that, therefore, is that, so far as I have gone, the appellant fails. But a further point was urged before us, namely, that there was an estoppel against the tenants from relying upon this defect. That estoppel was alleged to arise out of the previous proceedings by the landlord under sect. 6 of the 1939 Act. It was said that in those proceedings it was obligatory upon the tenants to bring forward all matters of unfitness of which they could avail themselves at the time, and that, in the subsequent proceedings with which we are concerned under sect. 14, they would be precluded from bringing forward any matter of unfitness which they might have brought forward in the earlier proceedings but did not. In my opinion that argument is misconceived. The proceedings under sect. 6 of the 1939 Act were proceedings in which the landlord was alleging that the tenants' notices of disclaimer were invalid because the premises were not unfit at the time when the notices were served. That application by the landlord could be effectively dealt with by the tenants by proving one single element of unfitness which, when established, would result in a decision that the notices of disclaimer were good notices. It was sufficient for the tenants, who were respondents in those proceedings, defending themselves and defending their notices, to put before the court facts sufficient to uphold the notices and, as I say, one fact alone would have been sufficient.

When we come to the present application under sect. 14, the tenants are taking upon themselves the burden of showing that the premises have not been rendered fit, and in respect of that it seems to me that they are entitled to rely on every matter of unfitness which they discover, or know of, even though it is a matter which was never canvassed or brought forward in the previous proceedings under sect. 6. The alternative view would be that in proceedings under sect. 6 the tenants would be bound at their peril to bring forward every single item in order to support the validity of their notices, even though one would be sufficient for the purpose. They would have to incur what might be very great expense in getting a survey of the whole building, when it would be quite sufficient for them to call a witness to prove that, for example, the roof was falling in and nothing more. It seems to me, therefore, quite impossible to say, when the two issues under sect. 6 of the 1939 Act and sect. 14 of the 1941 Act are quite distinct and the facts necessary to deal with them are by no means necessarily the same, that in a case such as this the tenants are precluded from raising in these pro-

ceedings matters which they might have raised in the earlier proceedings under sect. 6, if they had chosen to do so, and had had the requisite knowledge. In my opinion, there is no case of estoppel here by reason of what took place in the proceedings under sect. 6.

There is one other matter which I should have dealt with, and that is the question of fittings and fixtures. Counsel for the respondents argued that the judge was wrong in saying that the failure to replace (because they had disappeared) the partitions and the electric fixtures constituted a failure by the landlord to perform his statutory covenant under sect. 11. The county court judge did not accept that view. He did not apparently consider the question of fact whether the disappearance of these articles was due to war damage or not. He decided the matter on a point of law, namely, that tenants' and trade fixtures of that kind, removable by the tenant at any time, do not fall within the scope of the landlord's statutory covenant.

In my opinion, the judge was right in point of law in deciding as he did. The word used in the Act is "land," and "land" is defined as "land of any tenure and includes any buildings or works situated on, over or under land." The damage with which the Act is concerned is damage to land, as so defined, comprised in a lease. The covenant implied under sect. 11 is a covenant that the land comprised in the lease shall be rendered fit. It seems to me that, read in the context of this Act of Parliament and in the light of the mischief which it was obviously intended to remedy, the word "land" cannot be construed as covering what are generally called tenant's or trade fixtures which are removable by the tenant during the term, much less mere chattels which are not, in the strict sense, fixtures at all. To hold the contrary would lead to the most extravagant results. It would mean that if, let me say, a factory was the land comprised in the original lease and the tenant had installed machinery worth tens or perhaps hundreds of thousands of pounds which he was entitled to remove at the end of his term, the landlord under sect. 11 would be under an obligation to restore the whole of that machinery before he could demand a penny of rent. The machinery, although technically in law affixed to the freehold so long as it remains affixed, is, for all business purposes, the tenant's property. He puts it there: he can take it away. It is his, and, if it is destroyed, the loss is his. It has nothing in any practical sense to do with the landlord at all, and why the legislature should have gone out of its way to impose on the landlord an obligation to repair and reinstate, and perhaps entirely replace, trade fixtures, I cannot conceive. In my opinion, the judge construed the Acts quite correctly in that respect. Therefore the point based on the alleged unfitness due to the failure to replace those tenants' and trade fixtures, in my opinion, fails.

The tenants are thus right in this appeal, subject to one point of considerable importance. The particular matter of unfitness which was found against the landlord was unfitness physically situated in the first floor premises, that is to say, in the land comprised in the third lease, as I have called it, the lease of the first and second floors. It had nothing in the world to do physically with the ground floor which, so far as that floor is concerned, is now perfectly fit. It was argued, and it was accepted by the judge below—indeed, he had taken the same view on the earlier occasion—that all these three sets of demised premises must, for the purposes of the matter before him, be dealt with as one and, therefore, the defect on the first floor was one which affected not merely the premises comprised in the third lease, but also the ground floor as well, the reason apparently being that, owing to the lay-out of the premises as a whole and the way in which the tenants had chosen to use them, the ground floor, purely a display place, was useless without the first and second floors.

In my opinion, there is no justification in the language of the Act for amalgamating separate leases in that way. The Act deals throughout with land comprised in a lease, and the obligation under the statutory covenant under sect. 11 is confined to the land comprised in the lease, and so on, throughout the Act. The fact that a tenant for his own purposes has chosen to use premises comprised in one lease in business connected with premises comprised in another lease seems to me a matter which does not affect the landlord. If there had been three separate landlords in this case it would have been impossible, in my opinion, to suggest that the landlord of the ground floor, having done all he

is bound to do in the matter of putting those premises right, could be kept out of his rent because the landlord of the upper floor had failed in his obligations. I can find no justification whatsoever for any such construction of the Act. It may very well be that, in cases where the buildings have been so physically altered or arranged that one part cannot be used for business purposes without another, it would be a hardship on the tenant. But what about the hardship on the landlord who, being solely concerned with his own land, does what the statute tells him to do and puts it right and then claims his rent? Is he to be refused his rent because the other landlord has not chosen to put his part right? I find no justification in the Act for so saying and, in my opinion, the judge was wrong in so dealing with the matter.

THE result, therefore, is that, in my opinion, the appeal fails with regard to the first and second floors, but succeeds with regard to the ground floor, for the reason which I have given, and the date as from which that floor is to be treated as fit, I apprehend, must be the date asserted by the landlord himself, namely, Jan. 6.

GODDARD, L.J. : I agree, and I do not think I need add anything to the judgment which LORD GREENE, M.R., has delivered.

DU PARCQ, L.J. : I agree, and I only want to add one thing. The judge had before him under sect. 14 of the 1941 Act the question whether the land comprised in each of these leases had been rendered fit. I think, when one looks at the whole of the section, it is clear that that was the question. It is impossible to say that the land in any of the leases, except that relating to the particular part of the premises which received damage, had ever been rendered unfit. Counsel for the respondents argued that premises are rendered unfit within the meaning of the Acts if something happens to the next door premises which makes it impossible to use the premises which are themselves uninjured. I think that submission is quite inconsistent with the War Damage Act, 1941, s. 80, the definition section, because damage, in the sense in which counsel for the respondents uses it, is clearly not the direct result of action taken by the enemy or of the other matters mentioned in that definition section.

I, therefore, agree that the appeal must succeed to the extent indicated by LORD GREENE, M.R., and I agree that it fails on the other points.

Solicitors : *Ernest W. Long & Co.* (for the appellant) ; *Teff & Teff* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re TREDGOLD, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. TREDGOLD AND THE ROYAL SOCIETY OF MUSICIANS OF GREAT BRITAIN (INCORPORATED)

[CHANCERY DIVISION (Simonds, J.), **December 18, 1942.**]

Rentcharges and Annuities—Annuities given free of income tax—Statutory variation of tax burden—When provision made—Will and codicil—Codicil not expressly varying annuity—Codicil confirming will—Finance Act, 1941 (c. 30), s. 25.

By his will dated Mar. 23, 1936, the testator gave an annuity free of all deductions including income tax, and by a codicil dated Aug. 20, 1941, he made certain administrative provisions not touching the annuity and added : "In all other respects I confirm such will." He died in 1941. The Finance Act, 1941, s. 25 (which had become law before the date of the codicil) provides that, in the case of any provision contained in any will or codicil for the payment of a sum free of tax made before Sept. 3, 1939, and not varied since that date, the beneficiary shall bear a certain proportion of the income tax :—

HELD : the direction to pay the annuity was contained in the codicil or in the will and codicil regarded as one document made at the date of the latter, and was, therefore, not made before Sept. 3, 1939, and was not subject to the provisions of sect. 25.

[EDITORIAL NOTE. It will be remembered that the Finance Act, 1941, s. 25 was designed to place some part of the tax burden on the recipient of a tax-free payment in cases where the provision providing for the payment was made before Sept. 3, 1939.

Re Waring (1) decided that, where a will containing such a provision was made before Sept. 3, 1939, but there was a codicil executed after that date, the provision was not made for the purposes of the section after that date. The codicil in that case did not contain the usual clause confirming the will "in all other respects," and the effect of such confirmation was expressly reserved. That matter has here arisen for decision and, after a careful review of the authorities, it is decided that such a confirmation has the effect of making the provision, although it is contained in the original will and not expressly referred to in the codicil, one which is made at the date of the codicil, so that where the codicil is made after Sept. 3, 1939, the recipient gets the full benefit of the provision rendering the payment free of tax.

As to TAX-FREE PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391; and FOR CASES, see DIGEST, Vol. 39, pp. 165-168, Nos. 562-593.]

Cases referred to :

- (1) *Re Waring, Westminster Bank, Ltd. v. Awdry*, [1942] Ch. 426; [1942] 2 All E.R. 250; Digest Supp.; 111 L.J.Ch. 284; 167 L.T. 145.
- (2) *Pigott v. Waller* (1802), 7 Ves. 98; 44 Digest 371, 2054.
- (3) *Doe d. York v. Walker* (1844), 12 M. & W. 591; 44 Digest 372, 2067; 13 L.J.Ex. 153; 2 L.T.O.S. 424.
- (4) *Anderson v. Anderson* (1872), L.R. 13 Eq. 381; 44 Digest 275, 1082; 41 L.J.Ch. 247; 26 L.T. 12.
- (5) *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch.D. 75; 44 Digest 376, 2108; 59 L.J.Ch. 208.
- (6) *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101; 44 Digest 372, 2068; 62 L.J.Ch. 372; 67 L.T. 694.
- (7) *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; 44 Digest 374, 2081; 72 L.J.Ch. 230; 87 L.T. 712.
- (8) *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726; 44 Digest 376, 2102; 73 L.J.Ch. 481; 91 L.T. 48.
- (9) *Re Hardyman, Teesdale v. McClintock*, [1925] Ch. 257; 44 Digest 385, 2196; 94 L.J.Ch. 204; 133 L.T. 175.
- (10) *Re Reeves, Reeves v. Pawson*, [1928] Ch. 351; 44 Digest 382, 2165; 97 L.J.Ch. 211; 139 L.T. 66.
- (11) *Re Smith, Prada v. Vandroy*, [1916] 2 Ch. 368; 44 Digest 387, 2212; 85 L.J.Ch. 657; 115 L.T. 161.
- (12) *Re Elcom, Layborn v. Grover Wright*, [1894] 1 Ch. 303; 44 Digest 380, 2144; 63 L.J.Ch. 392; 70 L.T. 54.

SUMMONS to determine whether the Finance Act, 1941, s. 25, applied to an annuity given free of tax. The facts are full set out in the judgment.

L. M. Jopling for the plaintiffs, the executors.

R. F. Roxburgh, K.C., and *A. J. Belsham* for the first defendant, the testator's widow.

C. D. Myles for the second defendants, the residuary legatees.

SIMONDS, J.: By his will, dated Mar. 23, 1936, the testator directed that his trustees should pay to his widow the sum of £500 per annum clear of all deductions whatever, whether for income tax or any other purpose. He authorised a resort to capital for this purpose and by divers directions made it clear that his first anxiety was to make ample provision for her. On Aug. 20, 1941, he made a codicil to his will and thereby, after giving certain administrative directions not touching the annuity given to his widow, he concluded with the words :

In all other respects I confirm such will.
He died on Nov. 19, 1941.

By the Finance Act, 1941, s. 25 (1), which became law between the dates of the will and codicil, it is provided that :

... any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (a) is contained in any deed or other instrument, in any will or codicil . . . and (b) was made before Sept. 3, 1939; and (c) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10s. in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

The question which I have to determine is whether the subsection which I have read covers the present case, so that the widow's annuity is to be paid to her free from income tax only to the degree permitted thereby; in other words, is the provision of her annuity a provision which is (a) contained in a will or codicil, (b) made before Sept. 3, 1939, and (c) not varied after that date? Clearly the

provision satisfies the first condition : it is contained in a will or codicil. It satisfies also the third condition, for, whether it was made before or after Sept. 3, 1939, it was not varied after that date. The question is whether it was made before or after Sept. 3, 1939.

In *Re Waring* (1), where the relevant facts were (a) a will providing an annuity dated before Sept. 3, 1939, and (b) a codicil made after that date, which, though it contained no confirmatory clause, yet had in law the effect of republishing the will, it was decided that the provision was made before Sept. 3, 1939, so that the Act applied ; but the Court of Appeal expressly left open for further consideration and decision what would be the result if the codicil contained a confirmatory clause. It was contended before me that, though this question was thus left open, the answer to it was really involved in that decision in *Re Waring* (1), for it was urged that, if a codicil has the effect of republishing a will, it is immaterial whether or not it contains a confirmatory clause and, the result in either event being the same, the decision governs equally the case where the codicil, containing no confirmatory clause, yet has in law the effect of republishing a will, and the case where it has such a clause. I cannot so easily dispose of this case. It may well be that for most purposes the result is the same for the beneficiary, whether or not there is a confirmatory clause in the codicil, so long as there is in one way or another a republication of the will ; but the presence or absence of such a clause may, as the Court of Appeal clearly thought, be material in determining by what document or documents the provision is made. I must, therefore, examine the meaning and effect of such a clause in the light of recent authorities.

To clear the path I must say a few words about republication of wills. Generally it may be said that a republication of a will takes place when it is re-executed or confirmed in such a way as to acquire some force or efficacy which it did not previously possess. Specifically and more commonly the expression is used, as it was used by LORD GREENE, M.R., in *Re Waring* (1), to indicate what is sometimes called constructive republication, which takes place where a testator makes a codicil or executes some testamentary instrument from which the inference can be drawn that he wishes it to be read as part of his will : see JARMAN, 7th Edn., Vol. 1, p. 184.

If a testator thus shows that he wishes his codicil to be read as part of his will, it follows that he is re-asserting his testamentary intention. He is republishing his will. By a somewhat artificial doctrine the result of such republication was that for certain purposes the will was construed and took effect as if it had been executed at the date of republication : see SIR WILLIAM GRANT'S exposition of the law in *Pigott v. Waller* (2).

The republication of a will did not always and for all purposes have this effect. Whether it did so or not was a question of construction : see *Doe d. York v. Walker* (3), where for this purpose great importance was attached to the words :

In all other respects I ratify and confirm my said will.

The important point for the purpose of the present case is that, whether or not the inference of republication of a will is to be drawn from a codicil, it is impossible to say that a provision, which is found in the will and in the will alone, can inferentially or notionally or by any means be imported into the codicil, unless the codicil itself contains words which express the testator's testamentary intentions.

The last words which I have read state the real problem which I have to solve. If the effect of the confirmatory clause is the same as that of any constructive republication, that is, the will is to be construed and take effect as if it had been re-executed on the date of the codicil, it is clearly impossible to say that the provision is, for the purpose of the Finance Act, 1941, s. 25 (1), made not in the will but in the codicil. The provision was not in fact made by the codicil and the will was in fact made before Sept. 3, 1939, however much it may, for certain purposes, be construed as if it had been re-executed at a later date. If, on the other hand, the true meaning of a confirmatory clause is that it is to be read as if the testator had written out anew in the codicil itself the words of his will with such alterations as were therein contained, it can, I think, be said that the provision is contained in the codicil, for the testator is there, in his codicil, expressing in shorthand his testamentary intentions. The codicil is the final

expression of his whole will. I must then turn to the authorities to find what guidance I may, observing, however, that the question that I have to consider was in none of them the real question for decision.

In *Anderson v. Anderson* (4), the testatrix gave a share of her residuary estate to B., whose wife was one of the attesting witnesses. The bequest to B. under the will was, therefore, void. The testatrix made a codicil, by which, after giving certain directions not touching this bequest, she confirmed her will in other respects. B.'s wife did not attest this codicil. It was held by SIR JAMES BACON, V.C., that the codicil had the effect of republishing and incorporating the will so as to render the gift to B. valid. The important words are "incorporating the will." They are thus expanded by SIR JAMES BACON, V.C., at p. 387 :

Suppose that, by the codicil, she had said : " I am aware that my will is so erroneously attested as that my son's legacy will be forfeited, and to prevent that I execute this codicil, and do thereby confirm my will." There can be no doubt that she was competent to do this up to the latest moment of her life. I am of opinion that she has done this by the duly executed codicil ; that the whole contents of the previously existing will were incorporated in the codicil . . .

This, the first of the cases that I cite, has never, I think, been the subject of adverse comment and affords the nearest analogy to my present problem.

In *Re Blackburn* (5), the facts were that under an ante-nuptial settlement the survivor of husband and wife had, after the decease of the other of them, a testamentary power of appointment among their children. During the life of the wife, the husband made a will containing a residuary devise and bequest in favour of his children of all property which he might be possessed of or over which he might have power of bequest or disposal at the time of his death. After the death of his wife he made a codicil confirming his will. It was held by NORTH, J., that, though he could not exercise the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will and the power had been duly exercised. At p. 78 he said :

But I think the codicil had the effect of repeating the will, and making it as good and effectual as if it had been executed for the first time after the death of the wife. In other words, the codicil has the same effect as if the very words of the will were repeated in it.

Here, I think, is strong support for the view that it is the codicil with its confirmatory clause which contains the testator's testamentary disposition.

In *Re Champion* (6), NORTH, J., again discussing a confirmatory clause, said, at p. 109 :

It is settled by authority that the effect of such a phrase as, " I confirm my will in other respects " is a republication of the will, and when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.

It may fairly be observed that NORTH, J., is there discussing the result of republication generally rather than of a confirmatory clause in particular. His decision was affirmed on appeal.

In *Re Rayer* (7), a testator by a will made in 1882 gave certain annuities in succession, charging them on real estate and directing that they should be paid without any deduction except for legacy duty and income tax. By a codicil made after the passing of the Customs and Inland Revenue Act, 1888, he made certain immaterial dispositions and in all other respects confirmed his will. By that Act legacy duty was abolished and succession and other duties substituted for it in respect of such annuities. The testator died in 1892. An annuitant died in 1900, and thereupon certain reversionary annuities became payable, upon which succession duty and additional estate duty were exigible. The question arose who was liable to pay them ? FARWELL, J., at p. 688, cites the passage that I have already quoted from the judgment of NORTH, J., in *Re Champion* (6), and proceeds :

Therefore I have, I apprehend, to treat this case as though there had been simply a devise after the Act of these rentcharges or annuities with a direction in the words that I have read that they are to be paid without any deduction except for legacy duty.

And then at p. 689 he said :

. . . but the joint effect of will and codicil is that I have a document directing payment

of a rentcharge "without any deduction except legacy duty," made at a time when there was no duty called by that name, but another duty recently substituted for it called succession duty.

He decided that "legacy" must be regarded as *falsa demonstratio* and that the rentcharges were subject to deduction of succession duty. It may be that FARWELL, J., would have reached the same conclusion if, without an express confirmatory clause, there had been republication of the will by a codicil; but it is perhaps significant that he regarded the will and codicil as "a document" executed at the date of the codicil. A

In *Re Fraser* (8), where a testator made a will and numerous codicils, by the last of which he expressly confirmed his will as altered by prior codicils, STIRLING, L.J., delivering the judgment of the Court of Appeal, said, at p. 734 :

The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils. B

The same observation may perhaps be made: that the mind of the court was not directed to the question whether the result of a confirmatory clause is that the will is incorporated in the codicil or that the will is to be regarded as re-executed at the date of the codicil.

Re Hardyman (9) is interesting only because, though there the codicil appears to have contained no confirmatory clause, ROMER, J., relied on some of the authorities to which I have referred as stating generally the result of republication of a will by a codicil. It throws no light on my problem. C

In *Re Reeves* (10), where there was a confirmatory clause, RUSSELL, J., after an examination of the authorities (including *Re Hardyman* (9), which he does not differentiate) concludes, at p. 358 :

If I follow the principle laid down in *Re Champion* (6) and *Re Fraser* (8) and applied in *Re Smith* (11) and *Re Hardyman* (9), and read this will and codicil as one document, dated Feb. 10, 1926, the date of the execution of the codicil, there is a bequest in favour of his daughter of "my present lease," the present lease being that dated Dec. 31, 1923. D

That principle RUSSELL, J., followed and applied.

It remains only to refer to *Re Elcom* (12), to which reference was made in *Re Waring* (1). There the question was whether an assignor became entitled to certain property under an instrument made after Dec. 31, 1857, her title in fact arising under a will made before that date by a testatrix, who made a codicil, after that date, which republished the will, and died in 1886. The codicil had no confirmatory clause and the case is, therefore, no authority upon the meaning and effect of such a clause. Reliance was, however, placed on certain *dicta*. E

At p. 307, CHITTY, J., said :

The codicil is expressed to be a codicil to her last will and testament. It does not in terms confirm her will, but, as was admitted on both sides in the argument, nothing turns on that circumstance. F

In the Court of Appeal, LINDLEY, L.J., said at p. 312 :

She did not in terms republish her will; but that, in my judgment, is quite immaterial.

It is, I think, well arguable that these observations are not so much directed to the effect of a confirmatory clause in a codicil as to the general doctrine of republication and amount to no more than a re-assertion of the well-established principle that, with or without express confirmation, there can be constructive republication; but, however this may be, I am free to form my own judgment on the matter before me. G

The conclusion to which I come is that the presence of a confirmatory clause distinguishes the present case from *Re Waring* (1), and that here the provision of the widow's annuity was made not before but after Sept. 3, 1939, or, in other words, it was contained in a document, the codicil, which was made after that date or, if not, was made in two documents, the will and the codicil, which are to be regarded as one document made at the date of the codicil. H

In coming to this conclusion I get some assistance from *Anderson v. Anderson* (4) and *Re Blackburn* (5). Just as the testator in the former case, in order to avert the ill consequences of the Wills Act, confirmed her will by a duly executed codicil, so here the testator, by a codicil executed after Sept. 3, 1939, confirming his will made before that date, averted the consequences attaching to documents

made before that date ; and just as in *Re Blackburn* (5) the codicil was to be read "as if the very words of the will were repeated in it," so here the codicil is to be similarly read. If they are so read, the provision of the annuity is contained in the codicil.

I am conscious that the distinction is a fine one, but it is, I think, a real one. A testator, by using such words as "I confirm my will in other respects," is giving formal expression to his testamentary wishes. The fact that he makes a codicil shows that he is reviewing his testamentary dispositions and, reviewing them, he in effect says: "This and this I want to alter; this and this I want to stand." He is there and then stating by reference to an existing and identifiable document his last and final wishes. He is, in fact, making his last will. If, as here, it is made after Sept. 3, 1939, the statute has no application.

Declaration accordingly.

Solicitors : *Payne & Co.* (for the plaintiffs and first defendant) ; *Peacock & Goddard* (for the second defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

Re A DEBTOR (No. 4 of 1942), THE DEBTOR v. THE PETITIONING CREDITORS AND THE OFFICIAL RECEIVER.

[CHANCERY DIVISION (Lord Clauson and Farwell, J.), December 14, 1942.]

Bankruptcy—Bankruptcy notice—Extension of time for service—Whether notice of extension must be given to debtor—Bankruptcy Rules, 1915, r. 142.

Emergency Legislation—Bankruptcy notice—Application to liabilities adjustment officer—Registrar's discretion to stay proceedings—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), ss. 3, 20 (3).

Leave to extend the time for service of a bankruptcy notice was given by the court, but no notice was given to the debtor that such leave had been given, and the debtor contended the bankruptcy notice was void and ineffective. When the petition was heard by the registrar, application was made to stay the proceedings under the Liabilities (War-Time Adjustment) Act, 1941, s. 20 (3) on the ground that the debtor was availing himself of the services of the liabilities adjustment officer. The registrar refused to stay the proceedings on the ground that it was not the type of case contemplated by the Act, and the application was merely a device to gain time :—

HELD : (i) there was no rule that a bankruptcy notice must convey to the debtor that the time for service had been extended, and, therefore, the notice was good.

(ii) the registrar has a discretion whether he will stay proceedings under s. 20 (3) of the 1941 Act, and, in the circumstances, he exercised that discretion rightly.

[EDITORIAL NOTE. The first point in this case is a new one and is quite short. It was suggested that the debtor was entitled to be informed in a case where an extension of time has been obtained for the service of a bankruptcy notice and, if the creditor failed to inform him of that fact, he was entitled to ignore the notice and treat it as served out of time. The court, however, has decided that, where leave has been obtained, the service is good and the debtor, if he had any grievance, should have moved the court to set the notice aside and not have treated it as void. The second point is purely one of fact and discretion, but will be found of importance to those advising persons contemplating taking advantage of the Liabilities (War-Time Adjustment) Act, 1941.

AS TO EXTENSION OF TIME FOR SERVICE, see HALSBURY, Hailsham Edn., Vol. 2, p. 45, para. 54 ; and FOR CASES, see DIGEST, Vol. 4, pp. 98, 99, Nos. 882-892.]

APPEAL from a decision of the registrar at Stockport County Court. The facts are fully set out in the judgment.

V. R. Aronson for the appellant.

P. B. Morle for the respondents.

LORD CLAUSON : In this case the person whom it is sought to make bankrupt suffered a judgment on July 29, 1940, for £5,823 14s. 6d. The judgment was in respect of an overdrawn current banking account and interest. In due course application was made to the master for leave to proceed upon that judgment. The master gave something in the nature of conditional leave, and

there was an appeal to LEWIS, J., who, on going into the circumstances, was satisfied that it was a case in which unconditional leave should be given and, accordingly, unconditional leave was given. As a result of that a bankruptcy notice was issued. The bankruptcy notice was not served within 1 month after its issue. We have not been told the reason for the failure to serve the notice, but after the 1 month had expired an application was made to the court and the court in fact extended the time so as to enable the bankruptcy notice to be served after the expiration of 1 month from its issue and it was then duly served. A

The first objection taken is that it was not properly served. In the first instance that is quite plainly wrong, because it was served in accordance with the Bankruptcy Rules, 1915, r. 142; that is, it was served within the extended time which the court had the power to grant and did grant. The real point is that the debtor contends that the rule means that the bankruptcy notice must be served within 1 month from the issue thereof unless it appears, from an indorsement upon it or otherwise notice is given to the debtor, that the time has been extended by the court which issued it. Accordingly, the debtor suggests that, owing to the fact that there was no such intimation to him, he is entitled to treat the bankruptcy notice (I use his own language) as void and ineffective. That does not seem to me to be right at all. He ought to attend on the bankruptcy notice. It is quite plain when he receives it that it has been served on him a month beyond the right time. If that is so, and he conceives that he has suffered some grievance, his right course is to go to the court to have the service set aside or, if it turns out that leave was given to extend the time, to argue that the leave given *ex parte* was not properly given, and that the leave ought to be rescinded or that some further time should be allowed, or something of that sort. But I demur completely to the idea that, because he thinks there may be some irregularity or because he has not been notified of the exact order made extending the time, he is entitled to disregard the document. B C D

Counsel for the appellant, if I may respectfully say so, with characteristic skill and pertinacity, turned to various analogies—because it is admitted that there is no authority dealing with this particular point—and he referred to the well-known practice in the Chancery Division that when a judge has given leave to serve short notice of motion it is incumbent on the man who wishes to proceed with that notice of motion to show not only that, after quite clearly stating it was short notice he was asking for, he obtained from the judge leave to serve short notice, but also that it had been intimated to the respondent to the motion that such leave had been obtained. That practice was laid down many years ago and is a well understood practice and accordingly now, if the intimation that the leave was to serve short notice is not given, the court makes it a practice to refuse to deal with the motion on such short notice and allows the motion to stand over so that the man may have proper time, because it has been held that it is the duty of the plaintiff to tell him all about it. No such practice has been laid down with regard to bankruptcy notices. I am not aware, after a good many years' experience in bankruptcy, that any such practice exists. Counsel told us (and I have no reason to doubt it) that careful practitioners, in fact, when time has been extended, do notify the debtor of the order extending the time for service of the bankruptcy notice, and that is a very desirable practice. That that is a good practice to pursue is one thing: but to say that a man served with such a solemn document, issued by the court, as a bankruptcy notice, is entitled to disregard it entirely because he has not been told in so many words exactly how the time for service was extended, seems to me to be quite wrong, and I think it would be most unfortunate if practitioners supposed that any such rule as that existed. So far as that point is concerned, I feel quite satisfied that the point is taken not because of any grievance or of the fact that the absence of the notice in any way prejudiced the debtor. It has been taken simply as a point to cause delay, as a device to gain time. E F G H

That is the first point, and, in my view, the registrar of the county court was perfectly right in saying that the point was taken as a device to gain time. I only want to add that, if there was the faintest evidence or suggestion that even some inconvenience, certainly that some injustice, had been occasioned to the debtor by the fact that he was not fully informed of the details of the application which resulted in time being extended, the court would, of course,

pay the utmost attention to it. It is not suggested for a moment that there is any merit in the point ; it is the driest technical point, and, in my view, technically it is wrong.

The next point is this. On Nov. 12 the petition came on. Nothing was said then ; it was adjourned. It came on again on Nov. 19, and then the registrar read to the parties a letter which he had received from the Liabilities Adjustment Officer, London (Central) Offices. It was in these terms :

- A *Re* [the name of the debtor is mentioned] An application has been made by this debtor for advice and assistance in regard to his affairs. He informs me that a petition in bankruptcy filed by the National Provincial Bank comes on for hearing on the 19th instant. Although I have not had an opportunity to inquire very deeply into the debtor's affairs, from the information before me it would appear to be a case in which a protection order can be made. I have, therefore, advised him to make an application to you for a stay of proceedings under the Liabilities (War-Time Adjustment) Act, 1941, s. 20 (3), and at the same time to set down an application at the Westminster County Court for a protection order. If such an order is made you will in due course be advised of the reasons for such order.
- B

The Liabilities (War-Time Adjustment) Act, 1941, s. 20 (3), says this :

Any court before which are pending any proceedings in respect of a debt or liability which would be a debt provable in liabilities adjustment proceedings, may stay the proceedings (a) on the ground that the debtor or defendant is availing himself of the services of a liabilities adjustment officer with a view to arriving at a scheme of arrangement with his creditors ; or (b) for the purpose of enabling the debtor or defendant to avail himself of the services of a liabilities adjustment officer or to make an application to the court for the adjustment and settlement of his affairs under this part of this Act.

On being satisfied that it was a proper case, the registrar would undoubtedly have had jurisdiction to stay the proceedings.

- D I ought to mention that it appeared that the debtor had made a previous application in Manchester, and it will be observed that the application in London was not mentioned until the second hearing of the petition, namely, on Nov. 19. So far as I can gather from the evidence, nothing further has been done about the application in Manchester. The registrar expresses the view which he took in this way :

In view of the fact that no mention was made on last hearing of an intended application to the liabilities adjustment officer in London and that a previous application had been made to the liabilities adjustment officer in Manchester, I regarded this merely as a device to gain time, particularly since on both previous hearings the debtor had spoken only of a proposed settlement of the claim of the petitioning creditor : furthermore, on evidence given I was not satisfied that the debtor had brought his case within the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (1).

- E I sympathise with the registrar. I think that the evidence by which it was sought to bring the case within the Liabilities (War-Time Adjustment) Act, 1941, s. 3, was, to say the least of it, exceedingly vague. This is not a case in which an unfortunate man has, owing to the war, found that some business he has been carrying on has been prejudiced. As I gather from counsel, this gentleman's avocation in life is to buy properties and deal with them as occasion requires : in fact, he is a speculator in valuable properties.
- F

Accordingly, I am by no means satisfied that the registrar was wrong in refusing to be satisfied that the debtor had brought his case within the Liabilities (War-Time Adjustment) Act ; but, even if he had, this court has a discretion about the matter. The registrar has a discretion. He exercised his discretion in favour of allowing the bankruptcy proceedings to go on. In my judgment, he exercised his discretion perfectly rightly. If I had been sitting in his place, I must confess I should have exercised my discretion in precisely the same way. The Liabilities (War-Time Adjustment) Act is a most useful Act and has been most useful in many circumstances ; but I very much doubt whether a case of this kind, with the type of man who has an overdraft of £5,000 at the bank, is the type of case which the legislature envisaged at all in connection with that Act. However that may be, I feel satisfied that there is no reason why, in the case of this particular debtor, the ordinary proceedings in bankruptcy should not proceed in due course. They will be far more convenient and satisfactory than if an attempt is made by a somewhat informal and domestic procedure under the Liabilities (War-Time Adjustment) Act to deal with matters which I should have thought were quite unfitted to be dealt with in that sort of way.

G

H

So far as I am concerned, I take the view that the registrar of the county court was perfectly right and that this appeal should be dismissed with the usual results.

FARWELL, J. : I agree with everything that LORD CLAUSON has said, and I do not desire to add anything.

Appeal dismissed with costs.

Solicitors : *Tobin & Co.* (for the appellant) ; *Wilde, Sapte & Co.* (for the respondents).

[Reported by IRENE G. R. MOSES, *Barrister-at-Law.*]

HICHENS HARRISON WOOLSTON & CO., v. JACKSON & SONS.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **October 30, November 2, December 4, 1942.**]

Stock Exchange—Broker and client—Vendor repudiating contract—Broker replacing stock—Broker's claim to indemnity—Principal's duty to indemnify broker.

Solicitors were about to levy execution upon a judgment when they received from the daughter of the defendant in the action the certificate of certain stock in the Bristol Waterworks Co., the intention being that the stock should be sold and the proceeds applied in payment of the judgment and costs. The solicitors, the present respondents, then wrote, on their usual headed notepaper, to the appellants, who were stockbrokers on the London Stock Exchange, giving them instructions to sell and enclosing the certificate for the stock and a blank transfer which had been sent to them by the owner of the stock. The appellants, having found a purchaser, sent a contract note, "Sold for account of Messrs. Jackson & Sons, Miss A. E. Lucas." Miss Lucas was the holder of the stock. The appellants, in fact, sold the stock on the Bristol Stock Exchange, but Miss Lucas subsequently repudiated the contract and asked the Bristol Waterworks Co. to return the certificate. The company thereupon refused to register the purchaser as the holder of the stock. In these circumstances, the appellants, holding themselves bound by the London Stock Exchange Rules, r. 120, to replace the stock and to obtain a clean transfer, sued the appellants to recover their expenses in so doing :—

HELD : (i) at common law, apart from the Stock Exchange regulations, the appellants were entitled to be indemnified against the loss they had incurred by not being in a position to complete the contract of sale which they had made on the respondents' instructions.

(ii) when a person contracts to sell shares which are registered in some other person's name, it is the seller's duty under the contract to deliver a transfer executed by a transferor who is, and will continue to be, ready and willing that the transfer shall be duly registered in the transferee's name.

(iii) the respondents were acting in this matter as principals.

Decision of COURT OF APPEAL ([1941] 2 All E.R. 704) *reversed and decision of VISCOUNT CALDECOTE, L.C.J.* ([1941] 1 All E.R. 562) *restored.*

[EDITORIAL NOTE.] Although these proceedings are between a firm of stockbrokers and a firm of solicitors who had instructed them to sell certain stock, the real issue is what was the duty of the stockbrokers to the ultimate purchaser of the stock. It is essential that the purchaser shall be registered as the proprietor of the stock purchased, and the question was whether, in a case where the company refused to register the purchaser, that was a matter for the purchaser to take up with the original vendor or whether it was a part of the duty of the stockbroker selling the shares to tender shares which the company would be willing to register in the purchaser's name without question. In the language ordinarily used in respect of such transactions, had the stockbroker to tender a clean transfer. The vendor does not guarantee registration, but he must

do everything necessary to place the purchaser in a position to insist upon registration. VISCOUNT CALDECOTE, L.C.J., had held that they were bound to do so under the Stock Exchange Rules, r. 120. The House of Lords have carried the matter a stage further and hold that they are bound to do so at common law. Thus, where a difficulty arises in securing registration of the shares, it is not for the purchaser to bring proceedings against the vendor if he is preventing the registration, but it is the duty of the vendor to obtain other shares the registration of which can be secured. The vendor in such a case will generally be a stockbroker, in fact acting as the agent of the real vendor, but for such purposes to be treated as a principal. The duty as between vendor and purchaser being decided, it was clear that the stockbrokers were entitled to an indemnity from the persons instructing them to sell.

AS TO OBLIGATIONS OF THE VENDOR OF STOCK OR SHARES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 620, 621, para. 893; and FOR CASES, see DIGEST, Vol. 42, p. 827, Nos. 360-364.]

Cases referred to :

- (1) *London Founders Assocn. v. Clarke* (1888), 20 Q.B.D. 576; 9 Digest 353, 2232; 57 L.J.Q.B. 291; 59 L.T. 93.
- (2) *Skinner v. City of London Marine Insurance Corpn.* (1885), 14 Q.B.D. 882; 9 Digest 350, 2216; 54 L.J.Q.B. 437; 53 L.T. 191.
- (3) *Stray v. Russell* (1859), 1 E. & E. 888; 42 Digest 827, 360; 28 L.J.Q.B. 279; 1 L.T. 162; *affd.* (1860), 1 E. & E. 916.

APPEAL by the plaintiffs from a decision of the Court of Appeal given on July 3, 1941, and reported [1941] 2 All E.R. 704, reversing a decision of VISCOUNT CALDECOTE, L.C.J., given on Mar. 12, 1941, and reported [1941] 1 All E.R. 562. The facts are fully stated in the opinion of LORD ATKIN.

D. N. Pritt, K.C., and *H. G. Robertson* for the appellants.

F. A. Sellers, K.C., and *Ivan Horniman* for the respondents.

LORD ATKIN : My Lords, this is a case arising out of a sale of shares by the appellants (the plaintiffs), a firm of stockbrokers, members of the Stock Exchange, London, who allege that they were employed by the defendants to make the sale, that by reason of the defendants' default in completing the sale they have incurred liability to the ultimate purchaser, and they seek indemnity accordingly. The amount concerned is relatively small, £396; but in the result the case has come to involve issues important to all persons who buy and sell shares, and it is well that it should have come up for consideration by this House. The facts require to be stated in some detail: they are not in dispute, and once fully appreciated they seem to lead to an inevitable result.

The respondents, the defendants in the action, are a firm of solicitors practising at Ringwood in Hampshire, and in 1939, acting for a client, Etchells, had obtained judgment for £186 and costs in a claim for mesne profits against a Mrs. Lucas, a tenant of the then plaintiff. Execution was levied and the goods were about to be removed for sale when Miss Lucas, a daughter of the then defendant, by letter of April 25, 1939, surrendered a certificate in her name of £250 ordinary stock in the Bristol Waterworks Co., on the terms that the stock should be realised and the balance, after paying the amount due on the *fi. fa.* should be returned to her. At the request of the defendants she signed a blank transfer of the stock, and on April 25, the defendants sent written instructions to sell the stock to the plaintiffs, whom they had frequently employed before both for themselves and for clients. With the instructions they enclosed the blank transfer and the certificate for the stock. As one of the questions in the case is whether the defendants became personally liable as principals of the plaintiffs in this transaction, it is desirable to set out the letter dated Apr. 25, 1939, containing those instructions and sent by the respondents to the appellants :

We enclose herewith certificates for £250 consolidated ordinary stock in the Bristol Waterworks Company together with blank transfer duly executed. We shall be obliged if you will realise the stock for the best price obtainable and let us have cheque in due course.

On receiving these instructions, the plaintiffs made inquiries and found that the only effective selling market at the time was Bristol, and accordingly arranged with Messrs. E. J. Evans & Co., a firm of brokers, members of the Bristol Stock Exchange, to sell the shares for them, which they did at 147½, realising a net sum of £368 5s. Being advised by telegram of this sale, the plaintiffs on Apr. 26, wrote to the defendants a letter headed A/c Miss A. E. Lucas, acknowledging

their letter of April 25, and enclosing contract note for the sale. The contract note, so far as is material, is in these terms :

Sold for account of Messrs. Jackson & Sons.

Commission divisible with the above firm.

Miss A. Lucas.

250 Bristol W. Co. Cons. Ord. Sk.

368 5 0

(To a Non-Member).

Settlement 11.5.39.

Commission 1 16 10
Contract Stamp 1

1 17 10 A

366 7 2

Subject to the rules and regulations of the London Stock Exchange.

HICHENS HARRISON WOOLSTON AND CO.,

Members of the Stock Exchange, London.

Messrs. Evans on their part had sold the shares to Messrs. Grace Darbyshire and Todd, a firm of chartered accountants, who appear to have been acting for Mr. R. J. Fry. On April 26 they rendered bought and sold notes to Messrs. Grace Darbyshire & Todd and Messrs. Hichens Harrison & Co., respectively, in ordinary form. The sold note was addressed to Messrs. Hichens Harrison & Co. and was in the following terms :

We beg to advise having sold on your account, subject to the rules of the Stock Exchange.—Brokers contract. E. J. EVANS & Co., Members of the Stock Exchange, Bristol.

On May 11 the plaintiffs, having apparently received from Messrs. Evans the name of R. J. Fry as the purchaser, sent to Messrs. Evans the transfer completed with the purchaser's name, together with the certificate. The next day Messrs. Evans sent the purchase price to the plaintiffs, who on May 11 had sent their cheque to the defendants in a letter headed A/c Miss E. A. Lucas. They received an acknowledgment from the defendants dated May 12 in a letter headed : "*Etchells v. Lucas*. Account Miss E. A. Lucas."

On May 12 the defendants sent an account to Miss Lucas with a cheque for £148 11s. 2d., the balance of the proceeds of the stock after deducting judgment debt, costs and charges. On May 15, however, Mrs. Lucas wrote to the defendants returning the cheque in favour of her daughter and said in a somewhat incoherent letter :

You have not sold my daughter's shares. I am making her return this cheque. You will be good enough to send her the script back at once. On May 19 trouble began. On that day Miss Lucas wrote to the Bristol Waterworks Co. :

I am writing to ask you to hold up the sale of my shares till you hear from my solicitors. and Mrs. Lucas wrote to the defendants :

I have stopped the sale of my daughter's shares until the case against *Etchells* comes into court.

On May 24 Miss Lucas wrote to the Waterworks Co. :

I shall be obliged if you will return the script of my shares. The matter has been settled out of court, and there remains nothing but for me to ask you to return this to me personally.

And on June 4 Miss Lucas writes a letter to Mr. Picken, apparently the registrar of the Waterworks Co. :

My signature on the transfer deed is authentic, but it was obtained under fraud and compulsion.

This letter was sent to Mr. Picken under a covering letter from Mrs. Lucas. As a result the company wrote to Messrs. Evans on June 6, saying that, with reference to their letter of May 17 enclosing transfer Lucas to Fry and certificate, a letter purporting to be signed by the transferor had been received containing objection to registration and that the directors would probably decide to decline registration until any doubts concerning the transfer had been disposed of. On receipt of this Messrs. Evans naturally write to Messrs. Hichens asking them to put the matter right by return of post ; Messrs. Hichens pass this on to the defendants : the defendants are sorry that the plaintiffs have been troubled ; they give an account of their possession of the certificate and transfer and trust that this will be sufficient to enable the transfer to be proceeded with in the usual way. The plaintiffs pass this on to the Waterworks Co., who write on,

June 12 that in view of the objections which the transferor had made to registration, registration must be deferred until all doubts concerning the matter had been dispelled. This is passed on by the plaintiffs to the defendants "for your attention." In the meantime Messrs. Evans had received a similar instruction from the company, which they pass on to the plaintiffs: "We shall be glad, therefore, if you will take steps to put the matter in order immediately." Some delay was arranged between the parties on the footing that the defendants were taking steps to have the matter put right, but the defendants failed to induce Miss Lucas to withdraw her objection. Counsel's opinion was being obtained by the defendants, and on June 24 Messrs. Evans write to the plaintiffs that they will allow this matter to stand over for one week further, but cannot let the matter remain unsettled beyond that date. Eventually on July 6 the defendants write that the effect of counsel's opinion is that the matter is one entirely between the purchaser of the stock and Miss Lucas, to which the plaintiffs

A reply that the purchaser is a member of a stock exchange, and according to the rules of the Stock Exchange will in default of delivery of the stock buy in against us as your agent. Any loss involved in this transaction will be payable by you as our principal. The matter then comes into the hands of the plaintiffs' solicitors. Meanwhile Messrs. Evans had written to the plaintiffs on July 7 that they understood from a previous telephone conversation that it was intended to repurchase other stock to substitute the stock in question, and on July 11,

C the plaintiffs wrote to Messrs. Evans that they had that day been able to repurchase £250 Bristol Waterworks ordinary stock which was outstanding, and hoped to make delivery to Messrs. Evans when received from the market. The stock was repurchased for a sum of £372 2s. 6d., which is the amount which the plaintiffs now claim. Finally, on July 31, Messrs. Evans wrote asking whether the plaintiffs could then deliver the £250 stock in substitution; stating that the

D buyer insisted on the matter being cleared up by the end of the previous week; and in a letter dated Aug. 8 the plaintiffs enclosed the duplicate transfer deed and presumably the certificate.

The first question that has to be settled is whether the defendants are liable as principals to the plaintiffs. They say that the plaintiffs knew that the defendants were acting for a client, that the heading of the correspondence "A/c Miss Lucas" indicates their intention to deal only with the defendants

E as agents, that the part commission was divided with them further indicates that they were treated as agents, and the fact that they enclosed a blank transfer signed by Miss Lucas shows that they were disclosing a named principal. But in my opinion none of these facts is of any avail to displace the written authority contained in the letter from the defendants, dated April 25, and the terms of the contract note sent to the defendants, and accepted by them. The letter of

F authority is signed by the defendants without any qualification. I doubt whether any evidence is admissible to contradict it. But the fact that the plaintiffs supposed that the solicitors were acting for a client, or knew that they were, or even knew that the client was Miss Lucas (which is certainly doubtful) would have no effect to indicate that the plaintiffs were regarding the defendants as anything but principals as against them. It is the commonest occurrence

G in business for known agents known to be acting on behalf of a principal to contract in their own names; often indeed because they desire not to disclose their principals to a rival in business. Mr. Whitehead, the plaintiffs' partner reasonably explained the reference to a/c Miss Lucas as mere identification of the transaction, and the share of commission by reference to the firms' practice to treat all clients who normally acted on behalf of their own principals as being agents unless they disclosed that the transactions were their own personal account in which case the brokers were precluded by the rules of the Stock Exchange

H from dividing the commission. The transfer from Miss Lucas signified nothing at all except that the solicitors had the right to have her stock conveyed. Both VISCOUNT CALDECOTE, L.C.J., and the Court of Appeal were in favour of the plaintiffs on this point; and I entertain no doubt that they were right.

The Court of Appeal, however, came to the conclusion that the plaintiffs had incurred no legal liability to the Bristol purchaser, and that, therefore, no claim for indemnity arose. As to this there seems to have been some misunderstanding in the Court of Appeal of the case made by the plaintiffs. MACKINNON, L.J., states that the whole basis of this claim rests on the allegation

that it was the duty of the defendants not merely to hand over a transfer valid in form with a certificate for the shares, but also to secure or guarantee that the transfer would be eventually registered by the company in the name of the purchaser. This claim he very satisfactorily demolished showing by authority that for the last 80 years it has been held that the vendor on a sale of shares does not guarantee registration. But the appellants maintained in this House that they had never made such a case in the Court of Appeal. This seems to be borne out by the opening words of *DU PARCQ, L.J.*, at p. 711 :

It is clear that the defendants performed their duty when they handed over to the plaintiffs, acting for the transferee, a duly executed transfer, together with the certificate. They were under no duty to procure the registration of the transfer, and it is not contended that they were.

One may pause to say that the defendants did not hand over to the plaintiffs, acting for the transferee, the transfer and certificate. The plaintiffs were the brokers acting for the sellers, and in no sense and at no time acted for the transferees. *DU PARCQ, L.J.*, went on to give judgment in favour of the defendants on the ground that, while it was the duty of the seller to do nothing to prevent the registration of the purchaser's name, no such duty attached to him so far as interference by the transferee was concerned. *BENNETT, J.*, took the same view.

My Lords, the obligations arising on an agreement to sell shares or stock have been firmly settled for a number of years, and the passage cited by *MAC-KINNON, L.J.*, from *London Founders Assn., Ltd. v. Clarke* (1), at p. 709, is as good an authority as any :

... the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser.

In other words he has to do all that is within his power to enable the purchaser to secure the object of his purchase, viz., to put himself into legal ownership of the shares. Of course, he does not guarantee that the company will not in the exercise of discretion, or for some reason independent of himself, decline to place the purchaser's name in the register of members. It appears to me unnecessary and, perhaps, misleading to express the obligation of the vendor in terms of a warranty or warranties. It is an obligation arising directly out of the contract of sale that he will furnish the purchaser with a valid transfer and be and remain willing up to registration that, so far as he is concerned, the purchaser shall have the benefit of the transfer. If this is so, it seems to me to be entirely incongruous that the contract of sale should not involve an obligation on the part of the vendor that the transferor should equally be and remain willing, so far as he is concerned, that the purchaser should have the benefit of the transfer. Where the stage of registration is concerned, the transferor holds the field : the vendor if not the transferor has no relations with the company, and as against the company has no locus of objection to registration. If the vendor be himself the transferor *cadit questio* : everyone is agreed that he must not object to registration. But how is his burden lessened if he completes his contract by tendering a transfer not by himself but by someone of whom the purchaser knows nothing except that he is the owner of the contractual number of shares and with whom the purchaser may have, and in most cases has, no kind of contractual relation except such as may arise from the transfer itself. The transferor may be a nominee of the vendor, he may be a person who has signed a transfer in blank with the object that the vendor may realise the shares for himself. How could business be carried on if the vendor could say : "True, I must not object to registration : but I offer you a transfer from another owner ; on receiving that transfer with certificate you must pay me : but the person whose transfer I have given you in performance of my contract may forthwith do all he can to prevent you getting the legal right to the shares, and I shall hold on to the price leaving you to bring a lawsuit against my transferor." My Lords, it seems to me clear, that the obligation expressed by *LORD ESHER, M.R.*, in the passage I have cited applies to the seller's transferor as well as to the seller, and in my opinion, if it became important, applies to him even more rigorously than to the seller, for it is his objection which at that stage counts. I think, therefore, that the true view is that the defendants who are sellers in this case did not, as they were bound to do, put the plaintiffs in the position to

complete the contract of sale which they had employed the plaintiffs to effect and that they are obliged to indemnify the plaintiffs from the result of such breach.

For this result I have assumed, in accordance with the first part of this opinion, that the defendants were principals of the plaintiffs in the sale which the plaintiffs made through Messrs. Evans. There was nothing proved in this case either in the rules of the Stock Exchange, London, or in the rules of the Bristol Stock Exchange, that the plaintiffs in the transaction that took place, took the part of being vendors to Messrs. Evans. The latter rendered bought and sold notes in the ordinary form expressing the contract to be "brokers contract." But the plaintiffs were clearly on the Bristol documents the vendors of the shares and they assumed liability as vendors to Messrs. Evans' ultimate purchasers. This contract owing to the defendants' default they were unable to complete, and the cost of buying substituted stock was the proper measure of damages for that breach, and the true measure of the indemnity the plaintiffs are entitled to recover. I have not on this reasoning found it necessary to discuss the Stock Exchange rules, or the rules of the Bristol Stock Exchange, of which no evidence was given. VISCOUNT CALDECOTE, L.C.J., decided the case in favour of the plaintiffs by reference to the London Stock Exchange Rules, r. 120, which makes the seller of securities responsible for the genuineness and regularity of all documents delivered. There is no doubt that the transaction was subject to that rule, and I have little doubt that the decision can be supported on this point. But the sale as effected with Messrs. Evans was as expressed in their contract note "subject to the rules of the Stock Exchange." I think that this must mean the rules of the Bristol Stock Exchange, but we have no evidence of what they are. Perhaps I may be pardoned for making the suggestion, founded on some little experience of these matters, that it might be as well if this Bristol contract note in future were to define the Stock Exchange whose rules are being incorporated, as is done in the case of London contract notes. As this case can be decided on principles which are not dependent on the incorporation of express rules, I prefer to deal with it in that manner. For these reasons I am of opinion that this appeal should be allowed, and the judgment of VISCOUNT CALDECOTE, L.C.J., in favour of the plaintiffs should be restored. The defendants should pay the costs in the Court of Appeal and in this House.

LORD THANKERTON: My Lords, I agree with the opinion that has just been delivered by LORD ATKIN, and in the motion proposed by him. I need add nothing on the question whether the defendants are liable as principals to the plaintiffs, but, as we are differing from the view taken by the Court of Appeal as to whether the plaintiffs are entitled to be indemnified by the defendants in respect of the loss which they have incurred, I desire to add some observations on that point.

In *London Founders Assocn. v. Clarke* (1), at p. 582, LORD ESHER, M.R., says:

... I do not think that the vendor does undertake that the company will accept the purchaser so as to make himself responsible for their refusal to do so. The purchaser takes that risk on himself, and the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser.

That is accepted as a correct statement of the vendor's duty under the contract but it is incomplete in so far as it does not expressly cover the case where the vendor is not himself the transferor, but tenders a transfer by a third party in fulfilment of his contractual obligation, as was done in the present case. But to me it is clear that the only view on this aspect of the matter that is consistent with the *dictum* of LORD ESHER, M.R., is that, if the vendor chooses to offer to satisfy his obligation by a transfer from a third party, he must take the risk of that transfer not being as satisfactory as a transfer by himself should be, because of some action by the third party which has the effect of interfering with registration. In the present case the defendants were given reasonable time to try to remove the difficulty, but they failed to get it removed, and they must stand the consequences of their adoption of the use of a third party's transfer in satisfaction of their contractual obligation.

LORD RUSSELL OF KILLOWEN [read by LORD THANKERTON]: My Lords,

a curious feature about this appeal is that, if the case for the plaintiffs rested on a proposition upon which it was apparently based in the Court of Appeal, no fault could be found with the judgments in that court in dealing with that proposition. *MACKINNON, L.J.*, at p. 708 (after stating the facts) begins his consideration of the legal position with the following observation :

The whole basis of this claim rests on the allegation that it was the duty of the defendants, not merely to hand over a transfer valid in form with a certificate for the shares, but also to secure or guarantee that that transfer would eventually be registered by the company in the name of the purchaser.

DU PARQ, L.J., and *BENNETT, J.*, agree with the judgment of *MACKINNON, L.J.*, but they also deal with another point of view, and hold that, while the respondents were bound to do nothing themselves to prevent the registration of the purchaser, they were under no obligation to see (nor did they guarantee) that the transferor Miss Lucas did nothing to prevent such registration. Again I am not disposed to quarrel with this statement.

The seller of shares is clearly not liable if, notwithstanding that the seller and transferor are both desirous that the transfer should be registered, the company refuses to register. The seller has fulfilled his contract. It is for the transferee to insist with the company on his right to registration (see *Skinner v. City of London Marine Insurance Corpn.* (2), at p. 887, and *London Founders Asscn., Ltd. v. Clarke* (1), at p. 582). The seller is under a duty to hand over what are called in *Stray v. Russell* (3) "genuine transfers and certificates," in *Skinner's* case (2) "a valid transfer" and in the *London Founder's* case (1) "the transfer and certificates of the shares in proper form."

What happened in this case was that, when the ultimate purchaser Fry, having paid his money on settlement day, applied to have the stock registered in his name, his application was refused by the Waterworks Co. in consequence of a notification by Miss Lucas that her signature to the transfer had been obtained under fraud and compulsion. In those circumstances the appellants did what I think they were both entitled and bound to do ; they bought other stock for delivery to Fry in fulfilment of their obligation to him. It is conceded that, if the appellants were under liability to Fry, they would be entitled to claim indemnity against the respondents. The crucial question may now be posed. Did the appellants fulfil their obligation as sellers of the stock to Fry, by delivering a transfer executed by Miss Lucas, which she repudiated on the ground of fraud and duress ? In my opinion they did not. Whether the allegation of fraud and duress was true or false seems to me immaterial. The duty of the seller to deliver a transfer as stated in the authorities must, in my opinion, necessarily, involve a duty on his part to deliver a transfer executed by a transferor who is, and continues to be, ready and willing that the subject-matter of the transfer be duly vested in the person named or to be named as transferee in the transfer. Unless the transferor who is so put forward is and continues so ready and willing, I cannot think that the seller has fulfilled his obligation to hand over a transfer to the purchaser.

In this case, therefore, the respondents having failed in that obligation, the appellants found themselves in breach of their obligation to Fry, and became entitled to be indemnified by the respondents. I agree that the respondents were acting as principals in instructing the appellants.

I would allow this appeal and restore the judgment of *VISCOUNT CALDECOTE, L.C.J.*

LORD WRIGHT : My Lords, I agree with the opinion just delivered by *LORD ATKIN* and also with the judgment of *VISCOUNT CALDECOTE, L.C.J.* I desire to state very shortly my view on the crucial question before your Lordships, which is one of some importance because it is as to the true construction of a contract for the sale of shares such as that now being considered.

The true issue here is whether the sellers, the appellants, who I think sold as principals under the contract though they were acting as agents in a question between them and the respondents, made a good tender of the shares to the buyer whom I shall treat as Mr. Fry. It is unfortunate that the Court of Appeal do not appear to have directed their attention to that problem. They treated the case as capable of being determined by the simple application of the well-established rules laid down in *London Founders Asscn. v. Clarke* (1), and the

earlier authorities to the same effect cited in that decision. That rule is broadly that the seller of shares in the usual way is not responsible for the registration of the shares by the company. That is a matter for the purchaser to secure. But this is only true on the assumption that the transfer tendered in fulfilment of the contract was of a character which has been characterised by various adjectives, clean, valid, genuine, regular and the like. If the transfer tendered does not satisfy that description, the tender is not good and the seller has not performed his contract. It was on this ground that VISCOUNT CALDECOTE, L.C.J., decided in favour of the appellants. He held that the appellants were bound under the contract to produce stock which could be registered in the name of the buyer and had failed to do so. I am not clear whether he so decided as a matter of common law or only on the footing of the London Stock Exchange Rules, r. 120, which applied as between the appellants and respondents, though it is not shown that a similar rule applied as between the appellants and Evans & Co., the Bristol brokers. But I think the same obligation lies on the seller according to the ordinary rules of contract at common law. A seller of shares ought in law to be held bound to tender an unexceptionable transfer.

I do not think that the matter would have been open to doubt if the defect in the transfer had been that it was forged, or had been obtained from the transferor by fraud or duress or undue influence or any other ground that would have entitled the transferor to claim to treat it as void or voidable. If when the company in the usual way notified the transferor that a transfer had been lodged and she had been asked if she objected to the transfer, the reply had been that there was an objection of the type I have indicated, it is I think clear that the registration of the transfer could not (to adopt the language of VISCOUNT CALDECOTE, L.C.J.) have been made. The directors would be entitled to refuse to register the transfer. In my opinion a transfer under these circumstances could not be regarded as valid or proper or regular or whatever epithet is chosen. The company concerned in the present case is not a limited company registered under the Companies Act but a statutory corporation. That distinction is, however, not material so far as concerns the substance of the matter, though it would affect the form of procedure which the buyer might take against the company to secure registration. He could not avail himself of the summary procedure for rectifying the register under the Companies Act, but might proceed under R.S.C., Ord. 53, and apply for a *mandamus*. But if he took either course, he might have to assume the burden of proving that the transferor's objection was ill-founded. The transferee might refuse to embark on litigation. He might in the old phrase say that he had bought shares not a lawsuit. He might prefer to insist on having the shares tendered replaced by other shares which could be registered or some analogous mode of redress. The same conclusion may be reached on the footing that the seller of shares of which he is not the registered owner, who purports to perform his contract by means of a transfer executed by the registered owner, undertakes by his contract that the transferor is at all material times ready and willing and will do nothing to prevent registration, just as a seller who is himself the registered owner is bound in virtue of his contract, to do nothing to prevent the transfer being registered.

The present case may be regarded as peculiar because of the apparently groundless and irresponsible attitude of the transferor, Miss Lucas. But her attitude clearly was that she objected to the validity of the transfer and though she admitted that she had signed it, objected that her signature had been obtained by fraud and compulsion. In fact she repudiated the transfer and, as she adhered to that repudiation, the buyer could not get his shares except under the decision of a court. In my opinion, in these circumstances the appellants came under a liability to the buyer to make amends. It is not now disputed that the course which the appellants took to satisfy that liability was proper. It is not now disputed that on the footing of that liability which was incurred by the appellants in the course of their duty as agents employed by the respondents (who it is not now disputed were their principals in the matter), the appellants are entitled to the indemnity which VISCOUNT CALDECOTE, L.C.J., held they should have.

I concur in the motion proposed.

LORD ROMER: My Lords, the appellants in para. 3 of their statement of claim, after referring to the instructions to sell contained in the letter of Apr.

25, 1939, alleged, *inter alia*, that by reason of those instructions the respondents (a) impliedly warranted and agreed with the appellants that Miss Lucas would do nothing to prevent the Bristol Waterworks Co. registering the purchaser of the £250 stock as the holder thereof (b) were under the duty to the appellants to take all steps necessary to procure such registration. These allegations were probably the reason for the case taking the course that it did before the Court of Appeal. **MACKINNON, L.J.**, held that the appellants were under no such duty as was alleged in sub-para. (b). **DU PARCQ, L.J.**, and **BENNETT, J.**, held that no such warranty or agreement as was alleged in sub-para. (a) was to be implied. I respectfully agree with all three of them; but unfortunately they omitted to deal with the real question that arises for decision in this case. The question is this. At the time that the appellants purchased the second lot of £250 stock for delivery to Fry were they under a legal obligation to Messrs. Evans & Co. so to do. If they were, they are entitled to the indemnity from the respondents that they seek to obtain in this action, inasmuch as I am satisfied that the respondents in giving the instructions of Apr. 25, 1939, did so as principals. In my opinion the appellants were plainly under the obligation that I have mentioned. I do not think that a seller of stock can be regarded as having completely discharged his duty to the purchaser by merely handing over to him a transfer of the stock duly executed by the registered owner together with the certificate. It is in my view incumbent upon the seller to produce a transfer executed by a registered owner who is at all material times willing that the transferee shall be registered as owner in his place. In the present case the respondents failed to furnish the appellants with any such transfer and the appellants were accordingly unable to discharge the duty which they as vendors owed to Messrs. Evans & Co., and the ultimate purchaser. In my opinion the appeal should be allowed and I concur in the motion that is before the House.

Appeal allowed.

Solicitors: *Roney & Co.* (for the appellants); *Hair & Co.* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

THE DISTRICT BANK, LTD. v. THE LUIGI GRILL, LTD. AND OTHERS.

[CHANCERY DIVISION (Lord Clauson sitting as an additional judge),
December 8, 1942.]

Sale of Land—Concealment of incumbrance—Necessity to prove fraud—Law of Property Act, 1925 (c. 20), s. 183 (2).

The owners of a Crown lease of certain property required a security for an underlease thereof, and, accordingly, a guarantor paid in advance the rent for the first three years, that is, from Dec., 1936-Dec., 1939. In Dec., 1938, the plaintiffs appointed a receiver of the property which had been mortgaged to them by the owners to secure the latter's overdraft, and on taking office the receiver found that the rent, reserved by the under-lease, had already been paid until December, 1939, as stated. The same solicitors had acted for the owners in the matter of the underlease and the mortgage, but they did not mention to the plaintiffs that this rent had been paid. The plaintiffs claimed damages from the solicitors, pursuant to the Law of Property Act, 1925, s. 183, on the ground that they had failed to disclose "an instrument or incumbrance material to the title." It was not alleged or pleaded that such concealment was fraudulent:—

HELD: there is no right of action under the Law of Property Act, 1925, s. 183 (2) unless it is shown that the concealment was fraudulent, and, since this was not shown, the action failed.

[**EDITORIAL NOTE.** This case deals solely with the construction of the subsection here in question and decides that a right of action is available only where the concealment of an incumbrance is fraudulent. The point whether there was on the facts here an incumbrance within the meaning of the section is not dealt with nor many other points which might have arisen in this case.

AS TO FRAUDULENT CONCEALMENT OF INCUMBRANCES, see **HALSBURY**, Hailsham Edn., Vol. 29, p. 315, para. 409; and FOR CASES, see **DIGEST**, Vol. 40, pp. 78, 79, No. 605.]

ACTION for damages for failure to disclose "an instrument or incumbrance" as required by the Law of Property Act, 1925, s. 183. The facts are fully set out in the judgment.

H. J. Wallington, K.C., and *G. D. Johnston* for the plaintiffs.

R. F. Roxburgh, K.C., and *A. C. Nesbitt* for the defendants other than the first defendant.

A LORD CLAUSON: A company, whom I will call the owners, owned some premises in Jermyn Street under a Crown lease which was to run for 80 years from 1926. In September, 1936, the owners granted, and the defendants, Luigi Grill, Ltd., accepted, an underlease of the premises for 35 years at a rent of £1,600, rising to £1,850, payable quarterly.

B The defendant solicitors acted as solicitors for the owners in carrying through this arrangement. It would appear that the owners were not prepared to grant this lease without having some security that for the first three years the rent should be paid, and, accordingly, an arrangement was made between the owners and a gentleman, whom I will call the guarantor, to this effect. The guarantor paid £4,950 to the owners, being 3 years' rent of the premises comprised in the underlease. Contemporaneously £400 was returned to him, being treated as discount in consideration of the payment in advance of the 3 years' rent. The firm of solicitors, on behalf of the client, handed the £400 discount to the guarantor so that there is no doubt whatever that they knew all about the matter.

C In May, 1937, a proposal was made that the plaintiffs, who were the bankers of the owners, should advance them a sum of £36,000, by way of overdraft, and on Aug. 10, 1937, a charge by way of legal mortgage of the underlease was executed by the owners to the bank to secure the overdraft. The defendant solicitors acted as solicitors for the owners, and they deduced title and carried through everything which was necessary to complete the charge; but I may mention that they did not, either in the abstract or in any of the communications with the bank, make any mention of the fact that 3 years' rent under the underlease (the payment of the rent under the underlease being a necessary part of the security) had already been made and that there would not be any other payment of rent until the 3 years had expired. The solicitors apparently did not appreciate that there was any particular reason why they should disclose that matter, and they in fact did not disclose it, and I must assume, for the purposes of to-day at any rate, that the plaintiffs, the bank, knew nothing whatever about it. In the course of the investigation of the title certain requisitions were made in answer to which the owners' solicitors furnished a copy of the underlease and referred to its terms, as being an underlease at such and such a rent, and so on. There was also a letter which referred to the letting and asked the owners to confirm that it was a letting at a certain rent, which they did.

F On Dec. 22, 1938, owing, I suppose, to the fact that the owners' pecuniary position was to some extent in jeopardy, the bank appointed a receiver under their charge. The receiver went in, but on attempting to collect the rent from the sub-tenant, he was at once told (and he reported the fact to the bank) that the rent from December, 1936-1939, had been paid in advance, and accordingly, that he would not get any more rent until after December, 1939. In those circumstances the plaintiffs, the bank, anticipate, and I dare say with very good reason, that at long last it will be found that their security will be insufficient, and they are bringing an action for damages against the solicitors, on the footing that the solicitors are liable for the loss which the plaintiffs may have suffered by taking a security which may turn out to be insufficient. I do not propose to deal with a number of other interesting and, to my mind, difficult questions which arise.

II There is, first of all, the question of damages. Supposing that the plaintiffs are entitled to damages, are they entitled to damages unless they can show that the security has proved insufficient? They can hardly be entitled to damages for the fact that the receiver has been disappointed in not receiving certain sums. If he had received those sums, they would have been the property of the bank, but that would have been an item which would have had to be considered in making up the accounts between the bank as the mortgagees and the owners as the mortgagors.

There are various difficulties of that kind, but I do not propose to deal with them, because there is one point which is of vital importance, and a point upon which, if the plaintiffs fail, the action must go, and none of these further and more difficult questions arise. That point is this. It is suggested that the plaintiffs have the right to sue the defendants for damages under the Law of Property Act, 1925, s. 183 (2). It is admitted that but for the statutory cause of action, which it is alleged is given to the plaintiffs by that section, the plaintiffs cannot succeed. The Law of Property Act, 1925, s. 183, is in these terms : A

(1) Any person disposing of property or any interest therein for money or money's worth to a purchaser, or the solicitor or other agent of such person, who (a) conceals from the purchaser any instrument or incumbrance material to the title ; or (b) falsifies any pedigree upon which the title may depend in order to induce the purchaser to accept the title offered or produced ; with intent in any of such cases to defraud, is guilty of a misdemeanour punishable by fine, or by imprisonment for a term not exceeding 2 years, or both. B

That is the first subsection, and that, it will be observed, deals with criminal proceedings only, and there is no question that it would be necessary in those criminal proceedings for the prosecution to prove not only concealment, but concealment with intent to defraud. The second subsection is in these terms :

(2) Any such person or his solicitor or agent is also liable to an action for damages by the purchaser or the persons deriving title under him for any loss sustained by reason of (a) the concealment of the instrument or incumbrance ; or (b) any claim made by a person under such pedigree whose right was concealed by such falsification as aforesaid. C

This action is brought under the right of action which is conferred by subsect. (2), but, as indeed one is not surprised to find in the case of a firm of solicitors of repute such as the defendants, it is not suggested that there was any intent to defraud. The pleadings contain no allegation of any sort or kind of any intent to defraud, and I am accordingly treating the case on the footing that, assuming that there was concealment, there was no intent to defraud ; and the question then is whether the action can be brought under subsect. (2) where there is a complete absence on the part of the defendants of any such intent. D

Before going further into the meaning of that section, I propose to refer to the law as it stood before the enactment of the Law of Property Act, 1925, s. 183, and perhaps I ought to say this first, that the language of the section speaks of "any person disposing of property," and so forth, and *prima facie* the section refers, no doubt, to vendor and purchaser, but it was quite frankly admitted by counsel for the defendants, and I do not think there is any doubt, that a "person disposing of property" would include a mortgagor, and that a "purchaser," within the meaning of sect. 183, would include a mortgagee. E

Before the 1925 Act was passed, the matter was governed by the Law of Property Amendment Act, 1859, s. 24, a long section which combines in one long sentence, after the manner of the draftsmanship of the period of 1859, that which appears to be dealt with in the various subsections of sect. 183 of the 1925 Act. It provides that : F

Any seller or mortgagor of land . . . or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any . . . incumbrance from the purchaser . . . or falsify any pedigree . . . in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanour, and being found guilty shall be liable [to various punishments] and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the . . . incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree ; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land ; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General, or in case that office be vacant, of Her Majesty's Solicitor-General ; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the Attorney-General or the Solicitor-General (as the case may be) shall direct. G

It is quite clear, and in fact it was not disputed, that as the law stood under that section there was no cause of action in a civil court unless the concealment H

had been made with intent to defraud. It has been suggested, however, that the difference in drafting between that section and sect. 183 of the 1925 Act, to which I have already referred, is such that on the true construction of sect. 183, a civil cause of action is given even if there is no intent to defraud, and that the law is to that extent altered by the 1925 Act.

A I have referred for convenience to the historical fact of what the law was before the 1925 Act was enacted, and it is not worth pausing to consider exactly how far I am entitled to take into account, in construing this section, what the law was before it was passed; and so for the moment I will try as best I can to wipe out from my mind the provisions of the earlier section, and take this section as it stands. I may say at once that the conclusion to which I have come—and as I go through the section I shall endeavour to explain the reasons for the conclusion—is that the law under this section is just as it was under the previous section, that no civil action lies in respect of a concealment unless the concealment was made with intent to defraud; and, of course, if I am right in that view, this action must necessarily fail.

B There are one or two words in sect. 183 to which I should like to draw attention. Subsect. (1) says:

C Any person disposing of property or any interest therein for money or money's worth to a purchaser, or the solicitor or other agent of such person, who (a) conceals from the purchaser any instrument or incumbrance material to the title; or (b) falsifies any pedigree . . . with intent in any of such cases to defraud, is guilty of a misdemeanour . . .

D As I read that, it is clear that the concealment must be with intent to defraud if it is to furnish a ground for a prosecution, and the falsification must be with intent to defraud; and I may mention that under subsect. (4) no prosecution can be commenced without the leave of the Attorney-General. Now I come to the crucial subsection, subsect. (2). That says:

E Any such person or his solicitor or agent is also liable to an action for damages by the purchaser or the persons deriving title under him for any loss sustained by reason of (a) the concealment of the instrument or incumbrance; or (b) any claim made by a person under such pedigree whose right was concealed by such falsification as aforesaid.

F Almost every word, or shall I say every phrase, of that subsection refers me back, as I read it, to subsect. (1). The "such person" seems to me to be the person disposing of the property, and so on, who sells or falsifies with intent to defraud; the person referred to is a fraudulent person. There is this also to be observed:

G Any such person or his solicitor or agent is also liable to an action for damages. Surely that means that the man, who by reason of his fraudulent concealment is liable to prosecution, is going to be made liable to something else, namely, that he is going to be made liable to a civil action as well as being made liable to a prosecution under subsect. (1). It seems to me to suggest in the strongest terms that nobody comes within subsect. (2) unless he is a person who could be prosecuted under subsect. (1), or, in other words, a person whose concealment has been with intent to defraud. I do not think it stops there, because the subsection goes on:

... liable to an action for damages by the purchaser . . . for any loss sustained by reason of (a) the concealment of the instrument . . . or (b) any claim made by a person . . . whose right was concealed by such falsification as aforesaid.

Those words seem to throw me back to the concealment and the falsification mentioned in subsect. (1), which are fraudulent.

H The conclusion to which I come, therefore, is that unless an intent to defraud is alleged, and, of course, pleaded, a civil action brought under that section must fail; and, as I have said before, there is no suggestion of fraud made here and no attempt is made either to allege or to prove it, and in those circumstances I hold that this action must fail.

I only desire to add that I have been assuming, for the purpose of what I have said at present, that there was the concealment of an instrument or incumbrance, but, of course, there may be a very serious question as to whether the failure to mention this transaction about the payment of rent in advance and about the receipt, and so on, was or was not the concealment of an instrument or incumbrance, upon which various points might arise. There is also a point of some difficulty, to which I have already referred, as to the damages, and there is

further, as I understand, a question which may be raised by reason of certain provisions of the Registration Act. I only want to make it clear that, with the consent of counsel on each side, I have in this case taken the course—which I venture to think will in the long run probably save a good deal of expense—of not going into those other questions, some of which may be questions of considerable difficulty, but of simply dealing with this case on the ground that the plaintiff cannot establish a cause of action under sect. 183 (2); and, accordingly, should my view of the section turn out to be wrong, and should this judgment be upset elsewhere, I only want to register this, that it will be right, subject of course, to anything that a superior tribunal may think proper to say, that the matter should be sent back for retrial or for a new trial in order that the various points of difficulty to which I have referred may be canvassed at length under circumstances in which it is quite clear that they are material and have to be dealt with.

In the circumstances, the only order that I shall make will be, as against the firm of solicitors, to dismiss the action, with the usual result, that the plaintiffs must pay the costs.

Action dismissed with costs.

Solicitors: *Wetherfield, Baines & Baines* (for the plaintiffs); *Peacock & Goddard* (for the defendants other than the first defendant).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

HARMAN v. CRILLY.

[COURT OF APPEAL (Lord Greene, M.R., and Goddard, L.J.), December 10, 11, 1942.]

Practice and Procedure—Action for damages for personal injuries caused by a motor car—Trial by judge alone—Whether defendants can add insurance company as a defendant—Repudiation of liability under the policy by insurance company—R.S.C., Ord. 16A, r. 1.

The appellants, an insurance company, sought to set aside two third-party notices issued against them by the two defendants in the action. The plaintiff claimed damages for personal injuries caused by the alleged negligence of the first defendant, the driver of a motor vehicle owned by the second defendant. The two defendants claimed that they were entitled to an indemnity under the terms of an insurance policy issued by the appellants. It was said that the policy was issued, not to either of the defendants, but to one R., who had assigned his business, including the insured vehicle, to the second defendant, a limited company, and that, therefore, the policy was not available to the second defendant. The appellants contended, *inter alia*, that the main ground for the present appeal was that the fair trial of the action would be liable to be prejudiced if it was brought to the mind of the judge that the defendants were, or might be, entitled to the benefit of a contract of insurance:—

HELD: there was no possible ground for the suggestion that the presence of the insurance company as a third party would be calculated to embarrass or prejudice the fair trial of the action, where that action was to be tried by a judge alone.

[EDITORIAL NOTE. It will be remembered that it has always been the practice to withhold from a jury all knowledge that the liability to pay the damages which they may award is covered by an insurance policy. In *Carpenter v. Ebbelwhite* (3), there are certain *dicta* by SLESSER, L.J., which suggest that this practice should extend to the case where the action is tried by a judge alone. The Court of Appeal herein have finally decided that this practice does not apply where the case is tried by a judge alone, the whole reason for the practice not being then applicable. The question whether the practice still applies in the case of jury trials in motor vehicle cases is left open, since such actions are not for the present tried by juries. GREER, L.J., in *Carpenter v. Ebbelwhite* (3) pointed out that the reason for that practice had now disappeared since every jurymen was probably aware that the Road Traffic Act, 1930, required every motor vehicle to be insured against such claims.

AS TO ADDING INSURANCE COMPANY AS THIRD PARTY, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 78, 79, para. 134; and FOR CASES, see DIGEST, Vol. 36, p. 65, No. 421.]

Cases referred to :

- (1) *Gowar v. Hales*, [1928] 1 K.B. 191; Digest Supp.; 96 L.J.K.B. 1088; 137 L.T. 580.
- (2) *Lothian v. Epworth Press* (1926), [1928] 1 K.B. 199n; Digest Supp.; 96 L.J.K.B. 1092n; 137 L.T. 582m.
- (3) *Carpenter v. Elllewhite*, [1939] 1 K.B. 347; [1938] 4 All E.R. 4i; Digest Supp.; 108 L.J.K.B. 110; 159 L.T. 564.
- (4) *Jones v. Birch Bros., Ltd.*, [1933] 2 K.B. 597; Digest Supp.; 102 L.J.K.B. 746; 149 L.T. 507.

APPEAL by third parties from an order of CROOM-JOHNSON, J., dated Oct. 27, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

H. D. Samuels, K.C., and *F. W. Wallace* for the appellants.

Percy Lamb for the respondents, the two defendants in the action.

LORD GREENE, M.R. : The plaintiff claims damages for personal injuries occasioned by the alleged negligence of the driver of a motor vehicle (the first defendant Crilly) belonging to the second defendants, A. W. Robey, Ltd. The basis on which the third-party notices were issued against the appellants was that they had issued a policy of insurance, to the benefit of which the defendants claim to be entitled. It therefore appears that the defendants claim against the appellants that they are entitled to an indemnity. Such a claim falls within the language of R.S.C., Ord. 16 A, r. 1, and, on the face of it, the case would appear to be one in which third-party proceedings would be legitimate.

The application to set aside the third-party notices was based on three grounds, but before I refer to them I must say one word as to the controversy which is apparently going to be raised by the third parties. It is said that the policy of insurance in question was issued, not to either of the defendants, but to an individual, A. W. Robey, who assigned his business, including the insured vehicle, to the second defendants, A. W. Robey, Ltd. The question between the parties is whether or not, in view of what happened later in the matter of payment and acceptance of premiums, that policy is to be treated as between the parties as available to A. W. Robey, Ltd. That is the nature of the controversy. The third parties allege that the policy is not so available, and they maintain, accordingly, that there is not, and was not at the relevant time, in existence any contract of insurance at all under which they were bound.

The real substantial point which was urged before us was that, if the third parties are brought into the action between the plaintiff and the defendants, the fair trial of the action will be liable to be prejudiced, because it will be brought to the mind of the judge that the defendants are, or may be, entitled to the benefit of a contract of insurance. It was said that the judge, in deciding the question whether or not there is a binding contract of insurance may be affected by the consideration that, if he does not so find, the plaintiff may find himself without effective remedy.

I must protest against the idea that judges are liable to have their minds prejudiced by considerations of that kind. The issues between the several parties in this litigation are issues which are distinct, and it is the duty of the judge, and a duty which will be fulfilled, not to allow the result of one issue to affect his mind in considering the result of the other. It is said that there is an invariable practice to refuse to entertain third-party procedure against an insurance company, for reasons which are stated in several authorities. It is perfectly true that it has been said in this court more than once that in cases where there is to be a trial by a jury the bringing in of the insurance company by a third-party notice is to be discountenanced as making useless the rule of conduct recognised by the bench, that in a trial before a jury the jury must not be allowed to know that there is in existence a policy of insurance.

The place where that principle is laid down in the clearest way is in *Gowar v. Hales* (1). That was a case in this court, and SCRUTTON, L.J., explains the reason for the practice. It is based, according to the language of SCRUTTON, L.J., entirely upon the fact that in a jury trial the jury is liable to be prejudiced (and experience had shown that this liability was a real one) if it knows that there is in existence a policy of insurance.

There is an earlier case of *Lothian v. Epworth Press* (2), which, as stated in *Gowar v. Hales* (1), was a case of special circumstances, but it is to be observed that in that case the third-party procedure was accepted by the court, and

no objection to its acceptance was suggested upon the ground that the jury might be prejudiced. ATKIN, L.J., in his judgment, says quite clearly that, *prima facie*, an insurance company can be brought in by a third-party notice. I do not attach any particular importance to that case as qualifying the rule which, at the date when it was stated by SCRUTTON, L.J., was unquestionably what I have said.

The rule was reasserted in a later case, to which I need not refer, because I want to come at once to the last case on the subject, *Carpenter v. Ebbelwhite* (3). That was a case where the plaintiff joined the insurance company as defendants to the action, claiming against them a declaration of liability. That procedure, on the face of it, I should have thought was obviously quite wrong, because it is not the practice of the court to grant declarations in the air in respect of controversies which have not yet arisen, and upon that ground the judgment of GREER, L.J., and also the judgment of MACKINNON, L.J., were based. It was argued in that case as one reason for striking out the claim against the insurance company, that the presence of the insurance company in the action would be liable to prejudice the jury on the issue between the plaintiff and the main defendant. That argument was raised, but GREER and MACKINNON, L.J.J., did not accept it.

In his judgment, GREER, L.J., in a consideration of the general matter of the presence of insurance companies in an action for personal injuries where the main defendant is insured, says this, at p. 359 ([1938] 4 All E.R., at p. 45):

With regard to the point which was made by counsel on behalf of the respondent that the joining of the insurance company in the action is embarrassing because it would be necessarily unavoidable that the jury would know that there could not be any claim against the insurance company unless they decided the case in favour of the plaintiffs, that reasoning does not appeal to me because, since the time when it has been provided by statute that every owner of a motor car must be insured, that matter would be present to the minds of the jury just as much, though not a word was said about it, as if it was proclaimed from the house tops.

It is perfectly clear from that that in the view of GREER, L.J., even in the case of juries, the old practice is now out of date and the reason for it has disappeared. In this case it is not necessary for us to consider what may happen if and when actions of this character are again tried with juries. In present circumstances this action with which we are concerned will be tried by a judge alone, and I find the position of the authorities to be this, subject to what I am about to say as to the judgment of SLESSER, L.J., that even in the case of juries the question is, to say the least of it, an open one, and that no judge has ever suggested that when a trial is to be before a judge alone, the principle which was derived from jury trials would apply. As I say, I protest against the imputation that a precaution which was intended for the special case of juries is required in the case of a judge sitting alone.

What I have said is subject to the observations of SLESSER, L.J., in that case. He took a different view; he based his judgment not upon the ground which GREER, L.J., thought right, namely, that a declaration was not a form of relief which could be claimed in the action; but upon the ground that the presence of the insurance company as defendants would be calculated to embarrass or prejudice a fair trial. He referred to the decision of this court in *Gowar v. Hales* (1) and *Jones v. Birch Bros., Ltd.* (4), where SCRUTTON, L.J., reasserted the principles he had laid down in *Gowar's* case (1), and SLESSER, L.J., then said, at p. 361 ([1938] 4 All E.R., at p. 46), that this:

... indicates that the practice there referred to has been a universal practice in dealing with this class of case and one which, as I read his judgment, is not necessarily limited to cases where there is a jury.

I have carefully read the language of SCRUTTON, L.J., in both those cases, and with all respect to the opinion of SLESSER, L.J., I can find nothing in it to suggest that the principle which he was upholding was one which applied to any cases other than those where there was a jury. The whole of his reasoning was based upon the fact that juries are liable to be prejudiced by having that class of information before them, and I do not find anything in it to justify the proposition that the principle is to be applied in a case where the trial is to be before a judge alone.

This further observation was made by SLESSER, L.J., at p. 362 ([1938] 4 All E.R., at p. 47):

Counsel for the plaintiffs, at one stage in the argument, said he was willing, in order that this claim for a declaration should proceed, to abandon any claim to a jury, for the reasons I have given. Though the result of that would not be as objectionable as if there were a jury, I think, nevertheless, the objection would not be altogether removed. I think that Ord. 19, r. 27, is of general application with regard to third-party procedure.

A With all respect, I cannot agree with those observations. As I have said, I do not express any opinion as to what may be the proper practice if and when jury trials in this class of action are resumed; but it is quite obvious that the weighty observations of GREER, L.J., will have to be considered. In the present case, where there is no question of a jury trial, I can see no possible ground for suggesting that the presence of the insurance company as a third party will be calculated to embarrass or prejudice the fair trial of the action. In the result, I find no ground upon which we should be justified in differing from the view taken by the judge, and this appeal must accordingly be dismissed, with costs.

B GODDARD, L.J.: I agree. Like my Lord, I cannot agree with the views that SLESSER, L.J., expressed in *Carpenter v. Ebbblewhite* (3). *Gowar v. Hales* (1) did not lay down any rule of law; it laid down a rule of practice based upon considerations which existed in 1927, when that case was tried, but which took on an entirely different aspect after the Road Traffic Act, 1930. In any case, I do not think that *Gowar v. Hales* (1), was dealing with the case of a trial before a judge alone, and for myself, I have always thought the remarks of GREER, L.J., in *Carpenter v. Ebbblewhite* (3) have very great force. It is not necessary, as C LORD GREENE, M.R., has said, that we should to-day express a final view with regard to whether the rule in *Gowar v. Hales* (1) should prevail where there is a trial by jury, but I do call attention to one thing, and that is that the headnote in *Carpenter v. Ebbblewhite* (3) might mislead, because it concludes with the words "*Gowar v. Hales* and *Jones v. Birch Bros., Ltd.*, held applicable." If D that means that these cases were held applicable by SLESSER, L.J., there is nothing to be said, but it looks as if the whole court had held that the facts were applicable to the facts in *Carpenter v. Ebbblewhite* (3). I think that is wrong, and that SLESSER, L.J., did base his judgment on that basis, but GREER, L.J., did not indicate by a word that he thought those cases were applicable. I think that the remarks of MACKINNON, L.J., fairly read, indicate that he agreed with GREER, L.J., and not with SLESSER, L.J. Most judges who have to try these cases, E both on circuit and in London, know perfectly well whether there is an insurance company or not, and it does not matter whether they know it or not, and it would be quite impossible to suppose that they would allow their minds to be affected by it at all.

F It seems to me that the deciding question, whether there is a contract of indemnity, should be tried in the same proceedings as the action in which the question of the liability of the defendants is determined. I think there is no ground at all for saying a third-party notice is in any way embarrassing or would lead to anything but a fair trial of the action. I agree with LORD GREENE, M.R., that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: A. E. Wyeth & Co. (for the appellants); G. A. Hathway, agent for Flint, Bishop & Barnett, Derby (for the respondents).

G [Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

BALLETT v. MINGAY.

[COURT OF APPEAL (Lord Greene, M.R., Scott and MacKinnon, L.JJ.),
November 27, 1942.]

Bailment—Loan of goods to infant—Parting with possession—Failure to return on demand—Liability in detinue.

H Infants—Torts—Tort founded on contract—Liability for independent act outside contract.

The appellant, who was an infant, borrowed certain articles and failed to return them on demand, having lent them to C. It was not proved in evidence that the contract allowed the infant to part with the possession of the articles lent. He was sued in detinue and the county court judge gave judgment against him. It was contended that the respondent had sought to make the appellant liable in tort for an action which was in reality

a breach of contract, for which, as an infant, he could not be held liable :—

Held : the appellant was properly sued in tort because his action in parting with possession of the articles was outside the terms of the contract of bailment.

[EDITORIAL NOTE. In order to establish the liability of the infant in this case, it had to be established that the tort was not in law a breach of contract. In this particular case that resolved itself into a question whether or not the loan of the goods bailed to the infant was envisaged by the contract. On this the Court of Appeal has decided that the burden of proof is upon the infant to show that the contract allowed him to part with the possession of the goods and, as he failed to prove this, he was liable in tort. The leading authorities on the matter are considered and explained in the judgment of LORD GREENE, M.R.

AS TO LIABILITY OF INFANT IN RESPECT OF TORT FOUNDED ON CONTRACT, see HALSBURY, Halsham Edn., Vol. 17, p. 620, para. 1325; and FOR CASES, see DIGEST, Vol. 28, pp. 178-180, Nos. 381-395.]

Cases referred to :

- (1) *Jennings v. Rundall* (1799), 8 Term Rep. 335; 3 Digest 55, 17.
- (2) *Burnard v. Haggis* (1863), 14 C.B.N.S. 45; 3 Digest 56, 20; 32 L.J.C.P. 189; 8 L.T. 320.
- (3) *Turner v. Stallibrass*, [1898] 1 Q.B. 56; 3 Digest 109, 339; 67 L.J.Q.B. 52; 77 L.T. 482.
- (4) *R. v. McDonald* (1885), 15 Q.B.D. 323; 3 Digest 113, 369; 52 L.T. 583.
- (5) *Hiort v. Bott* (1874), L.R. 9 Exch. 86; 3 Digest 58, 38; 43 L.J.Ex. 81; 30 L.T. 25.
- (6) *Coldman v. Hill*, [1919] 1 K.B. 443; Digest Supp.; 88 L.J.K.B. 491; 120 L.T. 412.
- (7) *Genn v. Winkel* (1912), 107 L.T. 434; 3 Digest 100, 280.
- (8) *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; 3 Digest 109, 338; 40 L.J.C.P. 141; *sub nom. Williamson v. Verity*, 24 L.T. 32.

APPEAL by the defendant from an order of His Honour JUDGE SIR GERALD HURST, K.C., at the Croydon County Court, dated June 2, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

Elliot Gorst for the appellant.

H. Vester for the respondent.

Gorst : It was not argued before the county court judge that this was a case of tort, but that it was one of contract. In *Jennings v. Rundall* (1), it was held that a contract could not be enforced against an infant by regarding its tortious aspect. In the present case, the tort alleged is the breach of a suggested implied term not to part with possession. There is no evidence of any such term. Detinue will not lie in the case of an infant if it arises out of contract. In the present case there is the further point that the respondent knew where the articles were. He went to Chapman and entered into an agreement with him, asking to be paid. Having done that with the concurrence of the appellant, he cannot now claim from the appellant. The appellant is entitled to act upon the undertaking by the respondent to accept compensation from Chapman. [Counsel referred to ANSON ON CONTRACTS, 18th Edn., pp. 133, 416.]

Vester : The respondent was not aware, at the time of the bailment, that the appellant was an infant. Although the claim appears to be in respect of contract, it is really a claim in tort because the return of the goods was asked for. The claim in contract was abandoned when it was discovered that the appellant was an infant, and detinue and conversion only were relied upon. As soon as detinue and a failure to return after demand has been proved, the onus is upon the defendant to show that he lost the goods innocently. If he fails in that, he is liable. There was evidence that the loan was a personal one, and the judge was entitled to come to the conclusion that the parting with possession of the goods put an end to the bailment. In the present case, the appellant must show that the goods were lost without default on his part. He does not discharge that onus by showing that the goods were lent to Chapman in breach of the agreement. [Counsel referred to *Turner v. Stallibrass* (3), *R. v. McDonald* (4), *Hiort v. Bott* (5), *Burnard v. Haggis* (2), *Coldman v. Hill* (6), *Genn v. Winkel* (7), *Wilkinson v. Verity* (8).]

Gorst, in reply : With the exception of *R. v. McDonald* (4), the cases which have been cited do not relate to infants. It is a well recognised principle that an infant cannot be made liable in contract by the plaintiff making a claim in tort.

LORD GREENE, M.R. : The appellant is an infant who obtained on loan from the respondent an amplifier and a microphone. In dealing with this case,

there arises a difficulty of a type that often occurs in appeals from county courts. The note is quite short. It is made rather more difficult to follow because it embodies a note of evidence in a previous action where questions of the same character were raised. The county court judge gives no reasons for his judgment, and there are no findings of fact stated. He, in fact, gave judgment for the plaintiff for the sum of £38 8s., the value of the goods which the defendant had failed to return on demand. I think it is a right rule in dealing with judgments of county court judges in these cases to assume, unless the contrary is proved, that the judge has found all relevant facts necessary to support his decision in law. I think that is in general the proper assumption to make, and one which is fair to the county court judge himself. In the present case the contrary is not shown and, therefore, I approach this matter on the footing that the county court judge did find all the facts sufficient to enable his judgment to be supported. It is said that, if his judgment stands, the appellant, who was an infant, will have been held liable for breach of contract which was not one that bound him. It was said that the attempt to make him liable in tort was a breach of the principle which is laid down in *Jennings v. Rundall* (1), where an infant, having hired a mare, rode it carelessly with the result that she was injured. As BYLES, J., pointed out in the argument in a subsequent case (to which I shall refer in a moment), that was a case where the act of the defendant was not an act distinct from the contract of hire, but was an act which was within the four corners of the contract itself. In my opinion, the present case does not fall under that principle at all, because here the respondent parted with possession of the articles to Chapman and Chapman failed to produce them, various stories being told by him, or apparently at his instigation, as to what had happened to them. On looking at the evidence, it seems to me that, when properly construed, the terms of the bailment of these articles to the infant appellant did not permit him to part with their possession at all. If it was the bargain that he might part with them, it was for the infant to establish that fact, and it seems to me that he has failed to do so. On that basis, the action of the appellant in parting with the goods was one which fell outside the contract altogether and that fact brings the case within the subsequent case, to which I have referred, of *Burnard v. Haggis* (2). There BYLES, J., drew the distinction between that case and *Jennings v. Rundall* (1). He said that in *Burnard v. Haggis* (2), the action of the defendant was an act of tort just as distinct from the contract as if the defendant had run a knife into the mare and killed her. What had happened was that the undergraduate who had hired the mare, having been told that he must not jump her, lent her to a friend who jumped her, as a result of which the mare was injured and killed. WILLES, J., there said, at p. 53 :

It appears to me that the act of riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring.

In the present case it seems to me, therefore, that the infant was properly sued in detinue in that, on receiving a demand for the return of the goods, he refused or neglected to return them, and failed to prove that in parting with the goods he had not stepped outside the bailment altogether. On that basis, there is a remedy against the infant in tort because the circumstances in which the goods passed from his possession and ultimately disappeared were circumstances outside the purview of the contract of bailment altogether or, at any rate, were not shown by him to be within it. In all the circumstances, and dealing as best I can with the rather scanty evidence and the fact that there is no note of the county court judge's reasons or his findings of fact, I am of opinion that the appellant has failed to establish his case and that the appeal must be dismissed with costs.

SCOTT, L.J. : I agree.

MACKINNON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *R. J. Clark* (for the appellant) ; *W. F. Hollands* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

**ATTORNEY-GENERAL AT THE RELATION OF THE
BIRMINGHAM AND MIDLAND MOTOR OMNIBUS CO., LTD.
v. LEICESTER CORPORATION.**

[CHANCERY DIVISION (Benne't, J.), **December 21, 1942.**]

Local Government—Expenditure—Purchase of undertaking of omnibus company—Payment for goodwill—Ultra vires—Payment out of reserve fund of local authority's undertaking—Local Government Act, 1933 (c. 51), ss. 185-187—Leicester Corporation Act, 1930, ss. 45, 47. A

The defendant corporation had agreed to purchase the business and goodwill of a certain omnibus company and to pay the purchase price out of the corporation's reserve fund. The Birmingham and Midland Motor Omnibus Co., who operated the same route opposed the agreement on the ground that the agreement was illegal and *ultra vires* the powers of the corporation and contended that the corporation had no power to apply any of its reserve fund, general rate fund or other moneys for the purpose of the said purchase; and they asked for declarations and injunctions accordingly:— B

HELD: (i) since the passing of the Local Government Act, 1933, the agreement was not, by sects. 185-187 thereof, illegal or *ultra vires* the powers of the corporation.

(ii) such an agreement could only be financed from the general rate, and as the agreement in question was to be financed from the reserve fund the plaintiffs were entitled to a declaration prohibiting the defendants from using the reserve fund for the purchase of the business. C

(iii) under the Leicester Corporation Act, 1930, s. 47, the reserve fund could only be applied for this purpose if it were shown that such application was for the benefit of the corporation's omnibus undertaking and the evidence did not prove this. D

[EDITORIAL NOTE.] The local authority would have been prevented by the provisions of the Municipal Corporations Act, 1882, from paying for the goodwill of the omnibus company, but those provisions were repealed by the Local Government Act, 1933. However, the latter Act allowed the local authority to make such a payment only out of the general rate fund and not out of the reserve fund. The Leicester Corporation, like many others, has obtained a private Act amalgamating all their funds in the form which was considered in *Allchin v. Coulthard*, [1942] 2 All E.R. 39. This Act dealt specifically with the application of the reserve fund of any of the corporation's undertakings and, so far as relevant, allowed any part of that fund to be applied for the benefit of the undertaking, but it is held that the purchase here in question could not be said to be for the benefit of the omnibus undertaking of the corporation. E

AS TO PAYMENTS OUT OF THE GENERAL RATE FUND, see HALSBURY, Hailsham Edn., Vol. 21, p. 145, para. 259; and FOR CASES, see DIGEST, Vol. 33, pp. 80-87, Nos. 515-578.]

Cases referred to:

- (1) *A.-G. v. Manchester Corpn.*, [1906] 1 Ch. 643; 13 Digest 362, 972; 75 L.J.Ch. 330.
- (2) *A.-G. v. Leeds Corpn.*, [1929] 2 Ch. 291; Digest Supp.; 99 L.J.Ch. 9; 141 L.T. 658.

- (3) *London Assn. of Shipowners and Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242; 13 Digest 325, 603; 62 L.J.Ch. 294; 67 L.T. 238.

ACTION asking for declaration and injunction that a certain agreement entered into by the defendant corporation was illegal and *ultra vires*. All the facts are set out in the judgment. F

W. Craig Henderson, K.C., and the *Hon. H. L. Parker* for the plaintiffs.
The Hon. C. R. R. Romer, K.C., and *J. P. Stimson* for the defendants.

BENNETT, J.: In this action the Attorney-General by and at the relation of the Birmingham & Midland Motor Omnibus Co., Ltd., seeks to establish that a conditional agreement entered into on Feb. 20, 1939, between J. H. Hutton of the one part and the defendant corporation, the lord mayor, aldermen and citizens of the city of Leicester, of the other part for the purchase by the defendant corporation of the goodwill of the business of Hutton connected with the operation by him of a service of motor omnibuses is illegal and beyond the powers of the defendant corporation. G

The facts of the case are not in dispute. The defendant corporation was incorporated by royal charter in the reign of Queen Elizabeth, the original charter having been granted in the year 1589. H

The relators are omnibus proprietors operating services of motor omnibuses

both within and without the boundaries of the city of Leicester. They are ratepayers in the city, and they operate a bus service between a point within the city boundary and a neighbouring village outside the city boundary known as Newton Linford. This service runs between the city and Newton Linford by way of a lane known as Anstey Gorse Lane, and is operated under a road service licence granted to the relators in May, 1939, by the East Midland Traffic Commissioners under the provisions of the Road Traffic Act, 1930. This licence is modified temporarily by a road service permit issued in January, 1940, under the Defence (General) Regulations. Hutton is also an omnibus proprietor, and he operates a motor bus service between a point within the city and Newton Linford, and the service he operates goes over the same route as the service of the relators. Hutton operates his service under a road service licence granted to him by the East Midland Traffic Commissioners in November, 1937, temporarily modified by a road service permit granted to him by the Regional Traffic Commissioners for the North Midland Regional Traffic Area. Both these services provide transport between the city of Leicester and a public park near Newton Linford named Bradgate Park. This park is vested in the defendants and the Leicestershire county council upon trust to preserve the park as an open space, public park and recreation ground for the use of (amongst other persons) the inhabitants of the city of Leicester.

In July, 1937, the general manager of the defendant corporation's transport undertaking had under consideration the desirability of operating a motor bus service between the city of Leicester and Newton Linford, and with a view to enabling the defendant corporation to operate such a service he opened negotiations with Hutton for the purchase from him of the motor buses he used on this route and for the purchase of the goodwill of his business arising out of this service. Having regard to the provisions of the Road Traffic Act, 1930, to which I shall presently refer, there was no hope of a licence to operate this service being granted to the defendant corporation so long as both the relators and Hutton were holders of their licences.

In February, 1939, the general manager made a report to the transport committee of the council of the defendant corporation in regard to the acquisition of Hutton's buses and business, with the result that on Feb. 8, 1939, the transport committee resolved, first, that the general manager's report be received, and that the council be recommended to agree to the purchase of Hutton's service between All Saints Road, Leicester, and Newton Linford, upon the terms contained in the report; secondly, that the council be recommended to apply for sanction to borrow the sum of £12,714 accordingly; and, thirdly, that in the event of the council's disapproval of the proposal to borrow or of the minister's refusal to issue such sanction, the amount involved be met out of revenue and/or the reserve fund. Following upon this meeting the conditional agreement of Feb. 20, 1939, was entered into between Hutton, therein described as the seller of the one part, and the defendant corporation, by their general manager, of the other part. By this agreement, Hutton agreed to sell and the defendant corporation agreed to buy six motor omnibuses with spare parts and accessories at the price of £996, and also all the rights and goodwill of the seller in the stage carriage service or services operated by the seller under a road service licence held by him in respect of the said six omnibuses running between All Saints Road, Leicester, and Newton Linford at the price of £11,718.

Subject to the provisions of cl. 7 thereof the agreement was to be completed within 1 calendar month after the traffic commissioners should have granted to the corporation (a) their consent under the Road Traffic Act, 1930, s. 101, empowering the corporation as part of their undertaking to operate and run public service vehicles on the route operated by the seller and (b) a road service licence under the Road Traffic Act, 1930, s. 72, in the form required by the corporation. Cl. 7 of the agreement set out the conditions to which the agreement was subject. They were, first, the approval of the agreement by the finance committee of the defendant corporation, secondly, its approval by the council of the defendant corporation, thirdly, the grant by the East Midland Traffic Commissioners of a consent under the Road Traffic Act, 1930, s. 101, empowering the defendant corporation as the local authority to run public service vehicles along the route operated by Hutton in place of Hutton, fourthly, the grant by the said traffic commissioners to the defendant corporation of a road service

licence under the Road Traffic Act, 1930, s. 72, empowering the defendant corporation to operate a stage carriage service between a point in the city of Leicester and Newton Linford, and lastly, the grant by the appropriate government department of an instrument of approval to the borrowing by the defendant corporation of the amount necessary to enable them to complete the purchase. The clause enabled the defendant corporation to rescind the agreement if any of these conditions was not fulfilled.

The general manager reported this agreement to the transport committee on Feb. 22, 1939, and on that day that committee approved the agreement. On Feb. 28, 1939, a special meeting of the council of the defendant corporation was held and the council passed a resolution approving the purchase and also resolved that application should be made to the Minister of Transport for leave to borrow the sum of £12,902 to cover the total cost, and that in the event of such application not being granted the amount involved should be met out of revenue and/or the reserve fund.

It would seem that the Minister of Transport refused to sanction a loan being raised by the defendant corporation, and what subsequently happened is set out in paras. 13, 14, 15 and 16 of an agreed statement of facts which I will now read :

(13) At a meeting of the transport committee of the said council held on Mar. 22, 1939, the said committee after considering the views of the Minister of Transport in regard to the said council's application for consent to borrow resolved that it was desirable that the sum of £12,902 be paid wholly out of the reserve fund. The transport committee accordingly reported to the city council that they were of the opinion that it was desirable that the purchase price should be paid out of the reserve fund rather than out of loan and recommended the council accordingly. This report was considered by the council at a quarterly meeting held on Mar. 28, 1939, and it was resolved that the report be approved and adopted. (14) On Mar. 21, 1939, the corporation applied in writing to the East Midland Traffic Commissioners for their consent under the Road Traffic Act, 1930, s. 101, to the running by the corporation of the said service of stage carriages and on Apr. 1, 1939, the corporation applied in writing to the said commissioners for a road service licence for the said service. (15) The East Midland Traffic Commissioners gave notice of the said applications by the corporation in "notices and proceedings for the East Midland Traffic Area " No. 423 dated Apr. 14, 1939. (16) On Apr. 26, 1939, the company objected in writing to the said applications by the corporation and duly served copies of such objections upon the East Midland Traffic Commissioners and upon the corporation, and on June 21, 1939, the writ of summons in this action was issued by the company's solicitors.

The rights of the parties are to some extent governed by the provisions contained in a number of Acts of Parliament to which I was referred at the trial. It will be convenient, I think, to state at this point these provisions. First of all, there are the private Acts of the defendant corporation, conferring upon them various powers ; next there is the Road Traffic Act, 1930 ; and thirdly, there are provisions in the Municipal Corporations Act, 1882, and the Local Government Act, 1933.

The first of the private Acts to which reference was made was the Leicester Corporation Act, 1897, which conferred miscellaneous powers upon the corporation, including a power to work and run tramways within the borough. The next private Act was the Leicester Corporation Act, 1902, which by sect. 58 authorised the corporation to provide and run omnibuses within the borough in connection with the corporation tramways in the manner set out in the section, and also authorised the defendant corporation to provide all necessary plant for those purposes. The powers conferred upon the corporation by this Act, which seems to have been passed before motor omnibuses came into general use, were enlarged by the Leicester Corporation Act, 1913, s. 21. This section extends and applies the provisions of sect. 58 of the 1902 Act to the provision and use of motor omnibuses, and in addition empowers the corporation to provide and run motor omnibuses along three specified routes outside the city boundary. None of these is the route operated by Hutton, the goodwill of which is the subject of the agreement of Feb. 20, 1939. The last of the private Acts to which reference was made is the Leicester Corporation Act, 1930. Sect. 3 of this Act is a definition section, and provides that in this Act the expression "the omnibus undertaking" means the omnibus undertaking authorised by the Leicester Corporation Act, 1902, the Leicester Corporation Act, 1913, and this Act, Pt. II of this Act contains a number of provisions

relating to the tramways undertaking and the omnibus undertaking, including (in sect. 17) provisions in addition and without prejudice to the exercise of their powers under sect. 58 of the 1902 Act and sect. 21 of the 1913 Act. By this section the corporation are empowered to provide and maintain and run omnibuses along any routes within the city, with a proviso that the corporation are not to manufacture any part or parts of any omnibuses provided under the Act. These are all the provisions contained in the private Acts of the defendant corporation relating to the running of omnibuses, and they enable the defendant corporation to provide motor bus services along any route within the boundaries of the city, and along three specified routes outside the boundaries of the city, and also to provide motor buses for use in such services.

A The Leicester Corporation Act, 1930, Pt. IV, contains a number of financial provisions, to which reference was made at the trial. This part of the Act, so counsel for the plaintiffs informed me, was primarily concerned with questions of income tax and the provisions it contained were framed to enable the defendant corporation for income-tax purposes to amalgamate its undertakings, and to enable the revenue and expenditure of all undertakings to be paid into one account for the purpose of ascertaining the income tax liability of the corporation. But since the defendant corporation relied upon some of these provisions as authorising them to make the expenditure called for by the agreement of Feb. 20, 1939, I will read the sections relied on *verbatim*.

C The first relevant section is sect. 45, and subsect. (1) of that section is as follows :
Notwithstanding anything contained in any previous enactment all money received in any year by the corporation on account of the revenue of any undertaking for the time being of the corporation from which revenue is derived including the income arising from interest on balances in hand or from the investment of any reserve or renewals fund shall be carried to and form part of the revenue for that year of the general rate fund and all payments and expenses incurred in respect of any such undertaking in the same year shall be paid out of that fund.
D Subsect. (2) (a) provides that :

The corporation may (if they think fit) apply money received by them on account of the revenue of any of the undertakings (other than the electricity undertaking) referred to in subsect. (1) of this section in the construction renewal extension and improvement of the works and conveniences for the purposes of that undertaking or in the provision of funds for working capital for that undertaking. (b) The corporation may also (if they think fit) apply money received by them on account of the revenue of the tramway undertaking in payment of any charges or expenses for the time being payable out of the general rate fund or the general rate or otherwise in such manner as they think best for the public benefit of the inhabitants of the city and for the improvement of the city or for any of those purposes as to the corporation shall seem meet.

E Sect. 47 (1) enables the defendant corporation to provide a reserve fund in respect of each of the undertakings referred to in sect. 45 except the electricity undertaking by setting aside out of the general rate fund such an amount as they may from time to time think reasonable until the fund so formed amounts to the maximum sum for the time being prescribed by the defendant corporation. Subsect. (2) provides that existing reserve funds shall be deemed to have been formed under this section, and subsect. (3) prescribes the purposes for which a reserve fund may be applied. The terms of the subsection are as follows :

G Any reserve fund formed under this section shall be applicable to answer any deficiency at any time happening in the income of the corporation from the undertaking in respect of which it is formed or to meet any extraordinary claim or demand at any time arising against the corporation in respect of that undertaking or for payment of the cost of renewing improving or extending any part of the works thereof or otherwise for the benefit of that undertaking or for providing any new works plant or buildings for the purposes of that undertaking.

The rest of the subsection and subsect. (4) are not material.

H I can now pass to the Road Traffic Act, 1930, which, *inter alia*, confers power upon certain local authorities to provide omnibus services. This Act contains a number of provisions regulating the use of highways by motor vehicles, and in particular their use by vehicles which are described in the Act as "public service vehicles." Public service vehicles are, for the purposes of the Act, divided into two classes, one of which is called stage carriages, and comprises motor vehicles carrying passengers for hire or reward at separate fares stage by stage. The Act divides England and Scotland into traffic areas, and for each traffic area establishes three traffic commissioners charged with the duty of

issuing licences under Pt. IV of the Act, that being the part which regulates public service vehicles. Sect. 67 (1) of the Act provides that no person shall cause or permit a motor vehicle to be used on any road as a stage carriage unless he is the holder of a public service vehicle licence. Sect. 72 (1) provides that the traffic commissioners may grant to any person applying therefor a licence referred to as a road service licence to provide such a road service as may be specified therein. The grant of such a licence is a matter of discretion, and in the exercise of that discretion the commissioners are to have regard to, among other matters, the extent to which the needs of the proposed route are already served, the extent to which the proposed service is necessary or desirable in the public interest, and the needs of the area as a whole in relation to traffic, including the elimination of unnecessary services. The commissioners may attach conditions to a road service licence for securing the safety and convenience of the public, and may fix minimum fares. A road service licence continues in force for one year from the date on which it is expressed to take effect. Sect. 92 (1) declares that nothing in that part of the Act is to be treated as conferring on the holder of any licence granted under that part of the Act any right to the continuance of any benefit arising from the provisions of that part of the Act or from any licence granted thereunder.

Pt. V of the Act deals with and regulates the running of public service vehicles by local authorities, who are defined in sect. 108 as meaning "the council of any county borough or county district." The relevant provisions in this part of the Act are, first, sect. 101, which empowers a local authority who, under any local Act, are operating an omnibus undertaking to run as part of that undertaking public service vehicles on any route within their district, and also, with the consent of the traffic commissioners for the traffic area in which any other road is situate, on that road, and next, sect. 103, which enacts that for the purposes of this part of the Act a local authority may purchase and maintain such vehicles as may be necessary and may purchase by agreement, take on lease and hold land and may on any lands so purchased or leased, or any lands lawfully appropriated by them for the purpose, erect such buildings, sheds and conveniences, and may provide such plant and appliances as may be requisite for the establishment, running, equipment, maintenance and repair of their public service vehicles.

When the Road Traffic Act, 1930, came into operation, Pt. VII of the Municipal Corporations Act, 1882, was in force and restricted the spending powers of the defendant corporation and of all municipal corporations. That Act provided as follows :

139. The rents and profits of all corporate land, and the interest, dividends, and annual proceeds of all money, dues, chattels, and valuable securities belonging or payable to a municipal corporation, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (except where and as far as the application thereof is otherwise provided for) shall go to the borough fund. 140 (1). The borough fund shall be applicable to and charged with the several payments specified in Sched. V. (2). The payments specified in Pt. I of that schedule may be made without order of the council ; those specified in Pt. II may not be made without such order. (3). No other payment shall be made out of the borough fund except (a) Under the authority of an Act of Parliament ; or (b) By order of the council ; or (c) By order of the court of quarter sessions for the borough ; or (d) By order of a justice in pursuance of this Act ; or (e) In cases in which the court of quarter sessions for a county, or a justice acting in and for a county in the discharge of his judicial duty, might make an order for the payment of money on the treasurer of the county. (4). Saving, nevertheless, in relation to the application of the borough fund as authorised by this section, or otherwise by this Act, all rights, interests, and demands of all persons in or on the real or personal estate of the municipal corporation, by virtue of any legal proceeding, or of any mortgage or otherwise. 141 (1). An order of the council for payment of money out of the borough fund shall be signed by three members of the council, and counter-signed by the town clerk. (2). Any such order may be removed into the Queen's Bench Division of the High Court by writ of *certiorari*, and may be wholly or partly disallowed or confirmed on motion and hearing, with or without costs, according to the judgment and discretion of the court. 142 (1). All payments to and out of the borough fund shall be made to and by the treasurer. (2). All payments to the treasurer shall go to the borough fund. 143 (1). If the borough fund is more than sufficient for the purposes to which it is applicable under this Act, or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough.

Sect. 144 enabled a borough rate to be made by a borough council ; and sect. 149 provided that :

All sums levied in pursuance of the borough rate shall go to the borough fund ; and, subject to the foregoing provisions of this part, the same shall be applied to all purposes to which the borough fund is applicable.

Sched. V sets out in separate paragraphs the payments which could be made out of the borough fund and with which it was charged.

A It is quite clear, I think, that until June 1, 1934, when the Local Government Act, 1933, came into operation, unless the sections I have read contained in Pt. IV of the Leicester Corporation Act, 1930, authorised them so to do, the defendant corporation were forbidden by the Municipal Corporations Act, 1882, to pay to Hutton the sum of £11,718 for the goodwill of his business, because such a payment is not authorised by any of the paragraphs in Sched. V, and there was no authority to make such a payment in any Act of Parliament.

B The Local Government Act, 1933, repeals a number of sections of the Municipal Corporations Act, 1882, and in particular it repeals sect. 140 (2), (3), (4) and sects. 141-144 of the Municipal Corporations Act, 1882. It also repeals Sched. V, Pt. I, and in Pt. II, paras. 1 and 7-12. These provisions are replaced by the Local Government Act, 1933, ss. 185-187, which are as follows :

C 185 (1). All receipts of the council of a borough, including the rents and profits of all corporate land, shall be carried to the general rate fund of the borough, and all liabilities failing to be discharged by the council shall be discharged out of that fund. (2). An account called the "general rate fund account," shall be kept of all receipts carried to, and payments made out of, the general rate fund : Provided that, where any such receipts are receipts for the benefit of a part only of the borough, or any such payments are payments in respect of expenditure with which a part only of the borough is chargeable, a separate account shall be kept of receipts and payments in respect of that part of the borough. (3). If the general rate fund is more than sufficient for the purposes

D to which it is applicable, the surplus thereof may be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. 186. The council of a borough shall have power to levy rates to meet all liabilities failing to be discharged by the council for which provision is not otherwise made.

E 187 (1). All payments to and out of the general rate fund of a borough shall be made to and by the treasurer. (2). Except as otherwise expressly provided in this section, all payments out of the general rate fund shall be made in pursuance of an order of the council signed by three members thereof and countersigned by the town clerk, and the same order may include several payments : Provided that the following payments may be made out of the general rate fund without an order of the council, that is to say, payments made (a) in pursuance of the specific requirement of any enactment ; (b) in pursuance of an order of a competent court or of a justice of the peace acting in discharge of his judicial functions ; (c) in respect of any remuneration of (i) the mayor ; (ii) the recorder in his capacity either of recorder or of judge of the borough civil court ; (iii) the stipendiary magistrate ; (iv) the clerk of the peace, when paid by salary ; (v) the clerk of the borough justices ; (vi) any other officer or person whose remuneration is payable by the council ; (d) in respect of the remuneration and allowances certified by the Treasury to be payable to the Treasury in relation to an election petition ; (e) in respect of the remuneration certified by the recorder to be due to an assistant recorder, assistant clerk of the peace, or additional crier. (3). Any person aggrieved by an order of the council made under this section may appeal to the High Court, and on any such appeal the High Court may give such directions in the matter as they think proper, and the order of the High Court shall be final.

F G The last section in the Act to which reference was made was sect. 301, which provides that (subject to an exception which is immaterial) nothing in this Act shall prejudicially alter or affect the rights, privileges, and immunities of any municipal corporation or the operation of any municipal charter.

I have now, I think, stated all the relevant facts and referred to all the statutory provisions to which my attention was directed at the trial. In regard to the

H fact, it is to be noted that the decision of the council at the date of the issue of the writ was that the money which was payable to Hutton under the agreement of Feb. 20 was to be paid out of the reserve fund. Which reserve fund was not stated in the resolution, but I apprehend it must have been the reserve fund formed for the omnibus undertaking. This decision was made on Mar. 28, 1939, when the council approved and adopted the report of their transport committee.

The relief which the plaintiffs claim by the prayer of the statement of claim is, first, a declaration that the defendants are not entitled to carry out the purchase

of the business or the goodwill of the business of J. H. Hutton, and that such purchase is illegal and *ultra vires* and beyond the powers of the defendants, and an injunction following the terms of the declaration, and then :

... a declaration that the defendants are not entitled to apply, extend or use any part of the reserve fund, the general rate fund or any other fund or moneys belonging to the ratepayers of the city of Leicester, or derived from the rates of the city, or to borrow on the security of such funds or moneys for the purpose of purchasing or carrying out the purchase of the business or the goodwill of the business of J. H. Hutton, and that the use of any public moneys for such purposes is illegal and *ultra vires* and beyond the powers of the defendants.

and an injunction based on that declaration.

As I have already stated, and as appears from the agreed statement of facts, the defendant corporation were constituted by royal charter, and it is well settled law that, generally speaking, such a corporation can do anything that an ordinary individual may do. Until the Local Government Act, 1933, came into operation the spending powers of such a corporation were, however, restricted by the Municipal Corporations Act, 1882, s. 140 (see *A.-G. v. Manchester Corpn.* (1) and *A.-G. v. Leeds Corpn.* (2).) In the *Leeds* case (2), LUXMOORE, J., at p. 295, states the law relating to the powers of a corporation incorporated by royal charter in the following terms :

The corporation (that is the Leeds Corporation) was incorporated by royal charter in the year 1627 in the reign of King Charles I. The fact that it is incorporated by royal charter is of importance, because a corporation so constituted stands on a different footing from a statutory corporation, the difference being that the latter species of corporation can only do such acts as are authorised directly or indirectly by the statute creating it ; whereas the former can, speaking generally, do anything that an ordinary individual can do. If, however, the corporation by charter be, as the corporation is in the present case, a municipal corporation, then it is subject to the restriction imposed by the Municipal Corporation Act, 1882, and can be restrained from applying its funds to purposes not authorised by that Act.

Counsel for the plaintiffs rested his case for the first declaration for which the plaintiffs ask upon the proposition that upon the true construction of the Road Traffic Act, 1930, when local authorities were authorised to run public service vehicles on any road within their district, and also with the consent of the traffic commissioners for the traffic area in which any other road is situate on that road, and were given powers by sect. 103 to spend money for the purposes therein mentioned, there was to be implied into sect. 103 a prohibition against the expenditure of any money upon any purpose not mentioned in that section.

The authority upon which this argument was advanced was a passage from the judgment of LINDLEY, L.J., in the *London Assocn. of Shipowners and Brokers v. London & India Docks Joint Committee* (3). The passage upon which reliance was placed is to be found at pp. 250, 251, and is as follows :

The powers of the company to regulate the use of the docks, quays, and warehouses, and to make charges for their use, depend partly on the fact that the company is the owner of them and partly on the fact that the company's rights as owner are largely governed by special provisions rendered necessary for the protection of the public. Subject, however, to the restrictions expressly or impliedly imposed by statute, the company can exercise the ordinary rights which are incidental to the ownership of their docks, quays, and warehouses. As owner, the company could make any regulations it might think proper for the use of its property ; it could charge what it liked and could shut its docks altogether if people would not comply with its demands. These powers, however, are not unchecked by statute. The legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorised to acquire land for such purposes cannot, I think, admit of any doubt.

The decision in that case has nothing whatever to do with the question which has to be decided in the present case, but the passage I have read was relied on as laying down a general principle of construction applicable to all Acts of Parliament, including, therefore, the construction of the relevant sections of the Road Traffic Act, 1930. When that Act was passed the Municipal Corporations Act,

1882, was in full operation, and by sect. 140 of that Act the defendant corporation were, as I have stated, forbidden to spend any of the borough fund in running public service vehicles outside the city boundary upon a route not being one of the three routes described in the Leicester Corporation Act, 1913, s. 21. The express power, therefore, of expending money conferred upon local authorities by the Road Traffic Act, 1930, s. 103, was not superfluous. It was essential, not only in the case of the defendant corporation, but also in the case of any other local authority subject to the provisions of the Municipal Corporations Act, 1882. It seems to me to follow that, so long as that Act was in force, there was no need to read into the Road Traffic Act, 1930, s. 103, a prohibition against the spending of money upon purposes other than those mentioned in that section. The prohibition already existed in the Municipal Corporations Act, 1882, s. 140, and there was, therefore, no need to invoke the principle of construction stated by LINDLEY, L.J.

- A As I see the matter, so long as the Municipal Corporations Act, 1882, s. 140, was in force, the defendant corporation were by that section forbidden to make the payments for goodwill for which the impeached agreement calls and would have been restrained by a court of equity in an action brought by the plaintiffs from making that payment. Since the repeal of subsections. (2), (3) and (4) of that section by the Local Government Act, 1933, the only ban against making that payment has been removed, and the defendant corporation, having power as a corporation incorporated by royal charter to enter into the impeached agreement, are not now prohibited by any Act of Parliament from making the payments. The Local Government Act, 1933, s. 185 (10), gives them power to make the payment out of the general rate fund of the borough, and, if the general rate fund is insufficient to enable the liability to be discharged, sect. 186 confers upon the council of the defendant corporation power to levy a rate to meet it. But the council must decide that the payment is to be made out of the general rate fund. Up to the present time the council does not seem to have so decided. The only resolution of the council dealing with this matter to which my attention was called was the resolution of Mar. 28, 1939, when the council approved and adopted a report of their transport committee that the purchase price payable under the impeached agreement should be paid out of the reserve fund.

- E For these reasons the plaintiffs are not, in my judgment, entitled to the first declaration they claim, nor to the injunction claimed in the second prayer of the statement of claim.

- F It becomes unnecessary to express any opinion upon the argument of counsel for the defendants that the defendant corporation had as incidental to the statutory power of operating public service vehicles conferred by the Road Traffic Act, 1930, s. 101, a power to spend the money of the defendant corporation in buying the goodwill of Hutton's business. The defendant corporation have, however, resolved to discharge their liability to Hutton out of the reserve fund, and counsel on their behalf argued that they were entitled to do so. The question whether they are so entitled depends upon the meaning of the Leicester Corporation Act, 1930, s. 47 (3). It was argued that the acquisition of the goodwill of Hutton's business might benefit the corporation's existing omnibus undertaking, and, therefore, that the price of it could be paid out of the reserve fund. This is a question of fact. I agree that it may be possible for the existing omnibus undertaking to be benefited in some circumstances by the acquisition of the goodwill of another similar undertaking. But this is a matter for evidence and for proof of facts. There is no trace of the idea having at any time been in the minds of anyone representing the defendant corporation, and no evidence was called with a view to proving the facts. In my judgment the defendant corporation have failed to establish any ground upon which they can lawfully use the reserve fund of the omnibus undertaking in paying the price of the goodwill of Hutton's business.

Counsel for the defendants also argued that the defendant corporation were authorised by the Leicester Corporation Act, 1930, s. 45 (2) (b), to pay for the goodwill out of the revenue of the tramway undertaking on the ground that in doing so they would be applying the revenue of that undertaking for the public benefit of the inhabitants of the city of Leicester. The argument was that it would be for the public benefit of the citizens of Leicester that they should be conveyed to and from Bradgate Park in motor buses belonging to the corpora-

tion. This argument was not advanced on proof of any fact, but was grounded on the agreed fact that the defendant corporation are trustees jointly with the county council of this public park. Presumably adequate and efficient transport service between the city of Leicester and Bradgate Park is already provided by the relators and by Hutton. If it is not, representations can be made to the traffic commissioners who can deal with the matter. If it is, it is not possible in the absence of some evidence to come to the conclusion that it is for the public benefit of the citizens of Leicester that the defendant corporation should spend over £11,000 of their money in order that some of them may have the satisfied feeling of having been conveyed to and from Bradgate Park in a motor bus which belonged to the defendant corporation. A

The declaration which the plaintiffs claim by the third paragraph of the statement of claim is, in my judgment, too wide. I will declare that the defendants are not entitled to apply, expend or use any part of any reserve fund formed by them in respect of any of their undertakings for the purpose of purchasing or carrying out the purchase of the business or the goodwill of the business of J. H. Hutton, and that the use of any reserve fund for such purpose is illegal and *ultra vires* and beyond the powers of the defendants, and I will give liberty to apply for an injunction. It is a case in which, in my view, the plaintiffs have been wrong in their principal claim, namely, that the agreement in question was *ultra vires*. The defendant corporation have, however, passed a resolution for paying for the goodwill out of a fund which was not available for the purpose. In all the circumstances of the case the right order to make, I think, with regard to the costs is that the costs of the defendants should be taxed and that the plaintiffs should pay one half of the taxed costs. B C

Solicitors: *Sydney Morse & Co.* (for the plaintiffs); *Field, Roscoe & Co.*, agents for *L. McEvoy*, Town Clerk, Leicester (for the defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.] D

ARBON v. ANDERSON AND OTHERS. DE LAESSOE v. ANDERSON AND OTHERS.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
December 11, 1942.] E

Emergency Legislation—Detention under Defence Regulation—Treatment of detained persons—Effect of instructions issued by Secretary of State and of Prison Rules, 1933—Whether actionable rights conferred on detained persons.

The Secretary of State issued instructions, in the form of a White Paper, relating to the treatment of persons detained under the powers given by the Defence (General) Regulations, reg. 18B, whereby the Prison Rules, 1933, in so far as applicable to prisoners on remand, were made applicable to persons so detained, subject to certain modifications, which were set out in the White Paper. The plaintiffs, who had been detained under this regulation, complained that the treatment accorded to them while in prison was in breach of these rules and instructions and brought actions against the successive Secretaries of State and the governors of the prisons:— F

HELD: the White Paper and the Prison Rules, 1933, were purely administrative and a breach of them gave the persons detained no right of action against the Secretary of State or the prison officials. G

[EDITORIAL NOTE. A breach of statutory duty does not necessarily give a private person a right of action. Whether or not it does so is a matter of the construction of the statute, and the provision of alternative remedies is a strong argument against the remedy by action being available. Upon consideration of the authorities it is here held that neither a breach of the Prison Rules nor of the instructions regarding the detention of persons detained under the Defence (General) Regulations gives any right of action. H

AS TO DUTIES OF PUBLIC OFFICERS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 266-271, paras. 579-585; and FOR CASES, see DIGEST, Vol. 38, pp. 61-66, Nos. 366-412, and pp. 74-77, Nos. 523-542.]

Cases referred to:

(1) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 42 Digest 752, 1758; 67 L.J.Q.B. 635; 78 L.T. 869.

(2) *Cobbett v. Grey* (1850), 4 Exch. 729; 37 Digest 556, 1; 19 L.J.Ex. 137; 14 L.T.O.S. 182.

(3) *Osborne v. Milman* (1886), 17 Q.B.D. 514; reversed (1887), 18 Q.B.D. 471; 42 Digest 414, 4766; 56 L.J.Q.B. 263; 56 L.T. 808.

(4) *Gibson v. Young* (1900), 21 N.S.W.L.R. 7; 11 Digest 523, 291.

A Two ACTIONS by plaintiffs claiming damages for breach of statutory duty. The plaintiffs in both actions had been detained under the Defence (General) Regulations, reg. 18B, and brought actions against successive Secretaries of State and the governors of Walton, Brixton and Stafford gaols. They alleged that the treatment which they received while in prison was contrary to the instructions issued by the Secretary of State in Jan., 1940, in the form of a White Paper. These instructions related to persons detained under reg. 18B, and applied to them such of the prison rules as applied to prisoners on remand, subject to certain conditions and modifications contained in the White Paper.

B The cases were tried separately, but as the same issues of law arose in both cases and the complaints were of a similar nature, one judgment was given. The most serious complaints were in respect of the lack of facilities for association and organised games. It was held that these facts were proved but that the departure from the instructions in these respects was due to the conditions which existed at the time and which made some hardship inevitable. Although some of the complaints were well founded there had been no breach of the Prison Rules and the only serious departure from the instructions issued in the White Paper was in respect of the lack of association and of organised games, and these departures were known to, and approved by, the Secretary of State.

C *G. O. Slade, A. Aiken Watson and J. W. Williamson* for the plaintiff in each action.

D *The Attorney-General (The Rt. Hon. Sir Donald B. Somervell, K.C.), The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and Valentine Holmes* for the defendants in the first action.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and Valentine Holmes for the defendants in the second action.

E GODDARD, L.J.: The plaintiffs in these two actions claim damages against successive Secretaries of State and the governors of certain prisons in respect of the treatment which they received while detained in prison by virtue of orders of detention made under the Defence (General) Regulations, reg. 18B. Both plaintiffs complain that the treatment which they received during their imprisonment—for by whatever name it is called it was and is imprisonment—was not in accordance with the instructions issued by the Secretary of State in January, 1940, relating to persons detained under the regulation and was not in accordance with those of the Prison Rules, 1933, which apply to prisoners under remand or awaiting trial, and which by para. 12 of the instructions were applied to persons

F detained under the regulation subject to the special conditions of the instructions.

Reg. 18B provides that the Secretary of State shall direct where persons who were subject to its provisions should be detained and that they are to be so detained in accordance with the instructions issued by him. In January, 1940, certain instructions were issued in the form of a White paper which, by His Majesty's command, was laid before Parliament.

G The prison rules make no distinction between remand and convicted prisoners for general disciplinary purposes, and the prison diet is the same for both classes. A principal difference is that while the latter, of course, have to perform allotted tasks, the former need only work if they like—I was told that most of them do—otherwise they are confined to their cells except for exercise and attendance at chapel or interviews with the governor; but they have certain privileges which will be found in rr. 119-135. R. 121 contemplates that association with other remand prisoners may be allowed, though for what purposes and to what

H extent is nowhere specified.

In some respects the White Paper puts detained prisoners in a better and in other respects in a rather worse position than remand prisoners.

I now turn to the law. In my opinion, the White Paper contains nothing more than administrative departmental instructions which do not and are not intended to confer any rights on prisoners and cannot do so. There is no obligation on the Secretary of State to communicate them to Parliament, still less to the prisoners. They can be altered or withdrawn at any time. I cannot

agree with the contention of counsel for the plaintiffs that I ought to treat them as though they were set out in full in the regulations; that would be equivalent to saying that they were imposed by order in council with the consequence that if Parliament disapproved them, they would be subject to a resolution that they be annulled under the Emergency Powers (Defence) Act, 1939, s. 8 (2); if not annulled they would then have the force of a statute.

It is clear, in my opinion, that the matter is left to the discretion of the Secretary of State. The instructions, as I say, can be altered or withdrawn at any time. When the Home Office was informed that the conditions at Walton did not permit of the measure of association contemplated by the instructions, the fact that the prisoners were sent in there was equivalent to the Secretary of State instructing the governor to receive the prisoners nevertheless, and to do the best he could. I cannot see how it can be said that any statutory duty *vis-a-vis* the prisoners was created by the White Paper or that they could acquire any cause of action under it even if there had been a wilful disregard of the instructions by the governors.

With regard to the prison rules, it would be enough to say that I find there were no breaches; but in case a higher court should take a different view, I should say that, in my opinion, neither do these rules confer rights upon prisoners which can be enforced by action. They are made under the Prison Act, 1898, s. 2, for the "government" of prisons.

I think it is unnecessary to review the long series of cases which deal with the question as to when the breach of a duty imposed by statute confers a right of action on an individual. The question depends upon the scope and language of the Act which creates the obligation and on considerations of policy and convenience (*per* LORD MACNAGHTEN in *Pasmore v. Oswaldtwistle Urban Council* (1)). Whether the Act provides for a penalty, or whether some special tribunal is set up to deal with matters arising under the Act, are matters no doubt to be taken into account in determining whether a cause of action is also given, and may be the determining factor, but neither the presence nor absence of such provision is conclusive. The real question which falls to be determined is whether it is intended by the statute to confer an individual right. I am clearly of opinion that neither the Prison Act nor the rules were intended to confer any such right. It is significant that there is no trace of any action based on alleged breaches of prison rules ever having been brought in this country unless *Cobbett v. Grey* (2) and *Osborne v. Milman* (3) are to be so regarded, though, in my opinion, they are clearly distinguishable. The former case related to imprisonment in the wrong place. Under a rule having the force of statute different parts of prisons were set apart for the imprisonment of debtors of different categories. The plaintiff being in one of those parts was—it was assumed wrongly—removed by the warden of the prison to another and worse place of detention and this was held to be a trespass in spite of a somewhat vigorous dissent by POLLOCK, C.B.

In *Osborne v. Milman* (3), the plaintiff was imprisoned in Holloway Gaol and treated as a criminal prisoner. He contended that he was imprisoned on civil process and, therefore, ought to have been treated as a first class misdemeanant which is the only form of imprisonment that can be imposed on a prisoner on civil process. DENMAN, J., decided in his favour and awarded him damages. On appeal this decision was reversed on the ground that the prisoner was properly treated as a criminal prisoner, though obviously, if the court had thought that he should have been treated as a civil prisoner, the judgment would have been upheld. But both these cases relate to the nature of the imprisonment. Here the prisoners were lawfully imprisoned and the questions relate to the conditions of their imprisonment.

The nearest case to be found is *Gibson v. Young* (4). It was there held that no action lay against the government at the suit of a prisoner for damages for injuries caused by the negligence of a prison officer. The basis of the decision is public policy and the reasoning is directly applicable to the present case. While I do not think it necessary to decide whether, if a person sustains personal injury through an act of negligence of a prison officer, he can bring an action, it seems to me impossible to say that, if he can prove some departure from the prison rules which caused him inconvenience or detriment, he can maintain an action. It would be fatal to all discipline in prisons if governors and warders

had to perform their duty always with the fear of an action before their eyes, if they, in any way, deviated from the rules.

The safeguards against abuse are appeals to the governor, to the visiting committee and finally to the Secretary of State, and those, in my opinion, are the only remedies. Even if there were proof here that the prison rules had been broken, I should still hold that no cause of action thereby accrued to the plaintiffs.

A Counsel for the plaintiff asked me to fix the damages in any case, but I do not feel able to do so. If my judgment is reversed on appeal, I do not know in what respects it will be held that the plaintiffs have a cause of action; it may be that a higher court will think that they have on some of their complaints and not on others. Therefore, I must leave this to be dealt with elsewhere if the occasion arises.

B The actions, therefore, fail and are dismissed with costs. As the defendants are public officers and are sued in respect of their official duties, the taxation must be between solicitor and client.

Appeal dismissed with costs.

Solicitors: *Oswald Hickson, Collier & Co.* (for the plaintiff in each action); *Treasury Solicitor* (for the defendants in the first and second action).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

C

Followed. Re A SOLICITOR. [1951]
1 All E.R. 592.

Re A SOLICITOR, Re TAXATION OF COSTS.

D [CHANCERY DIVISION (Uthwatt, J.), **November 5, 1942.**]

Solicitors—Costs—Taxation—Withdrawal of bill—Discretion of court—Unpaid disbursements entered as paid.

A solicitor who had delivered a bill of costs, which did not show that counsel's fees had not been paid at that time as required by Ord. 65, r. 27 (29A), asked for leave to withdraw the bill and deliver a fresh bill:—

E

HELD: (i) the court has a discretion to allow a solicitor to withdraw a bill of costs and serve a fresh bill, but whether that discretion should be exercised must depend on the particular circumstances of the case.

(ii) on the facts of this case the discretion should be exercised.

[**EDITORIAL NOTE.** The solicitor is, as a general rule, bound by his bill as delivered and he is not entitled as of right to withdraw his bill of costs and substitute an amended one. The court, however, has power in its discretion to give leave to amend. That discretion is here exercised in a case where nothing more than a technicality was alleged against the solicitor and, if the court had refused to exercise its discretion, the client would have reaped the benefit of disbursements made by the solicitor.

F

AS TO WITHDRAWAL OF BILL OF COSTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 179, 180, para. 212; and FOR CASES, see DIGEST, Vol. 42, pp. 157-159, Nos. 1570-1595.]

Case referred to:

G

(1) *Thomas v. Smith*, unreported.

APPLICATION by a solicitor for leave to withdraw a bill of costs and serve a fresh bill. The facts are fully set out in the judgment.

A. T. Denning, K.C., and *G. Maddocks* for the applicant.

Gerald Gardiner and *D. Lowe* for the respondent.

H

UTHWATT, J.: This is a summons taken out by a solicitor asking, in substance, that he may be permitted to withdraw a bill of costs which he delivered to his client and to deliver a fresh bill. The applicant acted as solicitor to Greenhalgh in certain litigation. In the litigation Greenhalgh was partly successful, and costs were ordered to be paid by the other side to him. The party and party taxation in that action commenced in January, 1942. In the course of the transaction the applicant paid certain of counsel's fees. £80 was paid on Jan. 16, 1942, and £298 was paid on June 24, 1942. The result of those payments was that Greenhalgh, as against his litigious opponent, has, in the judgment for costs, taken advantage of the payments made by the solicitor.

The facts with regard to the solicitor and client bill were these. It was delivered on Mar. 5, 1942. At that date, counsel's fees had not been paid. The bill as delivered did not comply with the provisions of Ord. 65, r. 27 (29A), in that counsel's fees appeared in the manner which would be appropriate if the fees had been paid and did not appear as unpaid disbursements. Greenhalgh appeared to know when the bill was delivered that counsel's fees had not all been paid, but he did not know to what extent they had been paid, and he states in his evidence that he was not aware what the exact position was when the summons for taxation was taken out. A

The solicitor proposed to issue a writ against his client Greenhalgh to recover his fees, but it was suggested to him that, instead of issuing a writ, he should take out a summons for taxation. On Apr. 26, 1942, he took out a summons, and on May 11, 1942, a common order for taxation was made. As regards the actual bill itself, counsel's fees, being unpaid, would be disallowed on taxation between the applicant and his client Greenhalgh. The exact circumstances in which this bill came to be drawn do not appear to me to be really very material except in this sense, that they indicate no desire or intention on the part of the applicant to trick his client or to take advantage of him in any way, although they certainly show stupidity and negligence on the part of the solicitor. As regards Greenhalgh, it might be suggested that his opposition to this application shows cupidity. He has undoubtedly got the benefit of certain payments made by the solicitor, and he is relying on the technical rule to prevent the latter from recovering those sums from him. B C

However that may be, it is undoubted that there is a discretion in the court, and the court has power, to allow a solicitor to withdraw a bill and to deliver a fresh bill. There are, I think, old authorities to that effect, but there is a recent authority in an unreported case, *Thomas v. Smith* (1), where the Court of Appeal, reversing the decision of DU PARCQ, J., exercised that power and exercised it in circumstances which, as far as one could gather from the only available material—a note of the decision in the taxing master's office—were exceedingly like the present case. As far as I am concerned, that case is only authority for the proposition that there is jurisdiction in the court to allow a bill to be withdrawn and a new bill to be delivered. D

The question whether that discretion ought to be exercised in any particular case depends upon all the circumstances of the case. The fact that discretion has been exercised in one way in a particular case is no authority for saying that discretion should be exercised in the same way in a different case. One has to review the matter in the light of all the circumstances of the case, and no two cases are ever the same. Giving the best consideration I can give to the matter, it appears to me that this is a case where that jurisdiction ought to be exercised. My main reason for doing so is that, unless it is exercised, the client, Greenhalgh, will in fact get the pecuniary benefit resulting from the payments which the solicitor has made and which he failed to note properly in his bill. E F

Accordingly I propose, first of all, as this is an application made by the solicitor, to make an order for the taxation of Greenhalgh's costs as between solicitor and client for anything incurred to date under the order for the taxation of the applicant's costs; Greenhalgh's costs of this application are to be taxed as between solicitor and client. I propose to order the solicitor to pay both sets of costs. That is the first part of the order. G

The second part of the order is this, that, subject to those taxed costs being paid within 14 days after the completion of the taxation, I propose to give the applicant leave to withdraw the existing bill and to bring in a new bill distinguished in no material particular from the existing bill except that proper entries may be made in respect of the counsel's fees; in other words, the applicant is not to use this as an opportunity either for increasing or decreasing the charges which appear in the existing bill, or striking out any items, or putting in fresh items which have not already appeared. H

Solicitors: *Botterell & Roche* (for the applicant); *Hays, Roughton & Dunn* (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

HORTON v. OWEN.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Tucker and Cassels, JJ.), November 4, 1942.]

Emergency Legislation—Essential work—Directions to perform work—Non-compliance—Magistrates' power to consider reasonableness of direction—Defence (General) Regulations, regs. 58A, 92.

A In exercise of the powers given by the Defence (General) Regulations, reg. 58A, a national service officer, on behalf of the Ministry of Labour, directed the respondent to perform certain essential work. The work necessitated the respondent residing away from home and since he suffered from asthma he alleged this to be unreasonable and the justices found in favour of this contention :—

B HELD : upon the proper construction of the regulation, it was not open to the court to consider the reasonableness of the direction. The direction had been duly made in pursuance of the regulations, and, since it had not been complied with, an offence had been committed.

[EDITORIAL NOTE. In this matter the decision in *Minister of Agriculture v. Price* (1) has been followed, although, perhaps the matter is carried a little further than it was in that case, and the decision is rather a stronger one. In the earlier case, the question of reasonableness had been decided by a committee and there is reason to believe that an inquiry had been made into the matter. Here it is true there has probably been an inquiry before an administrative appeal board, but the court has reached its conclusion quite independently of there being any such inquiry. Indeed, it holds quite definitely that it must assume that the requirement of the national service officer is reasonable and that neither the justices nor the court can inquire into the question whether or not it was reasonable. This seems to bring such a matter within the decision in *Liversidge v. Anderson*, [1941] 3 All E.R. 338, and other cases under reg. 18B.

D FOR THE DEFENCE (GENERAL) REGULATIONS, reg. 58A, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, p. 658; and see also BUTTERWORTH'S EMERGENCY LEGISLATION, [13] pp. 235-237.]

Case referred to :

(1) *Minister of Agriculture and Fisheries v. Price*, [1941] 2 K.B. 116; [1941] 2 All E.R. 660; Digest Supp.; 165 L.T. 93.

E CASE STATED from a decision of the justices of Miskin Higher, Glamorganshire, dismissing an information against the respondent. The facts are fully set out in the judgments of VISCOUNT CALDECOTE, L.C.J., and TUCKER, J.

Solicitor-General (Sir David Maxwell Fyfe, K.C.) and Arthian Davies for the appellant.

The respondent did not appear and was not represented.

F VISCOUNT CALDECOTE, L.C.J. : An information was laid by the appellant on behalf of the Minister of Labour and National Service against the respondent, that he :

... did unlawfully fail to comply with a direction given to him on behalf of the Minister of Labour and National Service by a national service officer.

The direction was to perform work as a fitter.

G The material regulation under which such a direction may be given by the Minister of Labour is the Defence (General) Regulations, reg. 58A, which provides that the Minister of Labour :

... may direct any person in the United Kingdom to perform such services in the United Kingdom ... as may be specified by the direction, being services which that person is, in the opinion of the Minister, capable of performing.

H If a person fails to comply with any direction given under any of these Defence (General) Regulations, he is, by reg. 92 (1), guilty of an offence. It was in pursuance of those regulations that this information was laid.

The position is that this man, according to the facts found in the case stated, was a victim of asthma. He lived at Abercynon. The magistrates found that there were no travelling facilities between Abercynon and Cwmbran, where he was to work as a fitter, and on those two grounds the respondent declined to comply with the direction which admittedly was given by the national service officer. The respondent, according to para. (1) of the case stated, admitted that

he was capable of doing the work specified in the direction, but contended that he could not lodge away from his home owing to his suffering from asthma.

When the information came to be heard, the magistrates found that the respondent was capable of doing the work although he suffered from asthma, and that they were not satisfied that travelling facilities existed. They went on to find :

That in view of the periodic nightly attacks of asthma and coughing from which he suffered and the lack of nursing attention if he lodged at Cwmbran he had not acted unreasonably in refusing to comply with the said direction. A

It is said on behalf of the appellant that that was a finding which it was not open to the magistrates to make or even to consider ; that all they had to do was to consider whether a direction had been given by the Minister of Labour and National Service and given by him in good faith, and whether the person directed, namely, the respondent to this appeal, had failed to comply with the direction. B

We have been referred to *Minister of Agriculture and Fisheries v. Price* (1), where a somewhat similar question arose upon a direction of the War Agricultural Executive Committee, on behalf of the Minister of Agriculture. The magistrates found that no offence had been committed because they thought the directions unreasonable. I have come to the conclusion that in this case our decision must be to the same effect as the decision reached in that case. The court held that the magistrates had nothing to do with the reasonableness of the directions given by the Minister or on his behalf, but had to consider merely the question whether the direction was properly given and whether the person directed had failed to comply with it. So in this case there is no question but that he was capable of performing the work. The only point which he raised was that it was a real hardship to him to be obliged to comply with the direction of the Minister. I am not inclined to say anything as to the hardship because I do not know the facts, although I have the findings of the magistrates on the point as to whether there were travelling facilities and as to whether the man was suffering from asthma ; but, considering the finding and the fact, on the admission by the respondent, that he was capable of performing the work, and it being stated that the direction was given to the respondent to perform the work, there seems to me only one conclusion possible, and that is that this man has committed an offence by failing to comply with the direction. In my judgment, therefore, this case should go back to the magistrates, as it did in *Minister of Agriculture and Fisheries v. Price* (1), with an intimation that the court thinks that an offence was committed. C D E

TUCKER, J. : This is one of those cases which at the present time is one of considerable importance, because it involves the interference with the freedom of action and choice of the subject and, therefore, requires very careful attention and scrutiny. F

The regulation in force at the material time provided that :

The Minister of Labour and National Service (hereinafter in this regulation referred to as "the Minister") may direct any person in the United Kingdom to perform such services in the United Kingdom or in any British ship not being a Dominion ship as may be specified by the direction, being services which that person is, in the opinion of the Minister, capable of performing. G

Then it goes on to provide that :

Any directions given by the Minister under this regulation may, in accordance with his instructions, be given on his behalf by any person duly authorised in writing by him . .

Then reg. 92 provides, so far as is material :

If any person contravenes or fails to comply with any of these regulations . . . or any direction given or requirement imposed under any of these regulations . . . he shall be guilty of an offence. H

In the facts found in this case it appears that on Oct. 3, 1941; the duly authorised national service officer on behalf of the Minister gave a notice, pursuant to that regulation, requiring or directing the respondent to perform the services specified in the schedule thereto, being services which, in his opinion, the respondent was capable of performing. The services in question were specified in the schedule.

There is no question but that the direction was in order and properly made under the requirements of the regulations and that the work set out in the schedule is work which could properly be required to be performed by the respondent under the regulation.

The case goes on, *inter alia*, to state certain findings. One of those findings is that :

A The services specified in the schedule to the said written direction were services which, in the opinion of the Minister, the respondent was capable of performing.

Later on there is another finding :

The respondent admits that he is capable of doing the work specified in the aforesaid direction dated Oct. 3, 1941, but says that he cannot lodge away from his home owing to his suffering from asthma.

In stating their conclusions the justices stated first :

B That the respondent was capable of doing the work referred to in the said direction of Oct. 3, 1941, although he suffered from asthma.

C The facts show that on Oct. 6, 1941, he attended at the works specified, but refused to undertake the work owing to the lack of travelling facilities, coupled with the state of his health ; and he, in fact, never did undertake any of the work specified in the schedule to the direction. It is a fact which does not affect the legal interpretation of these regulations, but is referred to in the case, that there is an administrative board called a local appeal board, which is constituted for the purpose of considering appeals against such directions by the persons concerned, and we are told, as a matter of history, that this man's case had in fact been before this administrative local appeal board, which, of course, has no judicial powers.

D In my view, on the findings that I have referred to, there was only one course open to the justices, and that is to find that an offence had been committed. We are not concerned with whether or not there were any mitigating circumstances. The only question on those findings is, do they indicate the commission of an offence within the meaning of the regulations ? I think that it is clear that they do. There is nothing in reg. 92 to provide that, before any person is convicted, it must be proved that he has unreasonably failed to comply with any regulation, order or direction : it merely states that, if he does, in fact, fail to comply, he is guilty of an offence.

E I do not want to be thought to be taking too narrow a view of the facts stated in this case, or the meaning of the word "capable," and speaking for myself, I do not think that the word "capable" in reg. 58A is confined merely to the man's capability of doing any particular work from a purely physical point of view. I think that it must involve the consideration of the locality of the work where he is required to perform his duties, coupled with a consideration of his physical or perhaps mental capacity and ability to perform that work in that particular place ; but it is not really necessary for the decision in this case to express any final opinion upon that matter, nor, in my view, is it necessary in this case to decide whether or not the Minister is to be the final judge with regard to the man's capability at the time of the making of the order, or whether somebody else can inquire into it. In this case there is no finding in any way impugning the propriety of the direction, and there being nothing to indicate that a reasonable refusal to comply with such a direction is any defence, there is, in my view, only one course which the justices could take on the facts found in this case stated. I agree that the matter should be remitted to them with a direction to that effect.

F CASSELS, J. : I agree. I have nothing to add.

H Case remitted to justices.

Solicitors : *Solicitor to the Ministry of Labour and National Service* (for the appellant).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

POLPEN SHIPPING CO., LTD. v. COMMERCIAL UNION
ASSURANCE CO., LTD.[KING'S BENCH DIVISION (Atkinson, J.), **December 8, 1942.**]*Insurance—Marine insurance—Policy covering collision with other "ship or vessel"—Collision with flying-boat—Whether flying-boat a ship or vessel.*

The insured were the owners of the Polperro, which was insured against marine risks. The policy contained a provision that, if the ship thereby insured should come into collision with any other ship or vessel and the insured should in consequence thereof become liable to pay and should pay by way of damages any sum in respect of such collision, the underwriters would indemnify the insured against a certain proportion of such damages. In Jan., 1939, the Polperro collided with and damaged a flying-boat and, in an action brought as a result thereof by the Secretary of State for Air, damages amounting to £2,263 2s. 3d. were awarded against the insured, who claimed to be indemnified by the underwriters against part of this loss, together with interest and costs. The underwriters contended that a flying-boat was not a "ship or vessel" within the meaning of the policy:—

HELD: in this policy the words "ship or vessel" did not include a flying-boat because a ship or vessel is intended to do its real work upon the seas or other waters, and to be capable of free and ordered movement from one place to another, but a flying-boat's real work is to fly, and its ability to float and navigate short distances is merely incidental to its real work.

[EDITORIAL NOTE.] The only question here is whether a flying-boat is a ship or vessel. There are certain authorities dealing with such things as gas floats and pontoon cranes, which can travel for short distances on water and to a certain extent are navigable but which have been held not to be ships. A flying-boat probably comes nearer to the idea of a ship than these, but it is held that the main work of such craft must be made the criterion. The real work of a flying-boat is in the air and not on the sea and for this reason it is held not to be a ship or vessel within the terms of the policy here in question.

AS TO MEANING OF SHIP OR VESSEL, see HALSBURY, Hailsham Edn., Vol. 30, pp. 677-679, para. 861; and FOR CASES, see DIGEST, Vol. 41, p. 850, No. 7137.]

Cases referred to:

- (1) *The Gas Float Whitton*, No. 2, [1896] P. 42; *affd. sub nom. Wells v. Gas Float Whitton*, No. 2, *Owners*, [1897] A.C. 337; 41 Digest 850, 7137; 66 L.J.P. 99; 76 L.T. 663.
- (2) *Nicholson v. Chapman* (1793), 2 Hy. Bl. 254; 41 Digest 851, 7141.
- (3) *Merchants' Marine Insurance Co., Ltd. v. North of England Protecting and Indemnity Assn.* (1926), 25 Lloyd, L.R. 446; 42 T.L.R. 724; *affd.* 43 T.L.R. 107; Digest Supp.
- (4) *Watson v. R.C.A. Victor Co., Incorporated* (1934), 50 Lloyd, L.R. 77.

ACTION for the recovery of a sum due under a policy of marine insurance, issued by the defendants in respect of the ship Polperro, owned by the plaintiffs. The facts are fully set out in the judgment.

Sir Robert Aske, K.C., and *Patrick Devlin* for the plaintiffs.

D. N. Pritt, K.C., and *A. J. Hodgson* for the defendants.

ATKINSON, J.: The object of this action is to claim indemnity in respect of an accident in which a certain ship was involved. The plaintiffs are the owners of a ship called the Polperro, and in 1939 they held a policy covering them in respect of ordinary marine perils of the sea as from Dec. 30, 1938, to Dec. 30, 1939. The policy with the defendants covered them for a certain part of any loss that might be sustained in respect of claims under the policy. On Jan. 14, 1939, the ship ran into a flying-boat which we have called the X. The X was a flying-boat and not a seaplane. The difference between the two is this. A seaplane rests upon the water by means of floats on either side and the body of the seaplane is clear of the water, but a flying-boat, which is heavier and bigger, cannot be supported by floats and, therefore, the body of it rests upon the water and is supported in that way. That is why it is called a boat, because the body is constructed differently so as to maintain or bear the weight of the plane.

There was no question but that this accident was due to the fault of the Polperro. Proceedings were taken against the owners, and they were held liable to the extent of £2,263, and certain additional amounts, and the question here is whether they are entitled to recover part of this loss from the defendants. The words which the plaintiffs say give them the necessary cover are these, contained in the first clause of the Institute Time Clauses, which are attached to the policy :

A And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision the underwriters will pay the assured such proportion . . .

The question is whether this flying-boat was a "ship or vessel." There were two letters which have been treated as evidence of the facts set out in them. The letter of Oct. 21, 1942, states that this flying boat was a London reconnaissance flying-boat fitted with two engines which, but for the accident, would have been engaged in fleet exercises. She was designed to carry a crew of six, and had a normal range of 700 miles and a maximum range of 1,100 miles. It states that a seaplane does not normally travel on the surface of the water, except when taking off or alighting. Then later on further information was given :

C The hull of the flying-boat is constructed on the usual boat lines with bulkheads, frames, stringers and shell-plating of light alloy. It has a length of 52ft. 8ins.

By a later letter this information was added :

The London flying-boat is not amphibious. It is designed to take off from and alight on the water only. So far as can be ascertained a crew of six is usually employed, though the flying-boat could be flown with less than six.

D Now I am told that I have to give the natural and popular meaning to the words "ship or vessel," but probably it would be more accurate if I gave what I think was the meaning of the words as between the parties in this policy. One naturally begins by turning to the Merchant Shipping Act to see what definitions are there given of these two words "vessel" and "ship." By sect. 742 it is provided :

E "Vessel" includes any ship or boat, or any other description of vessel used in navigation ; "ship" includes every description of vessel used in navigation not propelled by oars.

It seems to me that the dominant idea there is something which is not merely capable of navigating for the moment but something which is "used in navigation." The next guide which is presented to me is *The Gas Float Whilton, No. 2* (1). There the plaintiffs were claiming to be entitled to a salvage award because of services rendered to a gas float adrift in the tidal waters of the F Humber. The facts are stated by LORD ESHER, M.R., on p. 45 :

G The lower part [of the float] bore the resemblance of a ship or boat ; that part called by the county court judge the hull had two ends, shaped like the bows of a vessel ; it was 50ft. long and 20ft. broad ; it had no mast, sternpost, forepost, or rudder ; its interior was wholly occupied by a cylinder into which gas was pumped so as to fill it, and so that the gas went up to a light elevated on a pyramid of pieces of wood 50ft. high. The float could not, by reason of its structure, be used for any purpose of its being navigated. It could not be navigated. It could not carry any man or any goods from place to place. It could not hold any man in it except that he could by means of a man-hole and ladder ascend to the light at the top to clean or arrange it. The float was fixed by an anchor or anchors and otherwise at a particular spot in the River Humber, so as to remain always fixed at that spot.

H It had broken away, and a claim arose for salvage services. LORD ESHER, M.R., took enormous trouble and delivered a very learned and long judgment. I am only going to pick out two passages. He says on p. 58 :

It seems impossible to say that within the ordinary English meaning among merchants or sailors or persons dealing with maritime affairs this thing could be called a ship, a vessel, or a boat. But now we have to deal with the argument that the general law maritime acknowledged in the High Court of Admiralty included, and includes, subjects or objects as the subjects or objects of salvage which are beyond ship, apparel, and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage.

Then on p. 60 he quotes with approval a passage from *Nicholson v. Chapman* (2) :

They are not vehicles intended for the navigation of the sea, or the arms of the sea ; they are not recognised as instruments of commerce or navigation by any Act of Congress. They are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them and transport them to their destined port . . .

Then he summarises the judgment, and I am satisfied that the dominant idea in the mind of LORD ESHER, M.R., about a ship was not merely its ability to be navigated, but whether it was in fact something which could fairly be said to navigate the seas. That went to the House of Lords, and I only want to quote one line from LORD HERSHELL. He says, at p. 343, that he agrees with the Court of Appeal that :

It was not constructed for the purpose of being navigated or of conveying cargo or passengers.

That seems to me to put his judgment in a nutshell, "for the purpose of being navigated." The next case is the *Merchants' Marine Insurance Co., Ltd. v. North of England Protecting & Indemnity Assn.* (3), where the question was whether a pontoon crane was a ship or vessel, and ROCHE, J., held that it was not. I do not want to read much of his judgment, but there is just one passage at p. 447 I ought to refer to :

With regard to the decisions that have been cited to me, and the definitions derived from dictionaries which have been put before me very fully by Mr. Jowitt, I say that the adaptation for navigation or to navigation is an ever-recurring element in the definitions in the dictionaries. It is indeed part of the definition adopted by Mr. Jowitt himself, which was that a vessel was an artificial structure made and used for the conveyance by water of persons or property.

I think it is fair to say that again the dominating idea throughout his judgment was this : was the structure which he was considering something which had been intended to be used for navigation, and he held that it was not a ship or vessel. The same view was taken in the Court of Appeal. That court was singularly loth to lay down any principle or any definition. I doubt whether SCRUTTON, L.J., was ever so hesitant about stepping in with some clarifying remarks. He was very vague about the basis of his judgment, but I think it is clear enough that they all thought that a floating crane was not something which could be regarded as being built in order to be "used in navigation." Then there is one further case, which is the last one I need refer to, the Scottish case of *Watson v. R.C.A. Victor Co., Incorporated* (4), where the question was whether a seaplane was a "ship or vessel" for the purposes of salvage. There is one passage on p. 78 with which I agree, and I will read it. :

On consideration of the question presented here for decision I am satisfied that the answer to it must be in the negative. It is common knowledge that a seaplane is in reality only a species of aircraft, and that although its construction permits of its floating on the sea, or even being navigated a short distance, its primary function—as illustrated in this case by the flight of the seaplane from New York to an island off the east coast of Greenland—is navigation in the air. Its construction for the purpose of floating or moving on the water is, I understand, mainly designed for purposes of safety should it be compelled through stress of weather or mechanical defect or for other reason to descend from the air while flying above water.

That, of course, is not true with regard to the flying-boat with which I am concerned. Here its construction is for the purpose of enabling it to land on water and to take off from water. The judgment continues :

In short, in popular language, no one would, I think, describe a seaplane as a ship, or vessel, or boat. But further it is, I think, plain that a seaplane does not satisfy the definitions or descriptions of a ship or a vessel given in either the Merchant Shipping Acts or in the decided cases.

Then he gives the definitions which I have already read and continues :

The essential element in these definitions is that ships or vessels must be structures "used in navigation". Plainly it cannot be predicated of a seaplane—which as pointed out is a species of aircraft—that it is "used in navigation" in the sense in which a vessel or a ship is so used.

Now I have been referred to one or two Acts of Parliament. The first that counsel for the defendants referred me to is the Air Navigation Act, 1920, and

he pointed out the confusion that would arise if a structure of this kind, whether a flying-boat or a seaplane, or whatever it may be, was to be deemed a "ship or vessel," and subject, therefore, to the provisions of both the Shipping Acts and the Air Navigation Act. Sect. 11 deals with the law relating to wrecks and the salvaging of life or property in connection with aircraft. Are there two sets of rules relating to aircraft and a "ship or vessel," or are the ordinary salvage laws applicable? There must be a special inquiry under sect. 12. Are there to be two inquiries? Then there is a later Act, the 1936 Act, which has provisions for the limitation of claims. That is a different standard altogether from that under the Merchant Shipping Act, and he points out that the two cannot work together. The 1936 Act has one or two sections which are of interest. Under sect. 3 (2) (counsel for the plaintiffs also prays this in aid) it is provided:

For the purpose of the Dockyard Port Regulation Act, 1865, seaplanes when on the surface of the water shall be deemed to be vessels.

They are only to be deemed to be vessels for a very limited purpose, and it is for the purpose of the Dockyard Port Regulation Act. There is a similar provision in the Statutory Rules & Orders published not under this Act but under an earlier Act. There is this particular regulation.

Every aircraft manoeuvring under its own power on the water shall conform to the regulations for Preventing Collisions at Sea, and for the purposes of these regulations shall be deemed to be a steam-vessel.

I cannot think, with deference to counsel for the plaintiffs, that one can find two better instances where, for certain limited purposes, a seaplane or a flying-boat has to be deemed to be a vessel. Of course, they are not registered as vessels; they are only for certain limited purposes "deemed to be." Then sect. 3 (3) of the Act is:

Any enactment which confers or imposes on a conservancy or harbour authority any power or duty to make byelaws for the regulation of ships or vessels shall be construed as if the power or duty so conferred or imposed included a power or duty to make byelaws for the regulation of seaplanes when on the surface of the water.

But for provisions of that sort harbour authorities would not have any power to make regulations governing seaplanes and flying-boats on the basis of their being ships or vessels.

The conclusion at which I have arrived is that in this policy it is impossible to hold that the words "ship or vessel" include this flying-boat. I do not want to attempt a definition, but I think a ship or vessel does involve two ideas. If I had to define them, I should say a vessel was any hollow structure intended to be used in navigation, that is, intended to do its real work upon the seas or other waters, and which is capable of free and ordered movement from one place to another. Its ability to navigate is not merely incidental to the work for which it is really intended. A seaplane's real work is to fly. That is its real work and what it is built for, and its ability to float and navigate short distances is merely incidental to its real work, and to my mind that is where the real difference lies. A ship or vessel must be something which is intended to do its real work upon the waters, and it has got to be capable of free and ordered movement. I put in the word "free" to recognise the point in that case before ROCHE, J., where the pontoon crane could be navigated to a small extent and with difficulty, but I do not think that that is navigation within the meaning of this definition. At any rate, there has to be free and ordered movement from one place to another on the waters, and, if you have not those three things, I do not think you are dealing with a "ship or vessel." There will be judgment for the defendants.

Judgment for defendants with costs.

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Parker, Garrett & Co.* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

EXECUTORS OF HAMILTON-RUSSELL v. COMMISSIONERS
OF INLAND REVENUE.[KING'S BENCH DIVISION (Macnaghten, J.), **October 12, 1942.**]*Income Tax—Settlement—Beneficiary absolutely entitled leaving fund to accumulate in hands of trustees—Liability to tax.*

A settlor directed trustees to accumulate the income of a trust fund during his life and, in the events which happened, to hold the fund and the income thereof for the testator upon his attaining 21 years of age. The testator attained that age in 1928 and was then in law entitled to call upon the trustees to hand over to him the fund and all accumulations of income. In fact he did not avail himself of this right until 1939, at which date the settlor was still alive. He died in 1940 and his executors were assessed to sur-tax upon the income of the fund from 1928 until the testator called for the fund in 1939 :—

HELD : the income of the trust fund was not the income of the testator for income tax purposes until he in fact determined the trust or the settlor died.

[EDITORIAL NOTE.] A person of full age and capacity absolutely entitled to a fund in the hands of trustees can call upon the trustees to hand the fund over to him. At the same time he is not bound to do so and he may prefer to leave the fund in the hands of the trustees. In this case, the beneficiary allowed the fund to accumulate in the hands of trustees for some 11 years and then called upon them to transfer it to him. It is to be noted that the terms of the settlement were that the trustees were to accumulate the income of the fund until the death of the settlor. It is held that in these circumstances, until the beneficiary did in fact determine the trust or his father died, the income of the trust was not his income for the purposes of income tax.

AS TO TAX ON INCOME TO BE ACCUMULATED, see HALSBURY, Hailsham Edn., Vol. 17, pp. 272, 273, para. 544; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 545a-545g.]

Case referred to :

- (1) *Wharton v. Masterman*, [1895] A.C. 186; 37 Digest 146, 721; 64 L.J. Ch. 369; 72 L.T. 431; affg. S.C. *sub nom. Harbin v. Masterman*, [1894] 2 Ch. 184.

CASE STATED under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

Cyril King, K.C., and *N. C. Armitage* for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) *J. H. Stamp* and *R. P. Hills* for the respondents.

MACNAGHTEN, J. : This is an appeal by the executors of the will of the Hon. G. L. Hamilton-Russell, who died on active service in France on June 2, 1940, against a decision of the special commissioners confirming an additional assessment to sur-tax made upon them for the year ended April 5, 1939.

By a settlement dated June 17, 1918, made between the ninth Viscount Boyne, the father of the testator, as settlor, of the one part and the trustees of the other part, after reciting that the settlor desired to form a trust fund "for the benefit of such persons and for such purposes as" were thereafter mentioned and as a commencement of such fund had transferred £15,000 National War Bonds to the trustees, it was provided that the trustees should during the lifetime of the settlor :

... accumulate the income of the trust fund by way of compound interest by investing the same and the resulting income thereof ...

and that after the death of the settlor the trustees should stand possessed of the trust fund and the accumulations of the income thereof or the investments representing the same up to the date of the death of the settlor in trust for such son or daughter of his as (being tenant in tail male by purchase of the freehold hereditaments settled by the indenture of resettlement dated Oct. 3, 1906, of the Brancepeth, Hardwick and Baysdale estates) should first attain the age of 21 years.

The testator was the eldest son of the ninth Viscount Boyne and he was tenant in tail of the settled estates. He attained the age of 21 years on Oct. 17, 1928,

and he then acquired a vested interest in the trust fund and its accumulations. It is well settled that in these circumstances, notwithstanding the fact that his father was alive and the trustees were bound to accumulate the income during his father's lifetime, the testator became entitled on attaining his majority to put an end to the trust and to require the trustees to hand over the trust fund to him. (*Wharton v. Masterman* (1)). The testator, however, did not avail himself of this right until Jan. 18, 1939, more than 10 years after he had come of age. He then, by a letter of that date addressed to the trustees, determined the trust, and required the trustees to hand over the fund to him, and they accordingly did so. At that date his father was still alive. The testator in fact predeceased his father and never succeeded to the Boyne title or to the settled estates.

The income received by the trustees between Oct. 17, 1928, when the testator came of age, and Jan. 18, 1939, when he put an end to the trust, amounted, it seems, to £14,530, and the additional assessment to sur-tax in that sum made upon his executors for the year ended Apr. 5, 1939, was made on the footing that the testator had received that income in that year. The statement in para. 4 of the case that the trustees paid over to the testator in the year 1938-39 (*inter alia*) the income which had been accumulated under the settlement since Oct. 17, 1928, is not quite accurate. The trustees did not pay the income to him. In accordance with the provisions of the settlement, they had invested the income which they received during that period. What they transferred to the testator were the investments which represented the income.

At the hearing before me the contention that the testator received in 1938-39 the whole of the income which had been accumulated since he came of age was given up, and it was said that the proper view of the matter was that the income of the trust fund after he came of age belonged to the testator and to him alone, and that he should be regarded as having received the income year by year and that separate assessments for the amount of the income in each of the years that had passed since he came of age ought to be made, provided, of course, such assessments were not barred by lapse of time. But whichever way the claim is made, the question at issue between the parties, namely, are the executors assessable in respect of any part of the income invested by the trustees before Jan. 18, 1939, when the testator put an end to the trusts of the settlement, remains for decision.

The case for the Crown is based, as I understand it, on the contention that as from the date when the testator came of age the trust fund belonged to him and that although for the next 10 years the trustees went on accumulating the income and investing it according to the terms of their trust, such income belonged to the testator and that for the purposes of the income tax and sur-tax he must be regarded as having received it as and when it accrued due year by year.

The rule that a man is entitled to take forthwith the fruit which must sooner or later inevitably fall into his hands, affords, in my opinion, no ground for the contention that he is bound to take it willy-nilly before it is ripe. No support for that contention is to be found in any of the cases cited to me. It seems unreasonable that a beneficiary should be compelled against his will to frustrate the wishes of his benefactor; and none the less so when they stand in the relation of father and son and the father is still alive. It would, I think, be—to say the very least—rather odd if a court of equity, charged with the duty of protecting and enforcing lawful trusts, held itself bound to put an end to such a trust, although all concerned desired its continuance; for it cannot be suggested that the Inland Revenue has any “equity” in this matter.

In my opinion, the testator was not assessable to tax in respect of any part of the income invested by the trustees before Jan. 18, 1939, and the appeal must, therefore, be allowed with costs.

*Appeal allowed with costs.**

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wilson & Co.*, Durham (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re LYNCH, LYNCH *v.* LYNCH.[CHANCERY DIVISION (Uthwatt, J.), **January 11, 1943.**]

Wills—Construction—Gift during widowhood—Beneficiary a spinster known by repute as testator's wife — Testator supplying his own dictionary — "Remarriage."

The testator appointed "my wife Annie Ethel Lynch" to be one of the executors of his will, and he directed that the income of his residuary estate should be paid "to my wife during her widowhood," with a gift over "after the death or remarriage of my wife." The testator was a widower, with whom the said Annie Ethel Lynch had been living as his wife, but since she was the daughter of his brother, she was not and could never be legally married to him. The question to be determined was whether this gift was effective :—

HELD : on the true construction of this will, the testator had provided his own dictionary ; it was clear he intended Annie Ethel Lynch when he said "my wife" and until "her remarriage" must in the context mean until her marriage. Therefore the gift did not fail, and she was entitled to her life interest until her death or marriage.

[EDITORIAL NOTE. If the strict meaning of the words is to be followed, it is clear that a woman who has not been married cannot be a widow. In some cases it has been said that in such a case the period of widowhood is a period which cannot exist and any gift during widowhood fails. There is, however, authority for saying that the testator has provided his own dictionary and that by widowhood he means the period between his death and a subsequent marriage of the woman in question and that construction has here been adopted.

AS TO GIFTS DURING WIDOWHOOD, see HALSBURY, Hailsham Edn., Vol. 44, p. 327, para. 376 ; and FOR CASES, see DIGEST, Vol. 44, pp. 872-875, Nos. 7283-7310.]

Cases referred to :

- (1) *Re Gale, Gale v. Gale*, [1941] Ch. 209 ; [1941] 1 All E.R. 329 ; Digest Supp. ; 110 L.J.Ch. 69 ; 165 L.T. 224.
- (2) *Re Boddington, Boddington v. Clairat* (1884), 25 Ch.D. 685 ; 44 Digest 1225, 10603 ; 53 L.J.Ch. 475 ; 50 L.T. 761.

SUMMONS to determine whether on the true construction of the testator's will the gift to the plaintiff contained therein was valid. The facts are fully set out in the judgment.

T. D. D. Divine for the plaintiff.

E. M. Winterbotham for the first two defendants, the testator's sons.

G. Hewins for the last three defendants, the testator's daughters.

UTHWATT, J. : This summons raises the question whether the plaintiff, Annie Ethel Lynch, is entitled to a terminable life interest in the residuary estate of the testator beginning at his death and ending at the time when she should marry.

The facts are these. The testator made his will on July 26, 1940. He died on Nov. 20, 1940, and his will was proved on Mar. 18, 1941, by the plaintiff. He was married once to Emily Bertha Lynch, who died in Nov., 1929, and by her he had two children who are beneficiaries under the testator's will. Then in Mar., 1935, the testator and the plaintiff a spinster began to cohabit as man and wife and they continued to do so continuously thereafter until his death. Throughout that period they always represented themselves as husband and wife but were never married. They both knew that they could not lawfully marry because the plaintiff was a daughter of the testator's brother and such a marriage would have been within the prohibited degrees of consanguinity.

In these circumstances I have to construe the will of the testator. The will starts off by appointing "my wife Annie Ethel Lynch" and another person to be executors and trustees. Then there is a gift to two daughters and a bequest of the whole of the testator's estate to the trustees upon trust to sell and convert. Then there is a direction that after payment of the just debts the balance is to be invested and the trustees are :

... to pay the income to arise therefrom to my wife during her widowhood for her own use and benefit absolutely. After the death or remarriage of my wife my trustees shall hold my residuary estate upon trust for my sons Albert Lynch Frederick William

Cook Lynch and Daniel Charles Lynch if and when they shall attain the age of 21 years in equal shares provided that in case any of my said sons shall have died in my lifetime or before the death or remarriage of my said wife leaving issue living at the date of the death or remarriage of my said wife who shall attain the age of 21 years such issue shall stand in the place of such deceased son and take *per stirpes* and equally between them if more than one the share of my residuary estate which such deceased son would have taken if he had been living at my death or at the death or remarriage of my said wife as the case may be and had attained a vested interest.

- A The question obviously arises upon the facts whether there is an effective gift to Annie Ethel Lynch of some sort of interest in the income of the testator's residuary estate. There can be no doubt as to the person who is referred to in the will as "my wife" because Annie Ethel Lynch is named as "my wife" and the gift is made to her in terms during her widowhood. The point taken is that this is a gift for a period which the testator has defined as during widowhood, that it was given for the period of widowhood and for that period only, that there
- B never can be any such period in the case of this lady, and, therefore, the gift fails. I agree with the proposition of law that, if that be the true construction of the will, then the gift does fail. That such a construction is possible is quite evident from the decision of FARWELL, J., in *Re Gale* (1), and with the decision in that case I agree. But the facts in this case are not at all the same as the facts in *Re Gale* (1). The question is merely a question of the construction of
- C this particular will in the light of the surrounding circumstances and all the provisions of the will. It is just as well to bear in mind what COTTON, L.J., said in one of the cases cited, *Re Boddington* (2), that, in construing a will of this kind, it is very seldom that one can get any assistance from other cases except so far as they lay down principles. I am willing to accept all the assistance I can from the principles laid down in the cases which have been cited. The principle is quite clear. If this gift was for a period which cannot be defined,
- D then it certainly fails. Upon this particular will one knows—this is in effect the evidence—that, first, both the parties were well aware that the lady, Miss Lynch, never could become the testator's widow in any circumstances whatsoever; and, secondly, that the whole scheme of the will is that a certain state of affairs is to go on until an event described as "the death or remarriage of my said wife" should take place. What did that mean in this will? The
- E "said wife" is identified; her death, of course, could happen. What is meant by "remarriage" in those circumstances? It can only mean marriage. Remarriage in that sense is obviously, on the scheme of the will, to coincide with the termination of the interest expressly given to "my said wife during her widowhood." In those circumstances I have no difficulty in arriving at the conclusion upon the construction of this particular will—and I confine it to this particular will and to the circumstances in which the will was made—that the testator has
- F provided his own dictionary in his application of the words "wife" and "widowhood" to Miss Lynch, and that the fair and proper reading of the phrase "to my dear wife during her widowhood" is "to Annie Ethel Lynch until she shall marry."

- I accordingly propose to declare that, upon the true construction of the will and in the events which have happened, the plaintiff is entitled to a life interest in the residuary estate of the testator beginning at the date of his death and
- G continuing until such date as she shall marry.

Declaration accordingly.

Solicitors: Redpath, Marshall & Holdsworth, agents for Shackles, Dunkerly & Barton, Hull and Hornsea (for all parties).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

H

Re THOMPSON AND COTTRELL'S CONTRACT.

[CHANCERY DIVISION (Uthwatt, J.), January 11, 1943.]

Sale of land—Title—Underlease—Head lease disclaimed on bankruptcy of lessee—Sale of underlease—Whether underlease properly described as such after disclaimer.

In 1941 the purchaser agreed to buy an underlease of a house, which was only part of the property comprised in the head lease. On completion the

purchaser found that in 1930 the head lessee had become bankrupt and that in 1937 his trustee had disclaimed the lease. The question was whether this disclaimer determined the existence of the head lease and whether, therefore, the interest of the vendor could properly be described as an underlease:—

HELD: the disclaimer operated to determine the head lessee's interest in the lease, but the disclaimer did not entirely extinguish the lease, for a failure to pay the rent thereunder would justify a distress. In these circumstances the interest of the vendor could properly be described as an underlease and a good title had been shown.

[EDITORIAL NOTE.] The judgment herein explores what may be described as a *lacuna* in the law, although it is referred to in the judgment, perhaps more accurately, as an inactive volcano which may burst into activity at any moment. The position arising on the disclaimer of a leasehold interest is for the most part defined by statute, and, in so far as the statute does not define it, it must be subject to the general law. No difficulty arises where there is merely a lease, and where there is a sublease of the whole property, the sublessee may be assumed to step into the shoes of the lessee. Where, however, there are sublessees of different parts of the demised premises at apportioned rents, the position is not clear. The statute seems to have assumed that the parties would apply to the court and have the whole position clarified under a vesting order. Where no such application is made, it seems to have been assumed that each sublessee becomes liable to the head lessor for the apportioned part of the rent and to perform the covenants so far as they relate to the property included in the relevant sublease; but clearly the sublessee may be liable to a distress by the head lessor for the whole rent reserved by the head lease and to forfeiture for failure to perform any covenant in the head lease. Whether this is so it was not here necessary to determine, the only question being whether on a sale the sublease could be properly described as an underlease. So long as the head lease can be considered as still in existence for any purpose, it is clear that the underlease is properly described as such, and it is here decided that the head lease remained in existence and the sale was the sale of an underlease. The effect of the disclaimer of a lease is particularly important at the present time in connection with war damage, but the terms of the Landlord and Tenant (War Damage) Act, 1939, s. 8 (2) differ so materially from the Bankruptcy Act, 1914, s. 54 (2) that it is not thought that the present decision is in any way decisive of the position arising under a notice of disclaimer.

AS TO WHAT IS AN UNDERLEASE, see HALSBURY, Hailsham Edn., Vol. 29, p. 264, para. 349; and FOR CASES, see DIGEST, Vol. 40, p. 144, Nos. 1131-1137.]

Cases referred to:

- (1) *Re Finley, Ex parte Clothworkers' Co.* (1888), 21 Q.B.D. 475; 5 Digest 955, 7832; 57 L.J.Q.B. 626; 60 L.T. 134.
- (2) *Hill v. East and West Indian Dock Co.* (1884), 9 App. Cas. 448; 5 Digest 950, 7786; 53 L.J.Ch. 842; 51 L.T. 163.

SUMMONS to determine whether the vendor of a sublease had shown a good title thereto. The facts are fully set out in the judgment.

F. Baden Fuller for the applicant, the vendor.

Sir N. Touche for the respondent, the purchaser.

UTHWATT, J.: The question raised by this summons is whether a good title according to the contract has been shown to an underlease to certain property situate at Erdington, Birmingham.

The contract is dated Oct. 15, 1941, and it is stated to be for the sale of an underlease of No. 19, Abbots Road, for 99 years (less 3 days) from Sept. 29, 1928, which was held at a rent of £5 per annum. Completion was fixed for Nov. 12, 1941, the title to begin with the underlease, with the result that the purchaser was not entitled to make any requisitions as to title of the reversioner. Requisitions were delivered; the purchaser was let into possession. On Oct. 28, an engrossment of the conveyance was prepared and that was executed as an escrow by the vendor.

On Nov. 5, 1941, the vendor sent his completion statement, together with some other documents. Among the other documents so sent was a notice of disclaimer, dated June 5, 1937, in respect of the head lease, out of which the underlease in question took effect. R. H. Bridge, as I understand the matter, was the head lessee and it was he who, in 1936, became bankrupt and it was his interest which was disclaimed in the bankruptcy proceedings. The head lease in question comprised, I understand, some fourteen properties and reserved a rent of £70 per annum; and in respect of it subleases had been granted off, each at a rent

of £5 per annum. In fact the rent had been paid to the freeholder since that date ; but that matter seems to be immaterial.

The only question with which I am concerned in these proceedings is whether a good title according to the contract has been shown. I am not concerned with any matter which bears upon the point whether or not the circumstances are such that the purchaser was entitled by reason of non-disclosure or otherwise to rescind the contract or to have it set aside ; it is merely a question of title.

- A The point taken at the bar is this. In fact you have agreed to sell an underlease ; that is a well-known instrument, which takes effect out of a head lease. Here, in fact, you have got nothing which can be rationally called a headlease and, therefore, you have nothing to sell which can rationally be called an underlease. That is, put shortly, the effect of the argument of counsel for the respondent ; and he adds to it by saying that the matter is not merely a technical one on
- B account of the uncertainties that arise under the Law of Property Act, 1925, s. 146 (10), the possibility that one sublessee might at the risk of forfeiting the sublease be called upon to take a vesting order in respect of the lease and so on, that, anyhow, you have not here a lessee bound to perform the covenants and that you have no bargain between the sublessee and the head landlord, who, on failure to receive his rent, remains entitled to distrain or entitled to forfeit the whole lease, in which event, of course, there may be proceedings
- C to obtain relief against forfeiture under the Law of Property Act, 1925. Those observations are simply directed to working out what is the position and marking the fact that the objection is not merely a technical one.

However that may be, I am only concerned with the question whether it can be rationally said of this particular interest which is agreed to be sold that it was an underlease. Upon its face the instrument purports to be an underlease.

- D There is no doubt about that. Was it so in fact ? Can it be rationally said that it was an underlease in fact, as described in the contract of sale ?

The answer to that question necessitates consideration to a certain extent of the provisions of the Bankruptcy Act, 1914, s. 54. The effect of that section is that, subject to certain conditions to which I need not refer, the trustee in bankruptcy is entitled to disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants. There

- E is no doubt that a lease may fall within that. Then subsect. (2) tells you what is the effect of the disclaimer. It provides :

The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

- F Stopping there, it is quite clear that the point of a disclaimer is not that the lease and all interests carved out of it by way of sublease or otherwise cease to exist. The disclaimer is limited to determining the rights, interests and liabilities of the bankrupt, and his property in respect of the property and the rights against third parties, except so far as necessary for releasing the bankrupt and his
- G estate, remain on foot. The position of the lease after it has been disclaimed is rather a curious one and it cannot, I think, be summed up in any one phrase. That perhaps is not entirely a disadvantage. The thing itself is necessarily the sum of qualities and the circumstance that you cannot describe those qualities in one word does not deprive the thing itself of any real meaning.

In *Re Finley* (1), LINDLEY, L.J., worked out, at p. 485, to a certain extent what was the position of a lease which had been disclaimed. He takes first

H the position where you have only two persons to consider ; the original lessor and the original lessee. Once there has been a disclaimer of the lease and the bankrupt's rights and liabilities are gone, there certainly can never be any other person than the original lessor interested in the property, with the result that the lease itself determines and it is treated there as entirely gone. How far any modification to the rule which he lays down is necessary in the case where the bankrupt is not the original lessee, but is an assignee from the original lessee, I need not stay to determine ; but it may be that some elaboration is necessary.

Then he takes the next case, where you have a lease and a sublease. If the sublessee becomes bankrupt, he points out that as between the sublessee and the sublessor the same consequences follow as where there is only a lease and the lessor becomes bankrupt. The original lessor is not effected in any way; you simply wipe out the relation between the two. Then you get the next case, where the original lessee becomes bankrupt and you consider the position between him and the lessor. As between them the consequences are the same as if there were no sublease. LINDLEY, L.J., said at pp. 485, 486 :

A

As between the lessee and the sublessee the consequences will apparently be these. The lessee's rights and interests and liabilities are determined under subsect. (2) and the extinction of his rights involve the extinction of the liability of the sublessee under his covenants.

That may necessarily follow.

He then considers the case as between the original lessor and the sublessee; and that is, of course, more or less the case that one has to consider on this summons. He puts it in this way, at p. 486 :

B

Now their rights and liabilities are preserved by subsect. (2), and, subject to the effect of a vesting order, whatever that may be, the case will stand in this way—the sublessee, although freed from his covenants to his own immediate lessor, must perform the covenants of the original lease or he will be liable to be distrained upon and to be ejected by the original lessor. That is obviously his position, and that was the position in which a lessee found himself, on the disclaimer of the lease by the trustee in the bankruptcy of his assignee, in *Hill v. East and West India Dock Co.* (2), under the Bankruptcy Act, 1869.

C

Then he goes on to point out that that is not an enviable position, but to a certain extent the matter is remedied by the fact that under the Bankruptcy Act any person interested can apply for a vesting order and so get the whole position clarified.

D

For my purposes the only point that I want to emphasise as resulting from the position of there being a disclaimed lease is that it certainly has not disappeared for ever. Apart from any vesting order, it has an operation in this sense: that failure to pay the rent reserved by it will justify distress; failure to perform the covenants contained in it will justify resort to the proviso for re-entry and, lastly, as the Bankruptcy Act itself recognises, it is capable of being vested in some person by an order made under the Act.

E

It appears to me that when you have an interest in land in a state of circumstances where these qualities subsist, it is impossible to treat the case as if the lease did not exist. It is there to a certain extent as something like an inactive volcano: it may break out into active operation at any time.

You have then your next question. In those circumstances, is it accurate to describe the interest which has been carved out of that lease while it was active as an underlease, although no vesting order has been made in respect of the head lease? For myself, I do not quite see what other name could be given to it. It is an obvious misdescription to call it a lease and, if an underlease be an interest in land taking effect out of a validly created leasehold interest, it appears to me that the interest agreed to be sold and described here as an underlease was in fact an underlease. Taking that to be the case, the property produced corresponds to the property described in the contract and I accordingly hold that it is no objection to the title that at the date of the contract the head lease had been disclaimed under the Bankruptcy Act, 1914, s. 54.

F

G

It was made clear to the purchaser at an early stage that the head lease was one which comprised more properties than one and, therefore, there is no objection to the underlease that it is carved out of a head lease which related to other properties than the property sold.

H

Declaration that the requisitions and objections have been sufficiently answered by the applicant and a good title to the property shown. Respondent to pay the costs.

Solicitors: Ward, Bowie & Co., agents for Duggan, Elton & James, Birmingham (for the applicant); Kenneth Brown, Baker, Baker, agents for D. R. W. Stevenson, Squires & Co., Cambridge (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

**Re HOOPER'S SETTLEMENT TRUSTS, PHILLIPS AND
ANOTHER v. LAKE AND OTHERS.**

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
January 22, 1943.]

Settlement—Beneficial interests Ultimate trust for statutory next of kin—Whether rules before 1926 or after 1925 applicable—Contrary intention—Administration of Estates Act, 1925 (c. 23), s. 50 (2).

A A clause in a settlement provided that, if the settlor died intestate and without having been married, then "the trustees shall stand possessed of the settled fund and the income thereof in trust for such person or persons as would have become entitled to the settled fund under the statutes for the distribution of the personal estate of intestates at the death of the settlor, had he died thereof intestate and without having been married."

B The settlement was made in 1912 and the settlor died in 1941, intestate and without having been married. The Administration of Estates Act, 1925, s. 50 (2), provides that trusts declared in an instrument coming into operation before the commencement of that Act by reference to the statutes of distribution shall, unless a contrary intention appears, be construed as referring to enactments in force immediately before that Act :—

C **HELD :** since the clause contained nothing beyond a declaration of trusts by reference to the statutes of distribution, no contrary intention appeared therein, and the clause must be construed as referring to the statutes in force immediately before the Administration of Estates Act, 1925.
Decision of FARWELL, J. ([1942] 2 All E.R. 581) affirmed.

[EDITORIAL NOTE.] The Court of Appeal have affirmed the decision of FARWELL, J. He, however, held that, since there was an ambiguity in the provision in the settlement, therefore, there could be no contrary intention within the meaning of the statute. The Court of Appeal have not found it necessary to rely upon this argument, but have decided that, as between two constructions, that which gives effect to every word used was to be preferred to one which required the introduction of additional words to give the clause the meaning contended for. Here the question was whether the words "at the death of the settlor" went with the phrase "such persons as would have become entitled" or "the statutes for the distribution of the personal estate of intestates." The court points out that the words cannot be associated with the statutes without at least supplying the words "in force," and, therefore, the clause must be construed as meaning the persons entitled at the death of the settlor since that did not require the introduction of additional words. In the view of the court, the clause contained only a declaration of trusts by reference to the Statutes of Distribution and nothing that could be the expression of a contrary intention, and it is pointed out that, when LUXMOORE, J., in *Re Sutton* (2) said that where there was an ambiguity the old statutes were applicable, he meant no more than that the clause contained nothing beyond a declaration of trusts by reference to the statutes of distribution.

E

F

AS TO REFERENCE TO STATUTES OF DISTRIBUTION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 317-320, para. 367-369; and FOR CASES, see DIGEST, Vol. 44, p. 878, Nos. 7436, 7437.]

Cases referred to :

G (1) *Re Sutcliffe, Sutcliffe v. Robertshaw*, [1929] 1 Ch. 123; Digest Supp.; 98 L.J.Ch. 33; 140 L.T. 135.
(2) *Re Sutton, Evans v. Oliver*, [1934] Ch. 209; Digest Supp.; 103 L.J.Ch. 127; 150 L.T. 453.

APPEAL by the defendant, A. L. Jennings, from an order of FARWELL, J., dated Nov. 4, 1942, reported [1942] 2 All E.R. 581. The facts are fully set out in the judgment of LORD GREENE, M.R.

H *H. B. Vaisey, K.C.*, and *Harold Lightman* (for *R. W. Goff*, on war service) for the appellant, a son of a deceased aunt of the settlor.

H. Wynn-Parry, K.C., and *Raymond Jennings* for the first and second respondents, aunts of the settlor.

Meyrick Beebe for the third respondent, the legal personal representative of a deceased uncle of the settlor.

W. Gutch for the respondent trustees.

Vaisey, K.C. : The judgment of FARWELL, J., involves a *non sequitur*. He found that, upon the true construction of the settlement, the new Act was referred to, but he said that the old statutes prevailed because there was an

ambiguity. This view was based upon a *dictum* in *Re Sutton, Evans v. Oliver* (2). If, however, the judge rightly came to the conclusion that the new Act was referred to, there was no ambiguity and the consequence is that the new Act should be applied. The law, and also the class, should be ascertained as at the date of the settlor's death. That was the view which FARWELL, J., took as the *prima facie* meaning of the settlement. If the words are construed as meaning "according" to the statutes of distribution "then in force," one has a contrary intention expressed. [Counsel referred to *Re Sutcliffe, Sutcliffe v. Robertshaw* (1).]

Wynn-Parry, K.C. : It is the statutes of distribution which are referred to and not the Administration of Estates Act, 1925. Sect. 50 (2) of the 1925 Act contains a clear direction as to the rule of construction to be applied. If there are two possible constructions, one of which gives effect to every word used without the introduction of other words, and the other construction entails the introduction of other words, the court should lean in favour of the first construction. [He was stopped by the court.]

LORD GREENE, M.R. : This appeal raises a question as to the application of the Administration of Estates Act, 1925, s. 50 (2), to a voluntary settlement made on July 12, 1912. By that document the settlor settled certain reversionary and other interests upon trusts which have come to an end or failed, and the question before us relates to the ultimate trust which comes into operation in that event. I need do no more than read that ultimate trust. It is in the following language :

In trust for such person or persons as would have become entitled to the settled fund under the statutes for the distribution of the personal estate of intestates at the death of the settlor had he died possessed thereof intestate and without having been married such persons if more than one to take as tenants in common in the shares in which they would have taken under the same statutes.

The practical issue is whether or not the language of that clause is to be construed in such a way as to refer to the Administration of Estates Act, 1925, or in such a way as to refer to the statutes relating to the distribution of the effects of intestates in force immediately before the commencement of that Act, namely, Jan. 1, 1926. If the former view be correct, the cousins will be entitled to share in the fund : if it be not correct, cousins are excluded and the fund will go among two aunts and an uncle to the exclusion of certain children of deceased aunts and a deceased uncle, for whom counsel for the appellant by representation appears. I should have said that the testator in point of fact died unmarried and intestate.

In construing that clause regard must be had to sect. 50 (2) of the 1925 Act. That section lays down a statutory rule of construction which must be applied in the manner indicated to trusts declared in the specified manner. The subsection is as follows :

Trusts declared in an instrument *inter vivos* made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactment (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act.

That language seems to me to mean clearly that if in a document of the date mentioned all that you find on the true construction of that document is the declaration of trusts by reference to the statutes of distribution, then the statutory direction as to the construction of such a document comes into operation and the court is bound to construe the trusts as referring to the statutes in force immediately before the passing of the 1925 Act. If, on the other hand, when the document is looked at, a contrary intention is found, and that I think clearly means an intention that the trusts are not to be construed by reference to those statutes, then the court, whatever view it might have taken apart from this subsection, has no option.

It seems, therefore, to me that the first question which has to be answered in applying the relevant language of the section is : do the words used do anything more than declare trusts by reference to the statutes of distribution ? If that and nothing else is what the document does, however obscurely it does it, there is an end of the matter. Therefore, the first task is to see whether there is anything more than such a declaration in this document. It appears to me that this document does not contain anything more than such a declaration. Counsel

for the appellant maintained that the words "at the death of the settlor" referred to the statutes for the distribution of the personal estate of intestates and that the phrase read as a whole meant the statutes for the distribution of the personal estate of intestates in force at the death of the settlor. Had that been the true construction it is clear that there would have been a contrary intention appearing, because the settlor would in fact have been saying: "This declaration of trust of mine is not a mere declaration of trust by reference to the statutes of distribution and nothing more, but it is a declaration of trust specifically directed to cover the statutes for the distribution of the personal estate of intestates which may happen to be in force at a particular time."

It is, however, to be observed that that construction which counsel for the appellant favours involves as a matter of English the writing in of at least the two words "in force," because the phrase "the statutes for the distribution of the personal estate of intestates at the death of the settlor" by itself would be an ungrammatical or, at any rate, a very loose way of referring to statutes in force at that particular time. On the other hand, to link the words "at the death of the settlor" to the words "would have become entitled" does not involve the insertion of any words at all; it is a perfectly grammatical sentence, the English and style of which could not be criticised. It is an alternative way of writing English in this sense, that a person who is minded to use a clause of this character—"would have become"—can, as he pleases, split it or not split it. Had the draftsman of this document written "as would at the death of the settlor have become entitled," he would have been writing, just as good English as this draftsman has written. This draftsman appears to me to have preferred not to insert the words "at the death of the settlor" after the word "would," but to insert them later in the sentence.

I, therefore, find myself forced to the conclusion that there is nothing here beyond the declaration of trusts by reference to the statutes of distribution and that there is no contrary intention appearing in the language used. That being so, the subsection comes into operation. The object of the subsection presumably was this. The declaration of trusts by reference to the statutes of distribution was, and still is, I suppose, a common thing in settlements and wills. It is a convenient and compendious way of declaring trusts which is favoured by some settlors and some testators. The legislature, knowing of the existence of that practice, has chosen to lay down a rule as to how such references are to be construed. If no such rule had been laid down, it might very well have been that the courts, finding nothing more than a reference to the statutes of distribution in the declaration of the trust, might have construed it as referring to the statutes for the time being in force. The legislature says: No, you shall not construe such a declaration in that way: if that is all you find, you must construe it as referring to the statutes in force immediately before the commencement of the 1925 Act.

Such authority as there is supports the view which I have expressed. Two cases were referred to; I do not propose to take up time by going into them. With regard to the first, *Re Sutcliffe* (1), a decision of EVE, J., all I need say is this, that the language used in the document in that case is on all fours with the language which we have before us save that the draftsman there split his clause in a way which the draftsman here has not done. Subject to that, that case and this case are on all fours, and EVE, J., decided that case in the same sense that this case, in my opinion, ought to be decided. The other case was one before LUXMOORE, J., *Re Sutton* (2), and there he came to a similar conclusion though on different language. He construed the language before him in the same sense and on the same principles as those which I have indicated here. When he referred to the necessity of finding a positive contrary intention in the will before the Act of 1925 could apply to the case, he did not mean anything more than I have myself ventured in my own language to say, namely, that it is not sufficient merely to declare trusts by reference to the statutes of distribution, but you must do something more if you wish to avoid the results laid down in the subsection, and that something more is the manifestation of a contrary intention. That, of course, does not mean, and the observations of LUXMOORE, J., do not mean, that it is necessary to express that intention in so many words. Like all intentions, it can be collected from the true construction of the document

as a whole ; it can appear by express language or by implication according to ordinary principles. But if, after looking at the document, you find that it is nothing more than a declaration of a trust by reference to the statutes, then you need not look any further. In my opinion, the conclusion of FARWELL, J., was quite right in this matter, and the appeal must be dismissed.

MACKINNON, L.J. : I agree.

DU PARCQ, L.J. : I agree.

Appeal dismissed. Cost of all parties out of estate.

Solicitors : *Torr & Co.*, agents for *Donald G. Ineson*, Cleckheaton (for the appellant) ; *Robbins, Olivey & Lake* (for the first two respondents) ; *Fiell, Roscoe & Co.*, agents for *Hallett, Creery & Co.*, Ashford, Kent (for the third respondent) ; *Beachcroft & Co.* (for the respondent trustees).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

EDWARDS v. SAUNTON HOTEL CO., LTD.

[KING'S BENCH DIVISION (Atkinson, J.), December 14, 1942.]

Companies—Directors—Remuneration—Commission—"Sum available for distribution"—Income tax—Method of calculating depreciation.

A clause in a service agreement for 5 years, later extended to 7 years, made on Sept. 23, 1933, between the defendant company and the plaintiff, provided that the company should pay him a fixed salary and also a commission of 20 per cent. on the sum available for distribution by the company at the end of each year. The defendants contended : (a) that they should deduct the commission from the profits and then credit the plaintiff with 20 per cent. of what remained ; (b) that income tax should be deducted before the profits were ascertained ; (c) that they should deduct a percentage for depreciation from the reduced value, instead of from the original value, in each year :—

HELD : (i) the profits were to be ascertained apart from the liability to pay commission and 20 per cent. of the profits so ascertained were to be paid to the plaintiff.

(ii) the plaintiff was entitled to be paid his percentage on the profits before the deduction of income tax.

(iii) in calculating depreciation a percentage should have been deducted from the original value in each year.

[EDITORIAL NOTE. That the profits should be ascertained without the deduction of the commission or income tax seems to be well-settled by authority. Precisely how the question of depreciation should be dealt with has not been the subject of much authority and it is decided as a matter of fairness to the servant whose remuneration is based on profits that what is called the straight line method should have been adopted. The case goes to show the difficulties of basing remuneration on profits and supports the arguments of those servants who prefer their commission to be based on gross takings, which is in many ways a much more satisfactory method.

AS TO DIRECTOR'S REMUNERATION, see HALSBURY, Hailsham Edn., Vol. 5, pp. 308-311, para. 523 ; and FOR CASES, see DIGEST, Vol. 9, pp. 544, 545, Nos. 3591-3600.]

Cases referred to :

- (1) *Johnston v. Cheestergate Hat Manufacturing Co., Ltd.*, [1915] 2 Ch. 338 ; 9 Digest 545, 3597 ; 84 L.J.Ch. 1914 ; 113 L.T. 148.
- (2) *A.-G. v. Ashton Gas Co.*, [1904] 2 Ch. 621 ; *affd.*, [1906] A.C. 10 ; 10 Digest 1162, 8225 ; 75 L.J.Ch. 1 ; 93 L.T. 676.
- (3) *Patent Castings Syndicate, Ltd. v. Etherington*, [1919] 2 Ch. 254 ; 9 Digest 545, 3599 ; 88 L.J.Ch. 398.
- (4) *Vulcan Motor and Engineering Co. v. Hampson*, [1921] 3 K.B. 597 ; 9 Digest 545, 3595 ; 90 L.J.K.B. 1366 ; 125 L.T. 717.
- (5) *Re Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92 ; 10 Digest 1002, 6958 ; 80 L.J.Ch. 210 ; 103 L.T. 609.
- (6) *Stapley v. Read Bros., Ltd.*, [1924] 2 Ch. 1 ; Digest Supp. ; 93 L.J.Ch. 513 ; 131 L.T. 629.
- (7) *Willmott v. Barber* (1880), 15 Ch.D. 96 ; 31 Digest 388, 5333 ; 49 L.J.Ch. 792 ; 43 L.T. 95 ; *on appeal* (1881), 17 Ch.D. 772.

A. T. Denning, K.C., and G. H. Crispin for the plaintiff.

N. L. C. Macaskie, K.C., and Valentine Holmes for the defendants.

ACTION to determine the proper construction of a service agreement. The facts are fully stated in the judgment.

ATKINSON, J. : The plaintiff claims that he has not been paid in accordance with his service agreement over a period of 7 years. In 1932 John Christie bought the Saunton Sands Hotel, which was an old hotel, and he bought it with the intention of refurnishing and bringing it up to date, and he also hoped to build a much larger and more modern hotel nearby. He himself was not expert in hotel management, but in 1932 he met the plaintiff, who was a man of great experience, and it is common ground that Christie received much helpful advice from the plaintiff. On May 29, 1933, Christie formed the defendant company. There were 1,000 shares. Christie held 999 of them, and his secretary held the remaining one. Christie opened that hotel on June 1, 1933, and the plaintiff managed it from the outset. On Sept. 23, 1933, the agreement on which this action is based was executed by the defendants, and the material parts are as follows :

Whereas the board of directors [which consisted at that time of Christie and the secretary] have pursuant to powers in or incorporated with the articles of association of the company appointed the said Arthur Morgan Edwards a director on the terms and conditions hereinafter contained. Now it is hereby agreed that the company shall employ the said Arthur Morgan Edwards and the said Arthur Morgan Edwards shall serve the company upon the terms and conditions following.

He was to hold office for a term of 5 years, but the company had power to terminate his engagement by 3 months' notice. During the period of service the plaintiff was to use his best endeavours to promote the welfare of the company, and he was to exercise and perform such powers as the board should from time to time delegate to him, and then comes the material clause :

The said Arthur Morgan Edwards shall be entitled by way of remuneration for his services to a salary at the rate of £100 per annum to be paid quarterly on the usual quarter days whilst the Saunton Hotel shall be of its present capacity to be increased to £250 per annum should the proposed enlargement of the hotel or building of a new hotel be carried out and also to a commission of 20 per cent. on the sum available for distribution by the company at the end of each year payable within 1 month after the annual accounts of the company have been passed. The said sum available for distribution before the deduction of the amount payable to the directors in fees shall be certified by the auditors of the company and their certificate shall be conclusive. According to the secretary, Edwards, they did not want to appoint a managing director, but he was appointed a director as indicated in the agreement.

The new hotel was in fact built and opened on July 1, 1935. No question arises as to the salary paid, and the whole question in this case is as to whether the plaintiff has been paid 20 per cent. on the profits available for distribution. The financial year adopted by the company was from Mar. 1, to Feb. 28 or 29 following, whichever it might be, and the action is concerned with the accounts for 7 years, because the plaintiff served the company until Feb. 29, 1940, on the same terms as those applicable during the 5 years' engagement. The company's auditors were Gardiner, Hunter & Co., and Bromfield, one of the partners, who gave evidence before me, said they were responsible for the first accounts, but thereafterwards they merely audited the accounts which were submitted by the secretary. The plaintiff was paid in accordance with the accounts. The plaintiff was dissatisfied with these accounts in three respects, and those three matters fall to be determined in this action.

The first matter of complaint has been called the commission point. The auditors took the view that in calculating his 20 per cent. of the profits you must first deduct from the profits, when arrived at, the commission which the plaintiff would receive and credit him with one-fifth of what remained ; in other words, he should be given one-sixth of the profits instead of one-fifth. Now Bromfield agreed that a clause giving the manager a share of the profits was a very common clause, and he agreed that in all his experience he had never known anybody else attempt to construe such a clause in that way, but he said he had never come across the words "the share of profits available for distribution," and he based his treatment of the matter upon those words. He said that you only get a sum available for distribution when the liability

for commission has been discharged. The words "profits of the company" have often been held to mean the profits available for distribution, and, of course, the argument would apply just as strongly to the word "profits" as to the words "the profits available for distribution." I am satisfied that the words mean that the profit has to be ascertained apart from the liability to pay commission, that in truth there is no liability until the profits are ascertained, and they must then be divided one-fifth to the plaintiff and four-fifths to the company. Reliance was placed upon the word "on" instead of the word "of"; but Bromfield attached no importance to that, and I cannot see that it makes any difference. There are one or two passages in the cases which throw some light on it, but I am going to refer to those when dealing with the next point.

The next point is the question of income tax. In the accounts for the first 2 years income tax was not deducted before arriving at the profits of the company, but in those for the third year, for some reason which has not been explained, they began deducting income tax as an expense before the profits were arrived at. That is wholly wrong. The payment of income tax is a payment out of profits, as has often been determined by the courts. The first case to which I have been referred is *Johnston v. Chestergate Hat Manufacturing Co., Ltd.* (1). The headnote reads :

By a clause in an agreement between a company and its manager he was to receive a fixed salary, and also, as soon as the profits for the year had been ascertained and certified by the company's auditors, a percentage of "the net profits (if any) of the company for the whole year." The agreement provided as follows : "For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries" and other items, which did not include certain items which would be deducted before arriving at the net profits or the income tax payable by the company. The balance sheet for 1 year showed a certain amount of profits including the income tax payable by the company, and the auditors gave a special certificate that the percentage payable to the manager was calculated on the amount of profits less income tax : Held (i) on the principle laid down in *A.-G. v. Ashton Gas Co.* (ii) that the income tax was part of the net profits available for dividends, and that the manager was entitled to be paid his percentage on the net profits before deduction of the tax ; and (2) that, the certificate being based on a wrong principle, the court was not bound by it.

I need not refer to what SARGANT, J., who tried the case, said on the first point, except that on p. 344 he says :

But, for the purpose of considering the strict way in which any such burden falls, it seems to me that I must consider that any sum which is paid by the company on behalf of the shareholders of that company by way of income tax, under the system under which income tax is deducted at the source, is part of the net profits of the company available for dividend.

Then he dealt with the second point as to whether the certificate was correct, and says :

In my opinion, if I can see that a certificate is given on a wrong principle, then I am not precluded by it from dealing with the matter . . .

He held that the auditors had dealt with the matter on a wrong principle; and, therefore, it was open to him to deal with it.

Twice since then the point has been referred to. In *Patent Castings Syndicate, Ltd. v. Etherington* (3), the question considered was whether the excess profits duty ought to be deducted from the sum available out of which the manager was to have a percentage, and I find this in the headnote :

Held, also, that (for the present purpose) no analogy between the incidence of income tax and that of excess profits duty exists . . .

and it was held that excess profits duty was a sum to be deducted before arriving at the sum available for division. At pp. 274, 275, DUKE, L.J., says :

The agreement was one between the works manager and the representatives of the shareholders of the company for an apportionment of a certain fund at the time of the annual general meeting of the company. Reference has already been made to the purpose for which an annual general meeting is held. I think the fund which was to be apportioned between the works manager and the shareholders was a fund which represented in truth the residue of the earnings of the company in the year which was available for distribution as between the company and its works manager, in such a sense that the part retained by the company should be capable of distribution among the several shareholders, or of retention by the company among its proper assets, to be

dealt with in such manner as its directors should think fit, and that the 5 per cent. which was to go to the works manager was to be equally his property. I think it was to be a distribution in fact of a divisible residue of profits, and that it was to be a rateable distribution.

There is also a reference to the point in *Vulcan Motor and Engineering Co. v. Hampson* (4), where again the question was whether excess profits duty was to be deducted before commission was calculated, and the decision follows the ones to which I have referred. At p. 603, WARRINGTON, L.J., said this :

I think that it is a clause dealing with the apportionment of the profits of the company between the shareholders, who, but for this agreement, would be entitled to the whole of those profits, and the works manager. If that is so, the present case is entirely covered by the decision in *Patent Castings Syndicate v. Etherington* (3)

Throughout that case the distinction between income tax and excess profits duty is clearly recognised. So, therefore, on the second point of principle, the incidence of income tax, I think the plaintiff is right, and there ought to be no such deduction.

The third matter of principle is the question, and the much more difficult one, of depreciation. Of course, there is no dispute that depreciation properly ascertained must be, and ought to be, deducted from the sum earned in order to arrive at the true profits which the company has made. A company can depreciate as much as it likes. It can write off, if it has had a good year, and very frequently does write off, very considerable sums. If there is only one shareholder, he can do what he likes. He has no one to consult, and can write off as much as he likes for depreciation. FLETCHER MOULTON, L.J., in *Re Spanish Prospecting Co., Ltd.* (5), dealt with the whole matter; he pointed out that to ascertain the profits exactly, you have to compare the value of your assets at the end of the year with the value at the beginning, ascertaining the amount by which they have depreciated in value. That depreciation is a loss properly brought into the profit and loss account. He pointed out that in practice no one really makes a fresh valuation of assets every year, but some fair way has to be adopted of arriving at the figure, and he goes on, at p. 101 :

But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid. A company may wisely write off liberally under the head of depreciation, but they will be only allowed to deduct the sum representing actual depreciation for the purpose of calculating the profits for income tax. The same would be the case if a person had a right to receive a certain percentage of the profits made by the company. In the absence of special stipulations to the contrary, "profits" in cases where the rights of third parties come in mean actual profits, and they must be calculated as closely as possible in accordance with the fundamental conception or definition to which I have referred.

No one has ever called in question the principle there laid down, and, therefore, the plaintiff has a right here to say that the revenue accounts could only be debited with a depreciation which in truth reasonably and fairly and properly represented the decreased value year by year of the assets. It has been decided that, if a company writes off excessive depreciation, it is in truth only creating a reserve which can be brought into revenue again at any time it likes and become available for profits. One of the cases which decided that is *Stapley v. Read* (6). I agree that it was never intended here that there should be fresh valuation every year, but it was intended, and I am bound to attribute that intention to the defendants, that only a reasonable estimate of depreciation should be made for the purpose of getting at the plaintiff's commission. You have to begin, and there is not much doubt about this, by obtaining a reasonable estimate of the life of your different classes of assets, and the cost has to be written off, or may be properly written off, over the appropriate number of years decided on, and it seems common sense that the method of writing off should operate fairly between the company and the third party. There are two methods which may be adopted; one is called the reducing value method, by which you deduct the same percentage every year, but calculate it on the reduced value, and the other method is called the original cost method or straight line method, where you deduct the same percentage every year from cost and write off the value

of the assets in that way. It seems to be recognised that whatever number of years you estimate as the life of a class of assets, there is always a residual value of 10 per cent. Therefore, if you think 10 years is a reasonable period to take as the life of certain assets, you write off the value in 10 years, getting down to their residual value, and the percentage you deduct depends on the method you adopt. If you adopt the reducing value method you have to make a deduction of 20 per cent. on the reduced value to get down to the residual value of 10 per cent. in 10 years, but if you adopt the other method you must only take 9 per cent., because, deducting 9 per cent. from the cost every year for 10 years, you find yourself down to the same residual value. The first method, the reducing value method, operates very hardly on anyone who is only interested in the profits for 5 years, or some period less than the full 10, and the straight line method operates much more fairly for him than the other. I find this, for instance, that if you adopt the first method, at the end of 5 years you have written off 67 per cent., whereas at the end of 5 years with the second method you have only written off 45 per cent. of the value. Those are the two methods, one of which has to be adopted, and I have to decide which. The method adopted by the Inland Revenue is the reducing value method, but they write off a much smaller percentage than the company did. The company in the first of their accounts adopted the reducing value method, and the auditors, as I say, approved the accounts year by year, but the auditors had never considered this question as between the plaintiff and the defendants. They only looked at the accounts as presented to them and looked to see if the company had depreciated them sufficiently. The witness said :

I knew it was a company, and as long as they depreciated sufficiently I did not mind how excessively they did it. I certified the accounts.

He had never addressed his mind to the question of the amount of profits available for distribution, and the view which he took, and he so advised the plaintiff, was that the plaintiff was bound by the accounts of the company, whatever they might be. The plaintiff was told that from the beginning when he raised the question of the commission that he was bound by the accounts; and naturally enough he believed what he was told. He was very disappointed, but he believed that was what the agreement meant, since he had been told so by the auditors.

It seems to me there is no dispute as to the length of life of the various assets upon which the residual value was reached. For the furniture, and that kind of assets, they took 18 years, for the glass, china and linen they took 10, for the cash register 10 years, and for the electric light plant $7\frac{1}{2}$ years, and, in my view, the only fair method to adopt is the second method, or the straight line method, and I think that that is the method which ought to have been adopted. That means, in the case of the furniture, that you would calculate a deduction of 5 per cent., in the case of the glass, china and cash register, 9 per cent., and for the electric light plant, 7 per cent., but here, besides depreciation the accountants also debited revenue with renewals. It is really not contested that you cannot do both. For example, if you have carefully written off your linen, in 10 years you cannot also debit the revenue account with the money spent on purchasing new linen; that is doing it twice over. Some companies think it better to charge renewals rather than depreciation in the case of rapidly depreciating assets. For instance, the Inland Revenue prefer renewals in such cases, and, of course, no depreciation is then made. The advantage of this is that you are substituting a certainty for a mere estimate, and it is for me to decide which method should be adopted. I think the fairest method as regards furniture, fixtures and fittings is to depreciate 5 per cent. on cost every year, as regards the cash register 9 per cent. on cost every year, and in the case of the electric light plant 7 per cent. on cost, and not to depreciate the glass and china and linen, but to allow renewals. That is my view. I do not think it is for me to determine the point, but I suggest that the question as to how it should be dealt with should be left to experts, because obviously they must be in a better position than I am to determine that question. If either of the parties prefer to refer the matter to Messrs. Whinneys and want to go to that expense, they may. They are accountants of very great experience in dealing with accounts of this kind, but that seems to me to be the way I should deal with it.

I am satisfied that the accounts must be reopened on this basis, not deducting the commission before ascertaining the profits, without any deduction of income tax, and, unless the parties wish to refer the matter to assessors to report as to the way of dealing with the depreciation, I decide that in the way I have indicated; that is to say, renewals for the glass, china and linen items, and the straight line method for the others.

Solicitors: *Culross & Co.* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL v. BARCLAYS BANK, LTD., AND OTHERS.

[KING'S BENCH DIVISION (Wrotesley, J.), November 10, 1942.]

Estate Duty—Property passing on death—Policies of assurance—Policies transferred to trustees—Separate fund provided for payment of premiums—Appointment—Death of assured—Whether policies kept up for donee's benefit—Customs and Inland Revenue Act, 1889 (c. 7), s. 11—Finance Act, 1894 (c. 30), ss. 2 (1) (c), 7 (7).

A settlor transferred to trustees two assurance policies on his own life and certain shares. The trustees were to use the income of the shares and any accumulation thereof to pay the premiums on the policies, and to hold the balance, whether capital or interest, and including the policy moneys, as he should by deed or will appoint. The appointment by deed was made, under which the investments were divided into two categories. Those in the first category, which formed the absolute fund, were to be held in trust for his elder son absolutely, but were liable to be resorted to, if necessary; for payment of the premiums. The investments in the second category were to be resorted to in the first place for payment of the premiums and subject to this the income of these investments, called the retained fund, was to be paid during his life to his elder son and in default of issue to his younger son, Mark. On the same day the elder son assigned his newly created absolute interest and his life interest to the trustees. Subject to the premiums on the two policies, these interests were then settled on the elder son for life, to provide an annuity not exceeding £1,500 and subject thereto on discretionary trusts for the benefit of the elder son, his wife, his children, his younger son, Mark, his wife and children, and their sister, Beryl. In 1934, the settlor died and on his death £78,675 was paid to the trustees in respect of the policies of assurance. The Crown contended that estate duty was payable in respect of this sum under the Finance Act, 1894, s. 2 (1) (c), by reference to the Customs and Inland Revenue Act, 1889, s. 11, by which duty is payable on all property passing on death, including policies wholly kept up by the insured for the benefit of a donee. The trustees denied that the policies were wholly kept up by the settlor for the benefit of a donee.

A further question was raised concerning the valuation for estate duty under the Finance Act, 1894, s. 7 (7), of the benefit accruing or arising from the cesser of the interest which ceased on the settlor's death. The trust funds were freed from the payments of the premiums which amounted to £3,720. The point was whether the value of the interest was the sum of £3,720 and the income tax on that sum which the trustees had to find, or as the defendants claimed, the bare sum of £3,720:—

Held: (i) upon the death of the settlor there were persons, all of whom had been designated not later than 1930, who benefited and the settlor had provided the means of keeping up the policies and had caused the premiums to be paid. The policies had, therefore, been wholly kept up by the settlor for the benefit of donees within the meaning of the Finance Act, 1894, s. 2 (1) (c).

(ii) the capital value of the interest which ceased on the settlor's death was not to be based on the net amount of the income freed by the fact that the premiums ceased to be payable, but on the amount of the trust

income which after it had borne income tax would produce the amount paid in respect of the premiums.

[EDITORIAL NOTE.] The principal question in this case is whether the deceased can be said to have kept up the policies. It was argued that, as the premiums had been paid out of a fund which the deceased had completely set aside and vested in trustees, the policies had been kept up out of that fund and not by the deceased. This argument is rejected and it is held that the deceased had kept up the policies. The calculation of the amount of the fund needed for the upkeep of the policies is important now that the rates of income tax are so high.

As TO POLICIES KEPT UP FOR A DONEE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 241, 242, para. 232; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.]

Cases referred to:

- (1) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 21 Digest 8, 27; 68 L.J.Q.B. 435; 80 L.T. 361; *varying S.C. sub nom. Re Cowley's (Earl) Estate*, [1898] 1 Q.B. 355.
- (2) *Inland Revenue Comrs. v. Scott's Trustees*, [1918] S.C. 720; 21 Digest 7, e.
- (3) *Lord Advocate v. Fleming*, [1897] A.C. 145; 21 Digest 87, 632; 66 L.J.P.C. 41; *sub nom. Lord Advocate v. Robertson*, 76 L.T. 125.
- (4) *Lord Advocate v. Fotheringham*, [1924] S.C. 52; 21 Digest 26, p.

INFORMATION by the Attorney-General to recover estate duty and succession duty. The facts are fully set out in the judgment.

The Attorney-General (Sir Donald B. Somervell, K.C.) and J. H. Stamp for the informant.

Cyril King, K.C., and Wilfrid Hunt for the defendants.

WROTTESELEY, J.: The facts of this case are somewhat complicated: but the important facts relevant to the decision of the first and principal point may be stated as follows:—

The first Lord Devonport executed a first deed of settlement by which he transferred to trustees two policies of assurance on his own life and certain shares. The trustees were to use the income of the shares and any accumulations of income first to pay the premiums necessary to keep up the policies, and the balance, whether capital or interest or the product of the policies, was to be dealt with as he should by deed or will appoint. Until and subject to any such appointment there were certain discretionary and other trusts for the primary benefit of his eldest son, the second and present Lord Devonport for his life, and after the death of this eldest son, other trusts such as for grandchildren.

The point of importance is that the first Lord Devonport not merely assigned these policies to trustees, but also gave them shares, producing income, the first call upon which was to be the keeping in force of the policies. From time to time the first Lord Devonport transferred other investments to the trustees. On May 15, 1930, he made the appointment by deed. The investments were by this deed divided into two categories; those set out in the first part of the schedule which formed the "absolute fund" were to be held in trust for the second Lord Devonport absolutely, but were still to be liable to be resorted to if necessary in order to pay the premiums. It was to the investments set out in the second part of the schedule that the trustees were first to resort for this purpose; and subject to this the income of these investments (called the retained fund) was to be paid during his life to the second Lord Devonport, and in default of issue to his younger brother, Mark. The matter was, however, somewhat complicated by a further and second settlement, made on the same day as the appointment, to which (i) the first Lord Devonport, (ii) this eldest son, the second Lord Devonport and (iii) the trustees were parties. By the deed the second Lord Devonport assigned his absolute interest, which had just been created, to the trustees, also his life interest in the retained fund. Subject always to the claim of the two policies, these interests were now settled on the second Lord Devonport for life, up to a yearly sum of £1,500 per annum; and subject thereto to permit the trustees to make various payments at their discretion to the second Lord Devonport, his wife, his children, his brother Mark, his wife and children, and their sister, Beryl.

In 1934, the first Lord Devonport died, and on his death £78,675 was paid to the trustees in respect of the policies of assurance. The Crown say that on this sum estate duty should be paid. They claim, first and foremost, under

the Finance Act, 1894, s. 2 (1) (c). The Finance Act, 1894, s. 1, created a new duty, payable on every description of property, real or personal, which passes on the death of a person. In addition, this new duty was to be exigible on certain property which did not pass on death, but nevertheless was to be dutiable because the circumstances were analogous to those of property which passes on death.

A The language by which this was brought about is to be found in sect. 2, which provides that property passing on the death of the deceased shall be deemed to include various kinds of property. For instance:—

2 (1) (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased . . .

B (c) Property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.

(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

C The Customs and Inland Revenue Act, 1881, s. 38, in its amended form is as follows:

The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

D The first question, therefore, to be resolved is whether this £78,000 odd is money received under a policy of assurance effected by a person on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee. It is clear that the money paid to the trustees is covered by the language of this subsection if these policies were wholly kept up by the first Lord Devonport for the benefit of a donee, whether nominee or assignee. The Crown claim that they were so kept up. The trustees deny it.

E It is a point upon which there is no direct authority, and little enough authority of any kind. On the one hand it is clear that what I may call the normal course was not pursued here. The first Lord Devonport did not pay the yearly premiums on these policies out of his private fortune. On the other hand, neither did the second Lord Devonport nor anyone else find the money to pay these premiums. Had they done so, there is no question but that this subsection could not have applied. The first Lord Devonport took a course of his own. He found a lump sum, or rather a body of investments, the income whereof was enough to pay the premiums. These investments and the policies he handed over to trustees with directions that they were to use the one to keep up the other. The trust was complicated by and wrapped up with all kinds of other matters, such as the creation of interests for his eldest son, and his other relatives. But this was the gist of the matter.

G The question is easy enough to ask; but not by any means easy to answer. There is no doubt that the first Lord Devonport did provide the wherewithal to keep up these policies, and in that sense kept them up; and there is no doubt that he did this not for his own benefit, but for persons such as his eldest son, the second Lord Devonport, should he survive him, with discretionary trusts either for the second Lord Devonport or some other relative of the first Lord Devonport. These were the persons for whose benefit the premiums were paid after the second settlement. To this the first Lord Devonport was a concurring party, having made it possible by his deed of appointment of the same date.

It is, I think, reasonably clear, by reference to the words in the Act dealing with policies which are not wholly, but only partly, kept up by the deceased, that what I am to look for in order to see if Lord Devonport can be said to have kept up these policies is the payment of the premiums. For it is by apportioning in proportion to premiums paid that the dutiable portion of the moneys paid under such policies is to be ascertained. Can Lord Devonport be said

to have kept up these policies by paying the premiums? It is not, and I gather cannot be, suggested that if I were so to hold I should be bringing about any absurdity or injustice, or anything contrary to the scheme of the Act. That the Act is the outcome of a scheme can be seen from the language of LORD MACNAGHTEN, in *Earl Cowley v. Inland Revenue Comrs.* (1), at p. 210.

What is the object of these words? In my judgment, it is in order to distinguish the case where the deceased pays the premiums, from the case where some other person, such as the recipient or a third party, pays the premiums. There is logic in this distinction. Where the deceased pays the premiums, he builds up a property which on his death passes to the person whom he has nominated, or to whom he by deed or will assigns it. In that sense the property created by the deceased passes to the person receiving the moneys. Where the nominee or assignee pays the premiums, he and not the assured builds up the property; and where a third party pays the premiums, it is that third party who builds up the property. In neither of these two latter cases can it be said that the deceased has contributed anything but the fact of his decease. The analogy, therefore, to property passing from the deceased to the recipient of it on the death of the former breaks down.

This train of reasoning would not, of course, justify me in stretching the meaning of the language. So far from that being the case, I have come to the conclusion that unless I can find some good reason to the contrary, the language of the statute as understood by ordinary men of common sense covers the case of a man who did the very thing which Lord Devonport did here. He took, as it were, enough and more than enough money to ensure the keeping up of these policies out of his own pocket, and handed it to persons who agreed to take it and use it for the purpose. He took steps to ensure that this act of his should be irrevocable. It is difficult to see what other steps a prudent and foresighted man could have taken to ensure the keeping up of these policies wholly by the payment of premiums at all costs, unless he had added a covenant by himself to make good any deficiencies. Assuming that Lord Devonport had agreed wholly to keep up these policies in 1922, can it be said that he was at any time guilty of a breach of his contract? To any such claim his answer would be *qui facit per alium facit per se*. I am fortified in this view by the chance remarks of the LORD PRESIDENT of the Court of Session in Scotland, in *Inland Revenue Comrs. v. Scott's Trustees* (2). The language is this:

It appears to me exactly the same as if he himself had paid out of his own funds during all those years all those premiums upon his four policies.

It is, so far as this case is concerned, a chance observation, for that court was not confronted with the problem with which I am confronted. In that case it was enough if the court found that the deceased had "provided" the money. But the facts are so like those in this case—in essentials—that even the chance observations of members of the court have some value; and the language, if it truly expresses the position of a settlor under the law of England, is decisive. It may be that there is something in the law of Scotland relating to trusts that would make the observations of the LORD PRESIDENT true in Scotland but not in England. I do not, therefore, rely upon it; but I am encouraged by it. For these reasons I am of opinion that the first Lord Devonport filled the role described in the Act, in that he wholly kept up the policies by paying, or what is the equivalent, causing to be paid, duly and punctually, the premiums on them.

But did he keep them up for the benefit of a donee, whether nominee or assignee? That phrase, of course, covers donees. So much is admitted. Here counsel for the defendants points to the welter of trusts created by the appointment and the second settlement, and suggests that, even in the plural, the word "donees" cannot be taken to cover all the persons and classes of persons for whose benefit these policies were kept up. They certainly make up a formidable list. If he is right, the case is not within this particular section, and the commissioners of Inland Revenue must resort to other subsections, such as subjects. (b) or (d), to establish any right to duty. If this be the true view of what Parliament intended in employing the word "donee," there must be some point at which the line can be drawn. I asked counsel for the defendants to help me by indicating where I was to draw the line here. He submitted that the line was to be drawn by stopping short at persons who derived a benefit

which came into possession, which materialised, on the decease. Thus a tenant for life would apparently be such a beneficiary *pro tanto*, but the remaindermen would not. If that were the true test, it would, if I rightly apprehend the argument, result in this remarkable state of affairs. This provision would work so as to exact duty if the moneys payable under a policy came immediately into the absolute possession of a person or persons, but not if they were to fall into the hands of trustees, and, through them, were to be used in one event for one set of beneficiaries, and in another for a different set or class.

A It is not suggested that any difficulty was caused merely by there being trustees and beneficiaries. But it was said that the policies must have been kept up for some person or persons created by the deceased in order to take the policy moneys. I find myself quite unable to appreciate this argument. I do not believe that in using the phrase "donee" Parliament was taking the faintest interest in the question whether these persons were one or many, or whether they were to take something immediately on the decease of the assured, or after a period, or subject to prior interests. I do not believe this because I cannot find anything anywhere in the Act to suggest that any such consideration was to come into the picture, and because to hold that it did would produce the most absurd anomalies, upon which I need not dilate.

B The defendants rely on *Lord Advocate v. Fleming* (3), a case under this very section as originally enacted, and some observations in that case made by LORD HALSBURY and LORD HERSCHELL. The observation of LORD HALSBURY was at p. 152 :

C I do not know that I can state it more plainly than LORD ADAM has done. He says : " I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence."

D Upon this it is suggested by the defendants that some, at least, of the alleged donees were or might be persons " not in existence," such as unborn children. The observation of LORD HERSCHELL is on p. 154 :

E Then it is said that account duty is payable by virtue of the Act of 1881 and sect. 11 of the 1889 Act. In order to bring the case within those statutes it is necessary to show that the policy, the duty on the proceeds of which is in question, has been either " wholly kept up " " for the benefit of the donee "—which, of course, is not the case here—or has been partially kept up for the benefit of the donee. In my opinion it would be really an abuse of words to say that the policy was " kept up for the benefit of the donee " at the time when payments were being made by the father of the lady, not for her benefit as far as appears, or for anybody's benefit but his own. The contention is that, because he afterwards creates a donee, the payment of premiums which he made, when for aught that appears he had no donee at all in his mind—I do not mean merely any individual donee, but no notion of creating a donee—must be regarded, if he creates a donee, as having been made for her benefit. I do not think it is reasonable to treat the language of the Act of Parliament in that way. I think that it would really be not using the words of the statute but abusing them if we put such a construction upon them.

F As regards the observations of LORD HALSBURY, they are upon the facts of that case, a consideration which is only too often lost sight of in quoting the observations of judges. The facts were :

G By gratuitous assignation dated 1883 a father assigned to his daughter policies of insurance on his own life on which for many years he had paid the premiums. From 1883 the premiums on the policies were paid solely by the daughter. The father died in 1890, and the daughter thereupon received the money due under the policies :—HELD, affirming the decision of the first division of the Court of Session, that neither succession duty nor account duty was payable by the daughter.

H Those are the facts, and that was the decision. So that we had there the case of a beneficiary who herself for 7 years paid all the premiums, and in that sense built up the property which ultimately passed ; and upon this aspect of the case LORD HALSBURY laid stress. As he said, it was the person ultimately entitled who herself in one sense created the property.

As regards the observations of LORD HERSCHELL, not only did he foresee, perhaps, the arguments which might wrongly be based on his decision, and say at p. 153 :

I do not intend to lay down any principle or to say anything applicable to any case but the one with which we are dealing.

but he went on to point out that a person who merely took out a life policy

must not be taken on that account to be making payments for the benefit of a donee, when in fact for aught that appears he has no donee at all in his mind. All of which leads to this, that it is not until an assignment has been made to a donee that a person can be said to be keeping up a policy on his own life for a donee. Viewed in the context in which they were made, neither of these observations can be said to assist the defendants in this case. Upon the death of the deceased in this case there were persons who benefited, some of whom had been designated by the deceased as far back as 1922 and all of them not later than 1930. A

In the result, therefore, I think that the Crown are right in alleging that these policies were wholly kept up by the deceased for the benefit of a donee within the meaning of the section.

The other question raised in the case concerns the valuation, under the Finance Act, 1894, s. 7 (7), of the benefit accruing or arising from the cesser of the interest which ceased on the death of the deceased. In this particular case this interest was that of the insurance company in receiving, or of the trustees in paying, the premiums, for the trust funds were set free from the burden of these premiums. They amounted to £3,720 per annum, and the trustees were not able to discharge the obligation by paying to the insurance company £3,720 less income tax, and by paying the income tax direct to the commissioners of income tax; they had to pay the whole sum of £3,720 to the insurance company. By the terms of the trust they were to resort first to the income from the retained fund, the income from which may be taken to have been £1,250, before paying income tax. The fact that they had to pay the income of this fund away by way of premiums did not excuse them from paying income tax. Accordingly, if the trustees paid or allowed for income tax on the £1,250, they were left with only £953 with which to meet a liability of £3,720. After paying this they still had to meet a demand of £2,767 for premiums, and for the purpose had to resort to the income received from the absolute fund. Here, again, the trustees had to pay income tax, so that in order to fulfil their obligations under the trust, they had to exhaust that fund, not merely by the amount due to the insurance company, by way of premium, but also by the relative amount of income tax upon that amount: the total is said to be £3,550. B C D

That being the practical position, what is in terms of income the value of the interest which ceased on the death of Lord Devonport? Is it the sum of £3,720 and the income tax on that amount which the trustees had to find, or is it as the defendants claim the bare sum of £3,720? E

The Act of 1894, in sect. 7 (7) (b) lays down this:

The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—(b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended. F

Here the interest extended to less than the whole income, for the whole income of the trust funds was not absorbed in paying the premiums. So I have to find the addition to the property equal to the income to which the demands of the insurance company extended. If I do this, the parties will, without any help from me, know how to capitalise it, and so ascertain its principal value. This, again, is a matter upon which I am not assisted by authority. The language is most unhappy and inept to describe what nevertheless the draftsman must have intended. He must have meant by property that which produced the rest of the income, which did not pass and so has not got to be valued. To this which is not income, but in the nature of capital, the Act says that there has to be added something which is equal to the income which has lapsed, and of this the principal value has to be ascertained. This must, I think, mean that you must begin by ascertaining the income or annuity which has ceased. G H

Once that is found, you must turn it into an addition to the property; and you must thereafter find its principal value or capitalise it. I am not sure that I know how you can arrive at an addition to a property which shall equal the income which was paid, but now has ceased to be payable. I, at any rate, can only do it by arriving—as the first step—at an income, but I think that it is not necessarily the same income as the one that ceased. *Lord Advocate v. Fotheringham* (4) is a good instance of that. That was the case of an annuity of £4,000 paid

out of a landed estate. The estate had a yearly rent roll of £13,000 gross, but only £10,000 net after deductions for various burdens. The case was much complicated by the fact that the parties had somehow agreed on a market value for the estate not based on the yearly maintainable revenue. Therefore the revenue had to be divided into the capital value in order to arrive at the appropriate number of years purchase. The majority of the court were clearly of opinion, as I understand that case, that the value of the £4,000 annuity under this section was not £4,000 merely, but was represented by the gross sum, arrived at by attributing and adding to the £4,000 its fair share in common with the rest of the rent roll of upkeep and burdens.

The income to which the interest extended in the case before me was an income which was free of tax. The position, therefore, of the insurance company can be compared to that of an annuitant who was to receive an income of a certain amount free of income tax. In order to produce such an income to the annuitant the trust income must be the amount of the annuity plus the amount of income tax relative to that income. On the death of such an annuitant it could not, I should have thought, be denied that the income to which the interest extended—which means, I suppose, the part of the total income covered by the annuitant's lawful demand—was, not the net income which the annuitant had been in the habit of receiving, but the amount of trust income necessary to produce it. For this is the amount set free through the cesser of the life interest of the deceased, and, notwithstanding the somewhat remarkable results which may flow from such a calculation with income tax at the present levels, that, and that alone, appears to me to comply with the words of the section.

Therefore, there must be, on both the points that were argued before me, judgment for the commissioners.

Judgment with costs.

Solicitors : *Solicitor of Inland Revenue* (for the informant) ; *Waterhouse & Co.* (for the defendants).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

PERRIN AND OTHERS v. MORGAN AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Romer), **January 25, 1943.**]

Will—Construction—Money—“All moneys of which I die possessed”—Absence of context—Home-made will.

The testatrix by her will, which was drawn by herself, directed “all moneys of which I die possessed of shall be shared by my nephews and nieces now living.” There was no residuary clause. The estate included *inter alia* dividends and interest received or accrued due, cash at the bank, rents due to the date of the death and substantial investments. The question arose as to the construction of the words “all moneys of which I die possessed of” :—

HELD : (i) the bequest of all moneys of which the testatrix died possessed included all the net personalty of her estate not specifically disposed of by the will.

(ii) [LORD RUSSELL OF KILLOWEN and LORD ROMER dissenting] the rule of construction hitherto followed in the decisions of the courts that the word “money” in a will must in the absence of a context be construed in a strict sense is too narrow. The court had to determine the meaning attached to the word in all the circumstances by the testatrix without any presumption that it bore any one of its possible meanings. The court had to avoid a construction which gave to the word any special legal meaning as distinct from the ordinary use of the word in the English language as used by the testatrix.

Decision of the Court of Appeal ([1942] 2 All E.R. 30) *reversed*.

[**EDITORIAL NOTE.** By a series of decisions there had come into existence a rule of construction that the word “money” when used in a will must be construed in its strict sense unless there was a context which permitted a wider meaning being given

to it. In this strict sense the word had been held to mean not only actual cash and currency, but also all forms of "money due," such as cash at the bank, dividends due and similar choses in action. The House, by a majority has decided that the decisions which thus restricted the meaning of the word "money" were wrong. The meaning to be given to any word in a will is the ordinary meaning of the word in English as understood by ordinary persons at the time the will is executed, save that a particular meaning may be given to the word by its context. It seems that where the rule erred was in requiring a context to extend the meaning of the word "money" beyond certain prescribed limits, whereas the true rule is that any of its ordinary meanings may be ascribed to it subject to any limitation of meaning demanded by the context. What is meant by context is not very clear. The so-called strict rule required other words in the will which showed that a wider meaning than the strict meaning was to be given to this word. The majority of the House, however, seem to look beyond the words of the will to the general nature of the testator's estate, his relationship to the beneficiaries, the age and education of the testator and generally to all relevant circumstances affecting the construction of the will. When the Court of Appeal, whose decision is here reversed, stated that they could find no context in the will enlarging the meaning to be given to the word, it would seem that they were not including in the term "context" any of these matters which are outside the wording of the will. However, the minority in the House of Lords, who only differ from the majority in that they consider that the rule was a right one and ought to be retained, find in the case of this will a sufficient context to take the case out of the strict rule. Thus all their Lordships are agreed that, on its proper construction, the word "money" as used in this will is sufficient to pass the whole residuary personal estate and, apparently, if the real estate had not been separately dealt with, it might have included any realty as well. Giving so wide a meaning to the word will no doubt work justly in the majority of cases though it will by no means ease the problem of construction. On the other hand, it has long been a rule among conveyancers to avoid the use of the word "money" by itself without the addition of some descriptive word—such as "ready money" or "money at the bank"—and, in practice, it should not be necessary to resort to the principle of this decision except in the case of home-made wills.

AS TO THE MEANING OF "MONEY," see HALSBURY, Hailsham Edn., Vol. 34, pp. 253-257, para. 307; and FOR CASES, see DIGEST, Vol. 44, pp. 720-730, Nos. 5692-5850.]

- (1) *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H.L. Cas. 68; 44 Digest 557, 3735; 28 L.J.Ch. 110; 33 L.T.O.S. 66; *affg.* (1855), 21 Beav. 143.
- (2) *Shelmer's Case* (1725), Gilb. Ch. 200; 44 Digest 721, 5710.
- (3) *Hotham v. Sutton* (1808), 15 Ves. 319; 44 Digest 723, 5740.
- (4) *Godsen v. Dotterill* (1832), 1 My. & K. 56; 44 Digest 723, 5741; 2 L.J.Ch. 55.
- (5) *Lowe v. Thomas* (1854), Kay. 369; *on appeal*, 5 De G.M. & G. 315; 44 Digest 720, 5699; 2 Eq. Rep. 742; 23 L.J.Ch. 616; 23 L.T.O.S. 238.
- (6) *Prichard v. Prichard* (1870), L.R. 11 Eq. 232; 44 Digest 726, 5793; 40 L.J.Ch. 92; 24 L.T. 259.
- (7) *Manning v. Purcell* (1855), 7 De G.M. & G. 55; 44 Digest 711, 5560; 3 Eq. Rep. 387; 24 L.J.Ch. 522; 24 L.T.O.S. 317; *on appeal* from 2 Sm. & G. 284.
- (8) *Re Cadogan, Cadogan v. Palagi* (1883), 25 Ch.D. 154; 44 Digest 721, 5704; 53 L.J.Ch. 207; 49 L.T. 666.
- (9) *Byrom v. Brandreth* (1873), L.R. 16 Eq. 475; 44 Digest 725, 5767; 42 L.J.Ch. 824.
- (10) *Re Taylor, Taylor v. Tweedie*, [1923] 1 Ch. 99; 44 Digest 723, 5737; 91 L.J.Ch. 801; 127 L.T. 684.
- (11) *Re Gates, Gates v. Cabell*, [1929] 2 Ch. 420; Digest Supp.; 98 L.J.Ch. 360; 141 L.T. 392.
- (12) *Re Hodgson, Nowell v. Flannery*, [1936] Ch. 203; Digest Supp.; 105 L.J.Ch. 51; 154 L.T. 338.
- (13) *Bourne v. Keane*, [1919] A.C. 815; 8 Digest 250, 106; 89 L.J.Ch. 17; 121 L.T. 426; *revsq.* S.C. *sub nom.* *Re Egan, Keane v. Hoare*, [1918] 2 Ch. 350.
- (14) *Re Jennings, Caldbeck v. Stafford and Lindemere*, [1930] I.R. 196; Digest Supp.
- (15) *Easson v. Thomson's Trustees* (1879), 7 R. (Ct. of Sess.) 251; 44 Digest 725, 5780*ii*.

APPEAL by the defendants from a decision of the Court of Appeal given on May 13, 1942, and reported *sub nom.* *Re Morgan, Morgan v. Morgan*, [1942] 2 All E.R. 30, affirming a decision of FARWELL, J., given on Jan. 22, 1942. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

Meyrick Beebee for the appellants.

H. O. Danckwerts for the respondents, C. B. & L. Morgan, Avery and Jeggo.

M. Gravenor Hewins for the respondents, Treble and Noyce.

VISCOUNT SIMON, L.C.: My Lords, this appeal raises the interesting and important question whether, when the word "money" appears in an English will as the description of that of which the testator is disposing, the word, in the absence of any context or other surrounding circumstances proper to be

considered as varying its meaning, must be interpreted according to an alleged fixed "rule of construction" which has been regarded by our courts as established and binding for many generations past, and which is said to be traced back to a pronouncement of GILBERT, C.B., in 1725.

The will in the present case was typed on a form supplied by law stationers, and the phrasing of it, as LORD GREENE, M.R., pointed out, goes clearly to show that it was not made with professional aid or skill. Indeed, this is admitted.

A It is a short document and I must set out its actual terms, which are as follows :

This is the last will and testament of me Emily Rose Morgan of New Farm King's Somborne in the county of Southampton, spinster. I give devise and bequeath to my nephew Leonard Morgan the six cottages called "Vicarage Terrace" King's Somborne, and to my nephew Charles Burnett Morgan, the eight cottages in Nutter's Drove King's Somborne and also the two thatched cottages with pasture called "Knowlton." I direct that all moneys of which I die possessed of shall be shared by my nephews and nieces now living, namely :—Leonard Morgan, Charles Burnett Morgan, Laura B. Avery, Charles Robert Morgan, Christina J. A. Jeggo, Enid E. Porrin, Percy E. Morgan, Olive L. E. Morgan, Robert G. Morgan, Ida W. Allan, Cicilia Morgan, Leslie Gilbert Morgan, Lilian E. Morgan, Ellen Treble. I give to my sister Julia Palmer, if alive at my decease, the legacy or sum of £500. I appoint my nephew Charles Burnett Morgan as executor of this my will. And I revoke all former wills. In witness whereof I have hereunto subscribed my name this 27th day of September, 1935.

EMILY ROSE MORGAN.

C The testatrix was a spinster who died in October, 1939, some 4 years after her will was made. She was one of a large family of brothers and sisters, of whom it appears that only one sister survived her—a sister who is not provided for in the will. As will be seen by its terms, she directed that "all moneys of which I die possessed" should be shared by 14 nephews and nieces therein named; apart from the gift to her sister Julia Palmer, if alive at her decease, of £500 (which gift failed as Julia Palmer predeceased her), there is no other provision in the will dealing with personal property.

D The testatrix's estate consisted of personalty in the shape of investments (stocks or funds of the United Kingdom and of the Dominions, securities of municipal corporations, and stocks and shares and debentures of companies), valued at a total of £32,783; cash at bankers amounting to £689; dividends received or accrued £36; rents due prior to her death £82; income tax repayment which was due to her £32; and household goods, etc., valued at £62. The total of her personal property was, therefore, £33,685, of which, as already stated, investments amounted to £32,783. In addition, the testatrix died possessed of real estate as follows: freeholds at King's Somborne valued at £1,445, and a freehold at Michelmarsh worth £340. It will be observed that the freeholds at King's Somborne were the subject of specific devises but the freehold at Michelmarsh is not mentioned in the will.

F On an originating summons FARWELL, J., decided that the bequest of "all moneys" of which the testatrix died possessed included dividends and interest received or accrued due to the date of her death; cash at her bankers; rents due to the date of her death; the proportion of the rents to the date of her death in respect of property devised to her for life; and any sums recovered by way of repayment of income tax; but did not include any other items of her estate.

G On this view, the nephews and nieces named in the will do not share in any of the investments, and out of personal property of the aggregate value of £33,685, what under the will falls to be shared between them is about £840. The testatrix would thus be taken to have died intestate as to the whole of the rest of her personal estate.

H The Court of Appeal, with manifest reluctance, felt constrained to confirm this view. Indeed, that court could take no other course than follow and apply the rule of construction by which, owing to previous decisions of courts of co-ordinate jurisdiction, it was bound. LORD GREENE, M.R., defined the rule thus, at p. 32 :

The rule is, and it has been laid down on many occasions, that the word "money" in a will must be construed in what is called its strict sense, unless there is a context which permits of an extended meaning being given to it. The strict sense of "money" curiously enough,—and this is one of the anomalies about this rule—is a sense which has been invented by the courts, and invented, I think, partly in order to get rid of the rigours of the rule which would have existed if the word "money" had been confined

to actual cash—which, no doubt, was the original meaning. That was felt by the courts to be going too far, so they have invented a special category which they have called “money in the strict sense,” which includes money not in any strict sense, because it includes choses in action, such as moneys on drawing account at a bank. The category, however, is closed, and we cannot extend the language unless there is a context permitting such a course. In the present case I am afraid that I cannot find such a context.

In his judgment, LORD GREENE, M.R., called attention to the remarkable fact that in applying this rule in previous cases judges have many times observed that they believed themselves to be defeating the intention of the testator. LORD GREENE, M.R., allows himself to use the strong expression that the rule “is a blot upon our jurisprudence,” but he pointed out that, as far as the authorities go, it was open to the House of Lords to reconsider the whole matter. The majority of your Lordships are, as I understand, prepared not only to interpret the language of the present will, but to pronounce upon the much larger matter of the rule itself, and I proceed to deal with this general question.

My Lords, the fundamental rule in construing the language of a will is to put upon the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the “expressed intentions” of the testator. In the case of an ordinary English word like “money,” which is not always employed in the same sense, I can see no possible justification for fixing upon it, as the result of a series of judicial decisions about a series of different wills, a cast-iron meaning which must not be departed from unless special circumstances exist, with the result that this special meaning must be presumed to be the meaning of every testator in every case, unless the contrary is shown. I agree, of course, that, if a word has only one natural meaning, it is right to attribute that meaning to the word when used in a will, unless the context or other circumstances which may be properly considered show than an unusual meaning is intended. But the word “money” has not got one natural or usual meaning. It has several meanings, each of which in appropriate circumstances may be regarded as natural. In its original sense, which is also its narrowest sense, the word means “coin.” Moneta was an appellation of Juno, and the temple of Moneta at Rome was the mint. Phrases like “false money” or “clipped money” show the original use in English. But the conception very quickly broadens into the equivalent of “cash” of any sort. The question “Have you any money in your purse?” refers presumably to bank notes or treasury notes, as well as to shillings and pence. A further extension would include not only coin and currency in the possession of an individual, but debts owing to him, and cheques which he could pay into his banking account, or postal orders, or the like. Again, going further, it is a matter of common speech to refer to one’s “money at the bank,” although in a stricter sense the bank is not holding one’s own money and what one possesses is a chose in action which represents the right to require the bank to pay out sums held at the call of its customer. Sums on deposit, whether with a bank or otherwise, may be included by a further extension. But this is by no means the limit to the senses in which the word “money” is frequently and quite naturally used in English speech. The statement that I have my money invested on mortgage or in debentures, or in stocks and shares, or in savings certificates, is not an illegitimate use of the word “money,” upon which the courts are bound to frown, though it is a great extension from its original meaning to interpret it as covering securities. In considering the various meanings of the word “money” in common speech, one must go even further, as any dictionary will show. The word may be used to cover the whole of an individual’s personal property—sometimes, indeed, all of a person’s property, whether real or personal. “What has he done with his money?” may well be an inquiry as to the general contents of a rich man’s will. Horace’s satire at the expense of the fortune-hunter, who attached himself to childless Roman matrons, has its modern equivalent in the saying, “It’s her money he’s after.” When St. Paul wrote to Timothy that the love of money is the root of all evil, he was not warning him of the risks attaching to one particular kind of wealth, but was pointing to the dangers of avarice in general. When Tennyson’s northern farmer counselled his son

not to marry for money, but to go where money is, he was not excluding the attractiveness of private property in land. These wider meanings of "money" are referred to in some of the reported cases as "popular" meanings, in contrast to the "legal" meaning of the term, but for the purpose of construing a will, and especially a home-made will, a popular meaning may be the more important of the two. The circumstance that a skilled draftsman would avoid the use of so ambiguous a word only confirms the view that, when it is used in a will, the

- A popular as opposed to the technical use of the word "money" may be important. I protest against the idea that, in interpreting the language of a will, there can be some fixed meaning of the word "money," which the courts must adopt as being the "legal" meaning as opposed to the "popular" meaning. The proper meaning is the correct meaning in the case of the particular will, and there is no necessary opposition between that meaning and the popular meaning. The duty of the court, in the case of an ordinary English word which has several quite usual meanings which differ from one another, is not to assume that one out of several meanings holds the field as the correct meaning until it is ousted by some other meaning regarded as "non-legal," but to ascertain without prejudice as between various usual meanings which is the correct interpretation of the particular document.

- I now turn to some of the reported cases, premising only that it seems to me a little unfortunate that so many of such cases should find their way into the books, for in most instances, the duty of a judge who is called on to interpret a will containing ordinary English words, is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied whatever the testator may have intended, but to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances. It can rarely happen, I should suppose, that the interpretation of a word like "money" in one will provides a sure and certain guide to its meaning in another will, which is differently expressed. In *Abbott v. Middleton* (1), a decision of this House in which LORD CHELMSFORD, L.C., LORD CRANWORTH, LORD ST. LEONARDS, and LORD WENSLEYDALE all took occasion to expound the governing rule as to the interpretation of wills, LORD WENSLEYDALE observed, at pp. 119, 120:

- A great many cases were cited at the bar, as they always are, when the question is on the construction of wills. Generally speaking, these citations are of little use. We are no doubt bound by decided cases, but when the decision is not upon some rule or principle of law, but upon the meaning of words in instruments, which differ so much from each other by the context, and the peculiar circumstances of each case, it seldom happens that the words of one instrument are a safe guide in the construction of another. . . .

- The decision reported as "*the case of Mary Shelmer's Will*" (2), is (like some other entries in the volume) not a judicial decision but arose out of a case submitted to SIR JEFFREY GILBERT and is an award signed by him. It is to be noted that the reporter (who, as the preface to the volume indicates, was none other than the Chief Baron himself) inserts a query in the margin as to whether the award is final or good in law. SIR JEFFREY GILBERT was asked in 1725 to decide as between relatives and servants of the testatrix as to the proper interpretation of the gift to two servants of "all my household goods, money and plate that I shall leave behind me at the time of my death undisposed of and not bequeathed to others." The arbitrator observed that the word "money" in our language:

- . . . is a genus that comprehends two species, viz., ready money and money due, that is to say, the money in her own hands, or her money in the hands of anybody else; and, therefore, in this case the bequests to her servants will comprehend Mr. Wood's mortgage, and the arrears of rent, since these must be looked upon by all the rules of construction to be Mrs. Shelmer's money at the time of her death; but the word money will not comprehend South-Sea stock or annuity stock because that is an interest arising out of funds, settled by publick laws; and though it be redeemable by money, or saleable for money, yet it can be no more looked upon as money at the time of Mrs. Shelmer's decease than a term of years, a coach and horses, or any other real or personal chattel whatsoever can.

There is no specific reference in the report to "Mr. Wood's mortgage," and I am inclined to think, in view of an earlier passage, that the reference must be to interest due to the testatrix on the mortgage when she died. It appears

to me that GILBERT, C.B., in making this award, did not regard himself as laying down a definition for use in subsequent cases, but was addressing himself solely to the meaning of the rather complicated document which was then before him.

Be that as it may, there is no doubt that in course of time the rule to which LORD GREENE, M.R., refers took shape and was increasingly regarded in the Court of Chancery as a mandatory rule of construction. Even where a decision as to the meaning of the word "money" was really arrived at by examining the terms of a particular will, there has been a tendency to quote the decision as establishing the proper interpretation for future cases, and that, notwithstanding that the interpretation adopted was felt not to give the word "money" the meaning intended by the testator.

Thus, in *Hotham v. Sutton* (3), LORD ELDON, L.C., sitting in the Court of Chancery, begins his judgment by saying, at p. 326 :

It is very probable, that this testatrix, if she was here, might decide both the questions, that have been made, differently from what must, I think, be the decision on them. and one of the decisions was that "money" in the codicil then being considered did not include "stock".

In *Gosden v. Dotterill* (4) a testator, after giving some pecuniary legacies, directed that "the rest of my money be equally divided, share and share alike, between A. and B." SIR JOHN LEACH, M.R., said (p. 59) that he had no doubt that it was the intention of this testator that his stock (it was some £600 in consols) should pass under the term "money," but, after delaying his decision in order to examine the authorities, he decided :

. . . that the term "money" will not pass "stock" unless there is in the will some explanatory context, and here is no explanatory context.

In *Love v. Thomas* (5), SIR W. PAGE WOOD, V.-C., after referring to *Hotham v. Sutton* (3) and *Gosden v. Dotterill* (4) as being decisions that he was bound to follow, held that a bequest of "the whole of my money" to X. for his life, and at his death to be divided between Y. and Z., could only avail to pass some £60 of cash and did not cover a considerable sum of stock in the funds. SIR W. PAGE WOOD, V.-C., at the end of his judgment, observes, at p. 378 :

It is painful to be obliged to come to the conclusion to which I have come upon the construction of this will; because I should have had strongly the impression that in ordinary parlance, the word "money," as here used, might have included the stock in question, if I were not compelled by authority to hold otherwise . . .

The decision of SIR W. PAGE WOOD, V.-C., was upheld on appeal.

There were other decisions in which, having regard to the language and framework of the will, a wider interpretation was adopted; for example, in *Prichard v. Prichard* (6), SIR R. MALINS, V.-C., begins his judgment by saying, at p. 234 :

The object must be to ascertain the intention of the testator. The word "money" will, in many instances, mean that money which a testator has in his house, or at his bankers at call; and if a man gives his ready money, or money as distinguished from other property, the court will see what was intended to pass, as in *Manning v. Purcell* (7). So in this case, if the testator, after the gifts of money, had added a residuary clause, I should have said, What portion of his property did he mean when he used the term "money"? but he makes one universal gift, without distinction, and he must either have intended to die intestate or he intended by the word "money" to describe all his property.

It was held by SIR R. MALINS, V.-C., that, on the language of that will, the wider interpretation was correct. Similarly, in *Re Cadogan* (8), KAY, J., said, at p. 157 :

. . . I feel compelled to hold that the lady used the word "money" in this will in the popular sense as a description of all her personal estate, and I do not think that any of the cases have laid down a rule which prevents that construction.

But the extent to which the earlier authorities were regarded as establishing the presumption of a more restricted meaning may be well illustrated from the language of LORD SELBORNE, L.C., when sitting for the Master of the Rolls, in *Byrom v. Brandreth* (9). LORD SELBORNE, L.C., said at p. 478 :

. . . I wish very much that I could accede to the argument of Mr. Rigby, because I cannot resist the impression that probably that which this testatrix intended is what he suggests. If the authorities had not required that the word "money" should be strictly construed, I am by no means certain that it would not be more in accordance with the ordinary and popular use of the word to hold it, when used in this way in a testamentary instrument, to be significant of all that we call personal or moveable

property, which, as a general rule, unless there be particular directions to the contrary, is subject to conversion after death. But though this is one of the instances in which the necessity of adhering to strict principles of construction renders it doubtful whether those principles may not more frequently contradict than give effect to the intention, yet, looking to the principle by which I am bound, I am compelled to hold that the word "money" cannot be extended to such an interest as the legacy in question.

The testamentary gift which LORD SELBORNE, L.C., was engaged in construing was a gift of "any money of which I may die possessed."

A The Court of Appeal in *Re Taylor* (10), found a context in the will before it which justified it in treating a bequest of "the money I have and am entitled to now and at any future time" as including invested capital. The judgments in that case, however, show that the Lords Justices felt bound by earlier authority to draw a contrast between the "popular" and the "legal" sense of the word "money". YOUNGER, L.J., for example, says at p. 110:

B This popular interpretation cannot, however, in the absence of a context, be placed upon the word "money" when used in a will, although the court will, to aid that interpretation, so far at least as personal estate is concerned, fasten upon even a slight context when it can find one.

In the absence of context to tip the balance, the modern decisions all come down on the side against the "popular" sense. See, for striking examples, *Re Gates* (11), and *Re Hodgson* (12).

C Notwithstanding this long tradition I would urge the House to reject the view that, in construing a will, the court must start with a presumption in favour of a particular narrower meaning of the word "money" (though not indeed its narrowest meaning) and that in the absence of contradictory context the court is bound to apply this narrower meaning, even though the inference is that this is not what the testator really meant by the term. As I have already said, the word "money" has more than one meaning, and it is in my opinion a mistake to pick out one interpretation of the word and to call it the "legal" meaning or the "strict legal" meaning, as though it had some superior right to prevail over another equally usual and not illegitimate meaning. The context in which the word is used is, of course, a main guide to its interpretation, but it is one thing to say that the word must be treated as having one particular meaning unless the context overrules that interpretation in favour of another; it is another thing to say that "money," since it is a word of several possible meanings, must be construed in a will in accordance with what appears to be its meaning in that document, without any presumption that it bears one meaning rather than another. While disclaiming any idea of interpreting a document which is not before me, I should have thought that the mere fact that a will in a single sentence disposed of "all the money of which I die possessed" was a reason for interpreting "money" in a very wide sense, though there is no positive context.

F In choosing between "popular" meanings, it seems to me that an interpretation which includes realty as well as personality in the word "money" may often be going too far, though of course everything turns on the language and circumstances of the particular will. An amateur will-maker, though using the word "money" loosely, may be drawing a distinction between "my money" and "my land," and indeed may mean to include leaseholds as well as freeholds in the latter expression, if he owns both. In the present case, the testatrix owned no leaseholds, so the question whether "all moneys" would have included leaseholds does not arise. On the other hand, the will deals separately with the more important of the freeholds, and this circumstance goes to show that "all moneys" in this will does not include the omitted freeholds—if the expression were "all remaining moneys" it might have been different.

G I have felt it right to deal with this case in the wider aspect, but before parting from it I must add, that I am much disposed to share the view which I understand commends itself to some of your Lordships, that, even if the so-called rule of construction were to be left standing, there are some indications in this will which might justify the application of the so-called rule being displaced by the language used and the circumstances of the case. This lady directed that "all moneys of which I die possessed" should be "shared by my nephews and nieces" as named. The testatrix held very considerable investments to which she makes no separate reference in her will. If the state of her property when she made her will was anything like what it was at her death, she must

therefore either have deliberately intended to die intestate in respect of her stocks and shares and to leave these nephews and nieces to share in what happened to be the balance at her bank at the moment of her death and little else, or else she must have used the phrase "all moneys," etc., as covering her investments also. But whether or not these considerations would be sufficient to overthrow the presumption which has for so long been regarded as *prima facie* forcing the court to apply a narrower meaning, it is clear that when the rule is rejected and the present will is given its natural construction free from the restraining use of a judicial dictionary, the appeal should succeed. A

The present question is not, in my opinion, one in which this House is required on the ground of public interest to maintain a rule which has been constantly applied but which it is convinced is erroneous. It is far more important to promote the correct construction of future wills in this respect than to preserve consistency in misinterpretation. The view expounded by LORD BIRKENHEAD, L.C., in *Bourne v. Keane* (13), applies here. As MEREDITH, J., in his pungent and entertaining judgment in *Re Jennings* (14) observes, the judiciary has waged a long fight to teach testators that "money" means "cash", but as the ordinary testator who makes his own will does not study the law reports, he persists in constantly using the word in a wider sense, and it is time that in such cases a "popular" meaning prevailed over the "legal" one. B

I, therefore, move that the appeal be allowed, and that, in place of that part of the order by FARWELL, J., marked (b), it should be declared that the bequest of all moneys of which the testatrix died possessed includes all the net personalty of her estate. C

LORD ATKIN (read by LORD THANKERTON): My Lords, I have had the opportunity of considering the opinion of VISCOUNT SIMON, L.C., with which I wholeheartedly agree, and find it unnecessary, therefore, to repeat his reasoning. The substance of the matter seems to be that the word money at the present time had a diversity of meanings: and that when it is found in a will, there is no presumption that it bears one meaning rather than another. The testator obviously means to dispose of at any rate some part of his property by the phrase; and the construing court has to ascertain what was meant, being guided by the other provisions of the will and the other relevant circumstances including the age and education of the testator, the nature of his property at the date of his will, his relations to the beneficiary chosen whether of kinship or friendship, the provision for other beneficiaries, and other admissible circumstances. Weighing all these the court must adopt what appears the most probable meaning. To decide upon proven probabilities is not to guess but to adjudicate. If this is to decide according to the "context" I am content: but I cannot agree that the court is precluded from looking outside the terms of the will. No will can be analysed *in vacuo*: there are material surroundings such as I have suggested in every case: and they have to be taken into account. F
The sole object is, of course, to ascertain from the will the testator's intentions. The result of your Lordships' decision will be to relieve judges in the future from the thraldom, often I think self-imposed, of judgments in other cases believed to constrain them to give a meaning to wills which they know to be contrary to the testator's intention. In the competitions for bad pre-eminence in departure from the true meaning I think I should place first the decision of TURNER and KNIGHT BRUCE, L.JJ., in *Lowe v. Thomas* (5), where the testator being possessed of stocks and some cash had left his "money" to his brother for life and on his death to the brother's two daughters with ultimate remainder to the survivor. The testator left £50 cash, and it was held that despite the series of life interests the bequest only passed the cash. The poorest mind would know that this was absurd: and so plainly did the Lords Justices, but they were held in thrall. G
A high place, however, in the competition could be given to *Re Hodgson* (12), where a nurse asked to make her will within two days of her death and having in her case by the side of her bed some £800 in cash and £600 in saving certificates left all her "money" to a named beneficiary. H
She left no next-of-kin and the Crown claimed and was awarded the saving certificates as *bona vacantia*. In the future the resources of the Crown will receive no such flagitious increment. I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery

judge, wait on the other bank of the Styx, to receive the judicial personages who have misconstrued their wills, may be considerably diminished. It will be a relief to the whole legal profession that at last, what LORD GREENE, M.R., rightly called a blot on our jurisprudence has been removed. On this particular will I have no doubt that for the reasons given by VISCOUNT SIMON, L.C., and others of your Lordships the word "money" in the bequest comprised the whole of the testator's personal estate.

A LORD THANKERTON: My Lords, this appeal arises out of the application by both courts below of a rule of construction of wills, by which they felt bound to construe the words "all moneys of which I die possessed," which occur in the will, as including only dividends received or accrued, cash at the bank, rents due, the proportion of rents payable to the testatrix as life tenant and income tax repayment, there being, in the opinion of these courts, no context sufficient to justify a wider meaning. I have had the privilege of considering the written opinions of all your Lordships and the facts of the case have been fully stated by VISCOUNT SIMON, L.C., who has also reviewed the main decisions which are material.

B Thus two questions arise in the appeal; the first relates to the rule of construction, and is whether the rule, as applied by the courts in the decisions referred to, is a wrong rule altogether, or is a sound rule, which has been wrongly applied. C This appears to be the first time that this House has had occasion to consider this rule, and I agree with the view, in which I gather all your Lordships concur, that the rule has at least been much misapplied. The second question is whether, assuming the rule to be sound, there is a sufficient context in the present case to justify a wider construction of the words "all moneys of which I die possessed." On the second question, I am of opinion that there is here a sufficient context to justify the construction of these words as intended to include the whole D of the residuary personal estate, and I agree with the statement of the relevant circumstances by LORD ROMER, while noting also the absence of an express residuary gift and the appointment of an executor. But it still remains right to express an opinion on the first question.

E In England, as in Scotland, the cardinal rule of construction of wills is that they should be so construed as to give effect to the intention of the testator, and I make no excuse for citing a passage from the opinion of Lord Justice-Clerk MONCRIEFF, in *Easson v. Thomson's Trustees* (15), at p. 253, which raised a similar question:

I am of opinion that these expressions "money" or "moneys" as here used are capable of including and are terms apt to include the testator's whole moveable estate. Their meaning is, of course, to be collected from the context, the place where, and the subject in regard to which they are used; and the question is neither what the testator meant, apart from the words, nor what the words might mean, apart from intention, F but what the testator meant by using them.

My Lords, it is clear that there has been a tendency on the part of the courts to allow this cardinal rule of construction to give way to the application of what is called the strict legal sense of the word "money." Marked illustrations of this tendency are to be found in the opinions of SIR JOHN LEACH, M.R., in *Gosden v. Dotterill* (4), at p. 59, of SIR W. PAGE WOOD, V.-C., in *Lowe v. Thomas* (5), at p. 378, and of LORD SELBORNE, L.C., in *Byrom v. Brandreth* (9), at p. 478. G The particular passages have been quoted by VISCOUNT SIMON, L.C., and, in my opinion, they justify, in that view, the description of such application of the rule by LORD GREENE, M.R., in the present case as "a blot upon our jurisprudence."

H There remains the question whether the rule, if purged of such tendencies, can survive, and, on this point I observe some difference of opinion among your Lordships. I will, accordingly, express the opinion that I hold on this point, though I doubt whether, apart from one not unimportant element, there is any real difference between your Lordships. There can be no doubt that the word "money" is capable of being aptly used by a testator in one of various alternative senses, in conformity with the ordinary use of the English language, and that the paramount duty of the court is to decide upon the sense in which the particular testator used the word in the particular will, without any prior presumption as to the particular sense intended by the testator. In my opinion, the cases should be rare in which the court is not able, in discharge of its para-

mount duty, to determine the sense in which the testator meant to use the word. These cases can only be cases where there is final ambiguity as to which of two or more senses was intended by the testator, and it may well be that the court, in order not to defeat the will, is entitled to hold, as a general rule, that one of these senses is more likely to have been intended by the testator than the other or others. But I cannot agree that any such rule can become stereotyped in perpetuity, for such a conception would ignore the fact that the testator's use of the word must be referable to the ordinary uses of the English language at the time when he is making his will, and the ascription to the testator of an intention to use the word in a sense which was determined to be the leading sense in an earlier age, without any regard to the possibility of a variation in this respect which had become current in the English language by the time that the will was made, is not justifiable.

The rule here founded on appears to be based on the arbitration award of SIR JEFFREY GILBERT, in 1725—over 200 years ago—and to have become established prior to the decision of LORD ELDON, in *Hotham v. Sutton* (3), over, 130 years ago. The mere fact that the original strict meaning of the word “money”, as relating to coin, was held to be subject to relaxation because of the current use of the word at that time, is sufficient, in my opinion, to permit a further relaxation if, in the passage of later years, there has occurred a variation in the sense in which the word is more ordinarily used in the English language. If the court is satisfied that such a variation has occurred, then, in my opinion, it is their duty to give effect to it in the case of a testator who makes his will at a time subsequent to the establishment of such a variation. The court is entitled to be credited with a knowledge of the ordinary use of the English language, and has a duty to apply such knowledge. *Exempli gratia*, I should think that war savings certificates, as suggested by LORD GREENE, M.R., might well be considered as covered by the ordinary use in the English language, since the last war, of the word “money,” and, if that view be correct, I am of opinion that the court would be contravening their paramount duty if they rejected the current use of the word in these days in order to apply the sense which was current in 1735 or in 1808. There does not appear to me to be any occasion for a separate rule in the matter. It is rather to treat the testator, in the case of ambiguity, as having used the word in the sense which the court adjudges to be the more ordinary use of the word in the English language at the time at which the testator used it.

I concur in the motion proposed.

LORD RUSSELL OF KILLOWEN (read by LORD ROMER): My Lords, I have had the opportunity of reading the opinion prepared by LORD ROMER in which he points out why upon the language of this particular will, construed in the light of the relevant surrounding circumstances, the words “all moneys of which I die possessed of” should be construed as including the whole of the residuary personal estate of the testatrix. I agree with him both in his reasoning and in his conclusion.

This result is arrived at in this case upon the context of the document. Context has always prevailed against the now much abused rule, as to which I desire to make some observations. The rule, which is attributed to GILBERT, C.B., was in its inception a kindly rule. It was not a restrictive rule, although, strangely enough, it has given rise to the expression “the strict meaning of money.” It was a rule born at a time when a man's money meant cash in his possession, and the rule extended the meaning of the bare word so as to include money not in his possession but presently due to him; or as the Chief Baron (in referring to a testatrix) said, it included ready money and money due, i.e., both her money in her own hands, and her money in the hands of anybody else. From time to time the meaning has been widened so as to include other assets; but I have always understood the rule as one which yielded to a sufficient context. With this understanding I do not see why the rule, properly applied, should fail to work justice. The blot, if any, is not the rule, but its misapplication.

There has been, however, a tendency for courts to allow the rule to prevail over the context, and to operate as a hard and fast limitation of the meaning of the word “money” when used in a will; and I agree with your Lordships

that it is advisable to take this opportunity of establishing that the meaning of the word "money", when used by a testator (whether *inops consilii* or himself a skilled conveyancer) is not restricted by any hard and fast rule, but depends upon the context in which it occurs, properly construed in the light of all relevant facts. In other words, given such a sufficient context, the word "money" may include more than what has been called the strict meaning, and may even include the whole residuary personal estate. Instances of this are the decisions of SIR R. MALIN, V.-C., in *Prichard v. Prichard* (6), and KAY, J., in *Re Cadogan* (8), and of your Lordships in the present case.

Beyond this I am not prepared to go. I am not prepared to abolish the rule. So long as it yields to context, it is as I have said a kindly rule; and being a rule of long standing which has for many years decided the title to property other than cash in hand, it should not be disturbed. To abolish it would be a retrogressive step. Let me give an instance. If a testator leaves his money to A. and the rest of his property to B., how is the will to be construed? If the rule is abolished, the context admits of only one answer: A. will only get the cash in the house. If the rule survives he will in addition get moneys in the bank, and any other assets of the testator to which the rule applies.

Two further remarks I desire to make. Let it be clear, that nothing in this case affects indirectly any other of the many rules for the construction of wills. Those of us who in the past have discharged this almost daily task, know full well how important it is that certainty in these matters should exist, and how successfully confusion and uncertainty have been avoided by the applications of these rules, which are the product of the learning and wisdom of our predecessors. I wish also to state that I agree with LORD ROMER in his remarks as to those judgments in which learned judges have stated their belief that their construction of a will defeats the testator's intention. Either they have misconstrued the will, or they have been indulging in guess-work.

LORD ROMER: My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. In order to understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said; that he was, in fact, one of those persons of whom KNIGHT BRUCE, L.J., said that they spoke as if the office of language were to conceal their thoughts. In many of the cases to be found in the books the court is reported to have said that the construction it has put upon a will has probably defeated the testator's intention. If this means, as it ought to mean, that the court entertains the strong suspicion to which I have just referred no sort of objection can be taken to it. But, if it means that the court has felt itself prevented by some rule of construction from giving effect to what the language of the will read in the light of the surrounding circumstances convinces it was the real intention of the testator, it has misconstrued the will.

My Lords, I do not, of course, intend to suggest that well-settled rules of construction are to be disregarded. On the contrary, I think that they should be strictly observed. But they ought to be applied in a reasonable way. It is no doubt of great importance to lawyers and others engaged in the preparation of wills that they should have the certainty of knowing that certain well-known words and phrases will receive from the court the meaning that the court has for generations past attributed to them. Much confusion and uncertainty would be caused if this were not so. The rules of construction in other words should be regarded as a dictionary by which all parties including the courts are bound. But the court should not have recourse to this dictionary for the purpose of construing a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the surrounding circumstances, whether the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning; whether in other words, to use another familiar expression, the testator has been his own dictionary. I have thought it desirable to make these remarks, however

elementary and obvious they may seem to be, as I have noticed in some of the reported cases on wills a tendency on the part of the court to pay more attention to the rules of construction than to the language of the testator. This is especially the case where the word "money" is concerned. The rule relating to this word is a strange one. Its *prima facie* meaning is what would normally be described in the balance sheet of a trading concern as "cash in hand." But the courts have given it a wider meaning when used in wills, and as the rule now stands, and has stood for many years, the word includes in addition certain choses in action by means of which cash is readily procurable. It includes, for instance, balances due to the testator on current or deposit account at his bank. A testator does not of course possess any of the cash that is at the bank. But people commonly speak of the balances due to them from the bank as their money at the bank, and the rule can be justified on this ground. But people just as commonly speak of their money in the funds or their money in this or that company or concern, and why all stocks and shares such as usually form the bulk of a testator's personal property should not also be included is what I have never been able to understand. I can see no intelligible reason for excluding them when the rule was opened so as to admit a testator's balance on deposit account. But such seems to be the law, and, when a testator is found to be using the word "money" for the purpose of distinguishing one item of his property from the remainder, the word *prima facie* bears the meaning attributed to it by the rule.

A testator nevertheless may by his will when properly construed show an intention not to use the word "money" as defined by the rule, but to include in it his Stock Exchange investments or even the whole of his residuary personal estate. The question to be decided on this appeal is whether such an intention is to be found in the will of Miss Emily Rose Morgan who died on Oct. 14, 1939. Your Lordships are by now familiar with the precise words of that will which is dated Sept. 27, 1935. I need not, therefore, repeat them. But I venture to say that no one who reads those words and will for the moment dismiss from his mind the rule as to the construction of the word "money" will entertain the slightest doubt that by the words "all moneys of which I die possessed" the testatrix intended to include the whole of her residuary personal estate. And this will be due to no mere guess work. It will be solely due to the effect produced on the mind of the reader by the language used by the testatrix construed in the light of the circumstances in which her will was made. The relevant circumstances were these. The testatrix at the date of her will had two sisters living. All her brothers and her other sisters were dead; but there were living 15 nephews and nieces. In these circumstances she left a pecuniary legacy of £500 to one sister, who predeceased her. The only other beneficiaries mentioned in her will were 14 of the nephews and nieces for whom she made provision in these words: "I direct that all moneys of which I die possessed of shall be shared by my nephews and nieces now living namely." She then named the 14 nephews and nieces. I am inclined to surmise from the words "my nephews and nieces now living" that the one nephew omitted from the list was so omitted through an oversight. But, however this may be, I find it impossible to regard the direction as merely applying to money as defined by the rule. The use of the word "moneys" in the plural and the use of the word "all" emphatically point, in my opinion, to an intention to dispose of something more than money as so defined and to make the bequest as comprehensive a one as possible. I cannot for a moment believe that, had the testatrix intended to provide what was in substance the whole of the generation of her family next to her own with nothing but money as defined by the rule, she would have used the language that I have quoted. The words in my opinion according to their true construction mean the whole of her residuary personal estate. Except in the case of a death bed will a testator is to be taken as disposing of his property as it may be constituted at some date which he hopes may be far distant. In the present case, indeed, the testatrix in terms describes the subject of her bequest in favour of the nephews and nieces as moneys of which she will be possessed at her death. It must, therefore, be taken to have been in her contemplation that at that date she might possess very little or even no money within the meaning of the rule. It is surely almost ridiculous to suppose that she has by her will directed that there shall be divided between no less

than 14 nephews and nieces merely what cash there might be in the house at the date of her death, together with such balance as happened to be then standing to her credit at the bank and the few paltry sums that might have accrued at that date from rents, interest and dividends. This further may be observed. If the testatrix intended, as in my opinion she did, to give to her nephews and nieces the whole of her residuary personal estate, what would in fact be divided between them by the executor would owing to their large number consist in all probability of cash. This may possibly be the explanation of why the testatrix when directing that her residuary personal estate should be shared by the nephews and nieces described it by the word "moneys." But, whatever may have been the reason actuating the testatrix, I am satisfied that in this particular will the word was in fact used as meaning the whole of her residuary personal estate.

My Lords, in my opinion this appeal should be allowed and I agree with the motion before the House.

Appeal allowed.

Solicitors: *C. R. Enever & Co.* (for the appellants); *Park, Nelson & Co.*, agents for *G. B. Footner & Sons*, Romsey, Hants, and *Stocken, May Sykes & Deerman* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

C MARSH v. COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Macnaghten, J.), January 15, 1943.]

Revenue—Excess profits tax—Trade or business—Commercial traveller—Salary and commission—Employee of one firm travelling for other firms—Whether engaged in "trade or business"—Finance (No. 2) Act, 1939 (c. 109), s. 12.

The appellant was employed by P. & P. as a commercial traveller on a basis of salary and commission on orders taken; he also travelled for other firms with the permission of P. & P. From these other firms the appellant received commission on the orders he obtained. The appellant was assessed to excess profits tax on the ground that he was carrying on a trade or business as a commercial traveller, and contended that there was no evidence on which the commissioners could find that he was carrying on a business at all:—

HELD: (i) if the plaintiff had been employed solely by P. & P., he could not be held to be carrying on a trade or business; but because he acted for other firms there was evidence on which the commissioners could conclude that he was carrying on the business of a commercial traveller and he was, therefore, assessable to excess profits tax in respect of that business.

(ii) the remuneration received from P. & P. was not to be excluded from the standard profits.

[EDITORIAL NOTE. An ordinary employee working for one firm obviously does not carry on a business on his own account. Here the employee of one firm was also an agent for other firms and it is held that he was carrying on the business of an agent or commercial traveller on his own account. It will be noted that his remuneration was in all these other cases by commission and not by a fixed salary.]

FOR THE FINANCE (NO. 2) ACT, 1939, s. 12, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1193.]

Case referred to:

(1) *Robbins v. Inland Revenue Comrs.*, [1920] 2 K.B. 677.

CASE STATED by the Special Commissioners for the purposes of income tax for the opinion of the High Court of Justice. The facts are fully set out in the judgment.

Cyril King, K.C., and *L. C. Graham-Dixon* for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.), and *R. P. Hills* for the respondents.

MACNAGHTEN, J.: This is an appeal by Harry Thomas Marsh against a decision of the Special Commissioners confirming an assessment to excess profits tax made upon him for the chargeable accounting period Apr. 1, 1939, to March 31, 1940.

The Finance (No. 2) Act, 1939, s. 12 (1), provides:

Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject

to the provisions of this part of this Act, be charged on the excess a tax (to be called the excess profits tax) equal to three-fifths of the excess.

a provision which has been subsequently changed by the substitution of five-fifths for three-fifths.

The trade or business which, according to the decision of the Special Commissioners, the appellant was carrying on, was that of a commercial traveller. The ground of the appeal is that there was no evidence on which the Special Commissioners could find that the appellant was carrying on any business at all and that, therefore, they have erred in law. A

The facts as stated in the case are that Marsh, when he left school some 34 years ago, entered the office of Messrs. Pillman & Phillips, who carry on the business of flour merchants at Bristol and London. Messrs. Pillman & Phillips, it seems, have for many years had a staff of commercial travellers, and in the year 1920 Marsh was made a member of that staff, a position which he has occupied ever since. He was formerly remunerated by a commission, with a guaranteed minimum of £600 per annum; but since the outbreak of the present war he has been paid a salary of £720 per annum, together with a commission at the rate of 1½d. per sack of flour if the deliveries in respect of orders obtained by him amount to more than the average deliveries for the mean of the 3 years before the war. If Marsh had no other employment than that in the service of Messrs. Pillman & Phillips, it would seem impossible to hold that he was carrying on a trade or business so as to be assessable to the excess profits tax. An individual in the whole time employment of a firm carrying on a trade or business, and precluded by the terms of his engagement from doing any work for any other firm, could not be said to be carrying on a business on his own account. *Robbins v. Commissioners of Inland Revenue* (1) is sufficient authority, if authority is needed, for that view. On the other hand, an individual employed, whether as a commercial traveller or in some other activity, by a number of firms does, as it seems to me, carry on a trade or business. An accountant acting for a number of firms is a good illustration of that proposition. B C D

The facts with regard to Marsh are that, although for the past 22 years he has been employed by Messrs. Pillman & Phillips as a commercial traveller, he has during that period travelled for other firms also, obtaining in each case the permission of Messrs. Pillman & Phillips to do so. At all times material to this appeal, Marsh acted for four other firms who sold various products such as chemical cream, cream powder, jam, and bakers' sundries. He had no agreement in writing either with Messrs. Pillman & Phillips or with any of these other firms, who were all customers of Messrs. Pillman & Phillips. From these other firms the appellant received commission on the orders obtained by him for them. The remuneration which he received from these other firms, according to the account for the year ended Mar. 31, 1940, which forms part of the case, was quite substantial. Out of his total receipts of nearly £2,500, the amount received from Messrs. Pillman & Phillips was no more than £778 4s. 10d. The whole of the balance of the money was made up by remuneration received from these other four firms; indeed, the remuneration received from one of the firms, Messrs. Goldrei, Foucard & Sons, egg importers and manufacturers of bakers' sundries, exceeded £1,000. In these circumstances, it seems to me that there was ample evidence on which the Special Commissioners could properly come to the conclusion that Marsh was carrying on the business of a commercial traveller and was assessable to the excess profits tax in respect of that business. E F G

It is suggested, so far as the employment by Messrs. Pillman & Phillips is concerned, that, since, if that employment had been his only employment, he would have been exempt from the excess profits tax, the remuneration received from that firm ought to be excluded from the "standard" profits and from the computation of his profits for the period in question; but I do not think that argument can prevail. When Marsh became a representative of the other firms, the result was that what had previously been merely an employment by Messrs. Pillman & Phillips became part of the business of a commercial traveller which he was then carrying on. H

The appeal must, in my opinion, fail and be dismissed with costs.

Solicitors: *Boxall & Boxall*, agents for *Lloyd, Burch, Griffiths & Dixon*, Bristol (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re GOODSON'S SETTLEMENT, GOODSON v. GOODSON.

[CHANCERY DIVISION (Uthwatt, J.), January 13, 1943.]

Income Tax—Annual payment—Agreement to pay without deduction of tax—Settlement giving annuities free of tax—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 23.

A A settlor transferred certain funds to trustees and subsequently executed a settlement whereby he directed certain annuities to be charged on the settled funds. In the settlement it was declared that each annuitant should be entitled to enjoy the annuity free of income tax and there followed a direction that the trustees should pay in addition to each annuity the income tax thereon. It was contended that this was an agreement for the payment of an annual payment in full without allowing for the deduction of income tax and, therefore, void under the Income Tax Act, 1918, All Schedules Rules, r. 23 :—

B HELD : since the funds had already been transferred to the trustees, there could be no agreement between the settlor and the trustees and the direction was, therefore, binding and the annuities were to be paid free of income tax.

C [EDITORIAL NOTE. It is well settled that in a will one may provide for an annuity free of tax, but that in a deed or settlement one has to arrive at the same result by providing for the payment of a sum which, after deduction of tax, amounts to the required sum. The settlor has here in a separate direction from the direction to pay the annuities directed his trustees to pay the income tax on the annuities subject to any exception or abatement to which the annuitants may be entitled. The question was whether this was an agreement to pay the tax and, therefore, void. It is held that, since the funds had already been transferred to the trustees, there was no agreement to pay the tax. The only remedy of an annuitant for the purpose of enforcing such a direction was an action for the administration of the trust and that is not an action in contract.

D AS TO VOID AGREEMENTS TO PAY INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 258, 259, paras. 526, 527 ; and FOR CASES, see DIGEST, Vol. 28, pp. 74-76, Nos. 398-417.]

E SUMMONS to determine, *inter alia*, whether annuities payable under cl. 3 of the settlement were payable subject to or free from income tax. The settlement was made on Nov. 26, 1925. By cl. 1 thereof the settlor transferred the funds of the settlement to his trustees giving them a power to vary such investments, by cl. 2 thereof he directed his trustees to pay the income from certain shares to his daughter Kathleen Craig for her life and after her death to hold such investments in trust for her children in such shares as she should by deed or will appoint, and by cl. 3 thereof he directed his trustees to pay certain annuities free of tax. The full terms of such clause are stated in the judgment.

F J. V. Nesbitt for the plaintiff, trustee of the settlement.

N. Gray, K.C., and Sir Lancelot Elphinstone for the first, third and fourth defendants, annuitants.

H. B. Vaisey, K.C., and A. P. Vanneck for the second defendant, H. L. Goodson.

G C. R. R. Romer, K.C., and H. O. Danckwerts for the fifth defendant, Mark Goodson, an infant.

UTHWATT, J. : The trust funds here dealt with are the residue of the 100,000 fully paid first preference shares comprised in the settlement. Cl. 3 of the settlement provides as follows :

H The trustees or trustee shall stand possessed of the residue of the said funds mentioned in the schedule to these presents and from time to time the money and investments into which in exercise of the powers herein contained the same may be converted and the income therefrom respectively to the use that the trustees or trustee shall out of the said premises and the income thereof pay the following annuities to be a first charge thereon and to commence from the death of the settlor and be payable by equal quarterly payments the first payment to be made at the expiration of 3 calendar months from the decease of the settlor.

Then the annuities are set out : to Lady Mary Ethel Goodson, the wife of the settlor, the yearly sum of £4,000 during her life ; to Kathleen Craig £500 ; to Maria Goodson £400 during her life or so long as she shall remain a spinster ; then to Lizzie Whitehead, the sister, £400 ; and to Christabel Denman an annuity

of £100. Then the settlement proceeds as follows :

. . . and the settlor doth hereby declare that each of the said annuitants shall be entitled to enjoy her annuity free from income tax and directs the trustees to pay in addition to each annuity the income tax which may be payable in respect thereof after allowing for any exception or abatement to which the annuitant may by law be entitled having regard to the total amount of her income and subject to the said annuities the trustee or trustees shall stand possessed of the residue of the said funds mentioned in the schedule to these presents [upon certain trusts] . . .

If one reads cl. 3 without having in mind the provisions of the Income Tax Act, 1918, All Schedules Rules, r. 23, it is, I think, quite clear, taking the first annuitant, that the meaning and effect of the settlement and the obvious intention of the settlor was that Lady Goodson should receive £4,000 spending money, subject only to this, that in ascertaining that £4,000 spending money you are to assume that she has got the benefit of the personal exemption or abatement to which under the provisions of the Income Tax Acts she is entitled ; in other words, if she had no other income at all, there was £4,000 that she would have to spend, neither more nor less, as the result of the disposition of the settlor. If she had this income, she might have slightly more spending money ; but the trust fund, as regards this contribution to her total income, was to get the benefit which resulted under the Income Tax Acts from the right of the person to repayment of tax suffered in respect of part of her income.

That, I think, is the clear meaning and effect of the settlement apart from the provisions of the All Schedules Rules, to which I am going to refer. The first is r. 19, under which, where annuities are paid out of profits or gains brought into charge, the payer is entitled, but clearly not bound—there is no doubt about that—to deduct the tax payable in respect of the annuity. Under r. 21 on moneys payable out of profits or gains not brought into charge you are bound to deduct the tax, and, being so bound, you are bound also to account for the tax to the revenue. In the case of deduction under r. 19 the tax is retained, as the phrase is, by the payer. Then one comes to r. 23, which reproduces in substance the Income Tax Act, 1842, s. 103. R. 23 is as follows :

(1) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment shall forfeit the sum of £50. (2) Every agreement for payment of interest, rent or other annual payment in full without allowing any such deduction shall be void.

There is no doubt about the effect of the second subrule. An agreement the subject-matter of which is that tax is not to be deducted when interest, rent or other annual payment is in question is void and of no effect at all.

If I have such an agreement here, r. 23 (2) applies, and tax has to be deducted from the sum of £4,000 when paid ; and, I assume, also from the further sums which are directed to be paid. In my opinion, there is no agreement here of any kind whatsoever to that effect. At the time when this settlement was executed, as appears from the recital, there had been transferred to the trustees the whole of the trust funds. The point of this document and the form of this document are that the settlor in it makes no agreement with anybody but does state what the rights are which are to attach to the funds which are in the hands of his trustees. The result of it is to create in the beneficiaries equitable interests, proprietary interests, in the funds and in the income of the funds. It may be somewhat difficult to define accurately the proprietary interest of an annuitant in a fund but that he has some equitable interest in the fund I have not the slightest doubt. His rights do not depend upon any agreement. No annuitant under this deed could sue the settlor upon any agreement at all. The settlor had done all he intended to do. If an annuitant wanted to enforce her rights under this document, she would not sue the trustees in contract or on an agreement. Her point would be : " You, the trustees, have in your hands funds which are subject to trusts one of which enures in my favour, and I am seeking to enforce that proprietary right ; I am not seeking to enforce any bargain." If that be the real position in law of funds held under such a settlement as this, it appears to me (and counsel for the second defendant quite rightly conceded it) that the case is clear.

That being the position, it appears to me that there is no agreement and that r. 23 (2) has no application whatsoever ; and there is at least one part of this document which I think takes effect according to the intentions of the settlor

who made it.

Declaration that the annuities were payable free of income tax subject, however, to the provisions of the Finance Act, 1941, s. 25.

Solicitors: *Church, Rendell*, agents for *Eastley & Co.*, Paignton (for all parties except the fifth defendant); *Hunters* (for the fifth defendant).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

A

R. v. COLLINS.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Tucker, JJ., **January 14, 1943.**)]

Criminal Law—Appeal—Application for leave to appeal after time expired—Conviction of murder not involving sentence of death—Criminal Appeal Act, 1907 (c. 23), s. 7—Children and Young Persons Act, 1933 (c. 12) s. 53 (1).

B

The applicant was convicted of murder and, being under 18 years of age at the time of the crime, he was not sentenced to death but ordered to be detained during His Majesty's pleasure. He asked for leave to appeal against that sentence and for leave to extend the time given for his appeal. Under the Criminal Appeal Act, 1907, s. 7, the court has power to extend the time for leave to appeal in any case except in a case of a conviction involving sentence of death:—

C

HELD: (i) there was no reason in law why the court should not extend the time for leave to appeal because, although the conviction was for murder, it did not involve a sentence of death, but, on the facts of this case, the court refused to extend the time for leave to appeal.

(ii) the court had no power to review a sentence which is fixed by law.

D

[EDITORIAL NOTE.] It was held in *R. v. Twynham* (1) that the Court of Criminal Appeal had no power to extend the time for appealing in a murder case. The statute limiting the court's powers gives it power to extend the time except in cases involving a sentence of death, which, so long as death was the only penalty in a murder case, justified the statement of law in *R. v. Twynham* (1). In 1933, however, it was enacted that, in the case of persons under 18 years of age, the sentence upon a conviction of murder is to be imprisonment during His Majesty's pleasure and, therefore, the law has been altered to the extent that, in such cases, leave to extend the time for appealing against conviction can be granted. Since, however, the sentence is fixed by law, no appeal can be entertained against the sentence, for the court has no power in any case to vary a sentence fixed by law.

E

AS TO EXTENSION OF TIME, see HALSBURY, Hailsham Edn., Vol. 9, p. 267, para. 348; and FOR CASES, see DIGEST, Vol. 14, pp. 504, 505, Nos. 5555-5570.]

Case referred to:

F

(1) *R. v. Twynham* (1920), 90 L.J.K.B. 586; 14 Digest 504, 5544; 124 L.T. 286; 15 Cr. App. Rep. 38.

APPLICATION for leave to appeal after the time for such appeal has expired. The facts are fully set out in the judgment.

No counsel appeared.

G

HUMPHREYS, J. [delivering the judgment of the court]: This applicant, Edward James Collins, is a young man now 18 years of age. He was tried and convicted at the assizes for the West Riding of Yorkshire of murder, he being at that time under the age of 18. As the result and in accordance with the Children and Young Persons Act, 1933, s. 53 (1), instead of being sentenced to death, as he would have been before that time, he was ordered to be detained until His Majesty's pleasure be known, that being the law to-day. He asks for leave to appeal against that conviction, and he is out of time with his appeal. He says that was because he was leaving things for his father to arrange with

H

The Criminal Appeal Act, 1907, s. 7, provides that this court may extend the time for leave to appeal in any case except in a case of a conviction involving sentence of death. There is, in our judgment, therefore, no reason in law why we should not extend the time, if we think it right to do so, although the conviction was for murder, because in this case it did not involve a sentence of death.

This matter arose as long ago as 1920 when every conviction for murder involved the passing of a sentence of death. The judgment of the court given

in *R. v. Twynham* (1) requires a slight amendment in view of the alteration of the law since that date. It is the last passage of the judgment of the EARL OF READING, L.C.J., giving the judgment of the court in that case, at p. 587, which reads as follows :

In future, it must be taken as a direction of this court that an application for an extension of time to apply for leave to appeal against a conviction for murder cannot be received after the time fixed by the section has elapsed.

The words "against a conviction for murder" must now be read : "against a conviction involving sentence of death."

Having dealt with that point, I may observe that this young man asks us to review the sentence which was passed upon him, which is something we have no power to do because we have no power to review any sentence which is fixed by law. The sentence is fixed by law in the case of a person convicted of murder who is under the age of 18 years of age ; the sentence is required to be, that he be detained until His Majesty's pleasure be known, and the judge cannot pass any other. On the facts it is impossible to say that there is any ground for interfering with this conviction. This application for leave to extend the time in order to give him an opportunity of appealing against that conviction, is, therefore, refused.

Application dismissed.

Solicitor : *Registrar of the Court of Criminal Appeal.*

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

HULME v. BRIGHAM AND ANOTHER.

[KING'S BENCH DIVISION (Birkett, J.), November 20, 1942.]

Mortgage—Fixtures—Degree of annexation necessary—Machines attached to driving apparatus attached to realty.

In July, 1929, a company of printers and bookbinders mortgaged their freehold business premises and the fixed plant and machinery and fixtures therein and issued debentures secured by a trust deed which provided that on the security becoming enforceable, a receiver appointed by the trustee might enter upon and take possession of the premises. In Feb., 1935, the company hired 6' printing machines from the plaintiff who had no notice of the debenture issues. When the security became enforceable, the two defendants were appointed as receivers and they contended that the printing machines had become part of the freehold, and that they were, therefore, entitled to withhold possession of them from the plaintiff. The machines stood by their own weight and were not fixed to the floor or to any part of the factory building, but the driving apparatus, parts of which were attached to the machines, was fixed to the freehold at certain points :—

HELD : the printing machines had never lost their chattel nature and were not fixtures. The defendants had, therefore, no right to withhold possession of them from the plaintiff.

[EDITORIAL NOTE. The sufficiency of the annexation of fixtures varies not only according to the degree or more of attachment to the land but according to the position of the rival claimants. The matter here arises between a mortgagor and his mortgagee, where the question is not necessarily the same as that between landlord and tenant ; but even here, where the mortgagor is a trader, it may be taken that the mortgagee has authorised the fixing of certain chattels necessary for business purposes. The only material question here is whether the fixtures have become parcel of the freehold. The argument was that the machines in question, though not themselves attached to the freehold, were attached to other machines so attached, and it is held that, in the circumstances, they were not fixtures.]

AS TO SUFFICIENCY OF ANNEXATION TO THE FREEHOLD, see HALSBURY, Hailsham Edn., Vol. 23, pp. 281-283, para. 413 ; and FOR CASES, see DIGEST, Vol. 35, pp. 302-310, Nos. 516-569.]

Cases referred to :

- (1) *Reynolds v. Ashby & Son*, [1904] A.C. 466 ; 35 Digest 309, 565 ; 73 L.J.K.B. 946 ; 91 L.T. 607.
- (2) *Lyon & Co. v. London City and Midland Bank*, [1903] 2 K.B. 135 ; 35 Digest 309, 564 ; 72 L.J.K.B. 465 ; 88 L.T. 392.
- (3) *Leigh v. Taylor*, [1902] A.C. 157 ; 40 Digest 653, 1917 ; 71 L.J.Ch. 272 ; 86 L.T. 239.

- (4) *Hobson v. Gorringe*, [1897] 1 Ch. 182; 35 Digest 309, 563; 66 L.J.Ch. 114; 75 L.T. 610.
 (5) *Pole-Carew v. Western Counties and General Manure Co.*, [1920] 2 Ch. 97; 31 Digest 325, 4668; 89 L.J. Ch.559; 123 L.T. 12.
 (6) *Holland v. Hodgson* (1872), L.R. 7 C.P. 328; 35 Digest 304, 538; 41 L.J.C.P. 146; 26 L.T. 709.
 (7) *Northern Press and Engineering Co. v. Shepherd* (1908), 52 Sol. Jo. 715; 31 Digest 190, 3247.

A *Valentine Holmes* for the plaintiff.
G. O. Slade and *M. Bowles* for the defendants.

BIRKETT, J. : The plaintiff's claim in this action is for the delivery to him of 6 printing machines of which he claims to be the owner, or payment to him of their value and damages for their detention. The defendants, who are the receivers of mortgaged premises under a trust deed, claim to be entitled to withhold possession of the machines from the plaintiff.

B The plaintiff has had a long experience in the printing trade, and towards the end of 1934, or the beginning of 1935, he instructed Ruddock, the London manager of Airey Entwistle & Co., a firm of auctioneers and valuers, to buy for him certain machinery which belonged to a firm named David Allen, Ltd. The price paid was £17,140 and certain machines were re-sold for the plaintiff by Ruddock for the price of £11,000 or thereabouts. The machinery which remained C consisted of 6 printing machines, the subject-matter of this action.

In February, 1935, these 6 machines were hired from the plaintiff by a company named Greycaine, Ltd., known before 1934, as the Greycaine Book Manufacturing Co., Ltd., printers and bookbinders, of Watford. The terms of the hiring were evidenced by a letter dated Feb. 5, 1935, and the company was to pay £18 D per week for the use of the machines; the machines were to remain the property of the plaintiff, and the company was to have the option of purchasing the machines up to the end of 1 year from Feb. 5, 1935. The machines were received by the company at Watford in or about the month of Feb., 1935. In July, 1929, some 6 years before, the company, Greycaine, Ltd., had issued a series of 100 first mortgage debentures of £1,000 each, secured by a trust deed dated July 8, 1929, made between the company and the Century Insurance Co., Ltd., as trustee.

E By cl. 5 of this trust deed the company charged by way of legal mortgage certain freehold premises at Watford where the printing business of the company was carried on and the fixed engines and plant and machinery and fixtures in and about the same with the payment to the trustee of all principal, interest, and other moneys secured by the deed and the debentures. Cl. 10 of the deed should be in arrear for 30 days. Cl. 11 of the deed provided that, after the F security should have become enforceable, the trustee or any receiver appointed by him under cl. 17 might enter upon and take possession of the premises, but there must be 14 days' notice given of this, unless the trustee should certify that further delay would imperil the interests of the debenture holders. Cl. 17 provided that after the security should have become enforceable the trustee might by writing appoint a receiver with such powers as the trustee thought G expedient. Cl. 18 provided that the receiver should be the agent of the trustee for all purposes, and in particular regarding his possession or occupation of the premises, save that the company was to be responsible for his acts and defaults.

On Nov. 16, 1934, there was a second trust deed securing a further issue of debentures made between the company, the Friends Provident and Century Life Office, and the trustee of the first deed. This deed incorporated all the provisions of the first deed of July 8, 1929. The plaintiff did not know of the H debenture issues and made no search or inquiry, and his agreement was made with the company in Feb., 1935, without reference to or indeed thought of any such matter.

In July, 1935, by letter of July 12, the company asked the plaintiff to remove four of the machines, as they were of no use to the company. Nothing was done save that there were some negotiations between the parties to try to achieve some settlement. The four machines remained on the premises but were not used, and of the other two only one (the two-colour machine) was fully used, the other being used very little.

On Nov. 20, 1936, interest on the debentures was 30 days in arrear and the trustee appointed the first defendant, Bernard Harry Brigham, a chartered accountant, to be receiver, and certified that further delay would imperil the interests of the debenture holders and excused the giving of the 14 days' notice required by cl. 11 of the deed.

The first defendant took possession on Nov. 21, 1936, and on Nov. 26, 1936, wrote to Messrs. Airey Entwistle asking them to remove the printing machines in question. Correspondence followed on this letter; but on Dec. 17, 1936, the first defendant wrote to Airey Entwistle saying that he could not allow the machines to be removed as he contended they were part of the freehold, and suggested that the dispute would have to be decided in a court of law; but that the question should be deferred.

On Apr. 8, 1937, the trustee appointed the two defendants to be receivers, the appointment of Brigham being in confirmation of his previous appointment, and all the provisions of the deed of Nov. 20, 1936, were to extend and apply to the appointment of Apr. 8, 1937.

The 6 printing machines were set up at the company's factory at Watford, but they were not fixed to the floor or any part of the building in any way. One machine was 12 tons in weight; another 7 tons in weight; and the 4 others were 9 tons in weight each. They stood, therefore, secure and stable by their own weight, and this was agreed to be so by the parties. In order to work the machines it was necessary to supply them with motive power, and the motive power at Watford was electricity. Machines such as these can be, and are, regularly driven from what is called "line shafting," but that was not erected at this factory and the machines were driven by a separate driving belt and motor for each machine. The company provided the motors and driving belts and all accessories; the plaintiff supplied only the 6 machines. Electric mains carried the electric current to the factory, and at the distribution point electric cables were installed to carry the electric current from the mains to the motors and the machines; the necessary wires were contained in conduit tubing; switch gear for controlling the supply of electric current was attached to one of the girders; and for controlling the electric current to the motors push button controls were installed which were affixed to the machines themselves with removable screws. To apply the power to the machines pulleys, and leather driving belts were used, one pulley being on the motor and one on the driving shaft of the machine; and for reasons of safety the driving belt and gear were enclosed in a guard which was attached and fixed to the floor of the factory. At its other end the guard was attached to the machine by a screw.

In the case of one machine, the conduit tubing ran down the girder to which the main electric power switch was fixed. It then ran along the floor partly grouted in concrete and partly laid in a concrete channel and thence to the machine being screwed at various points. Then the conduit tubing passes through the push button control to the motor. This motor is on the floor but mounted and bolted on slide rails which are then bolted in turn to the concrete floor. The conduit tubing is attached to the motor and the motor is attached to the machine by the driving belt. Substantially the same arrangement applies to the other five machines, with these differences. In one case there are no slide rails to the electric motor and the bolts holding the motor are inserted in the concrete floor. In another the driving belt guard is fixed at one corner by a screw to the floor and the motor is mounted on steel girder floor joists held by bolts grouted into the concrete floor. In a third the conduit tubing going to the motor is fastened to the floor by metal saddles or staples. In a fourth the driving belt guard is screwed to the floor in three places; the motor is mounted and fixed as in the second machine and the conduit tubing is partly grouted in concrete and partly laid in a concrete channel, and is fastened to the floor by metal saddles or staples. In a fifth the driving belt guard was screwed to the floor in three places, and the motor fixed as in the second machine. From all this it is clear that the machines in this case were not fixed themselves in any way to the freehold, nor was there any need for them to be; but the driving apparatus, to use a general term, was affixed to the freehold at certain points, and portions of the driving apparatus were affixed to the machines.

I should be prepared to hold on the evidence before me that it would be a comparatively simple matter to detach the portions of the driving apparatus

from the machines, and that the machines could be dismantled and removed without unbolting from the floor either the motors or the guards.

On these facts, counsel for the defendants contended that the machines had lost their chattel character and had become part of the realty, and the defendants were, therefore, entitled to withhold possession from the plaintiff. The question which I have to decide is whether these 6 printing machines were fixtures on Nov. 21, 1936.

A Many cases were cited to me in the course of the case, but for the reasons I shall give it is happily not necessary for me to discuss them in any detail. In *Reynolds v. Ashby & Sons* (1) the machines were fixed to concrete beds in the floor by means of bolts and nuts, and could have been removed without injury to the building or beds. The court held that the machines passed by the mortgage to the mortgagee. These cases were reviewed, and LORD LINDLEY said, at pp. 473, 474 :

B My lords, I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute.

C *Lyon & Co. v. London City and Midland Bank* (2), to which my attention has also been called, was then discussed by LORD LINDLEY. There chairs screwed to bars fastened to the floor of a place of public entertainment in Brighton were held to be chattels and not to pass with the property mortgaged.

From the examination of many cases it would seem that the definition cited from ADKIN AND BOWEN ON FIXTURES and adopted by counsel for the defendants conveys the essential matters :

A fixture is an article which by its annexation to the land has lost its chattel nature and has become, in the eye of the law, part and parcel of the realty.

D To make these printing machines in this case fixtures, therefore, they must be annexed to the realty ; and in deciding whether annexation has taken place physical attachment is only one of the considerations to be kept in mind. An article, not physically attached to the land, in certain circumstances may yet have become part and parcel of the land and have lost its chattel character. The question of annexation depends on a number of circumstances, and the cases show that each case must be considered and decided on its own circumstances, applying the principles of law which have been laid down.

E In *Leigh v. Taylor* (3), certain tapestries affixed by the tenant for life for purposes of ornament were held not to pass with the freehold to the remainderman, and LORD MACNAGHTEN said, at p. 162 :

F The question is still, as it always was, has the thing in controversy become parcel of the freehold ? To determine that question you must have regard to all the circumstances of the particular case . . . The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times.

G In *Hobson v. Gorringe* (4), where a gas engine affixed to the ground by bolts and screws to prevent it from rocking was held to be a fixture, A. L. SMITH, L.J., in a considered judgment reviewed all the principal cases up to that time ; and in *Pole-Carew v. Western Counties and General Manure Co., Ltd.* (5), the Court of Appeal made a still later review.

From a consideration of these cases it would seem that, although there may be some cases where an article has some degree of physical attachment and yet does not become a fixture, the annexation of a chattel to realty depends mainly on its attachment to the soil or to something attached to the soil, such as a building.

H In *Holland v. Hodgson* (6), certain looms in a worsted mill were attached to the stone floors by nails, and it was held that they passed on a mortgage of the mill as part of the realty. BLACKBURN, J., said, at p. 335 :

Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

It is said in this case on behalf of the defendants, that although these printing machines are not physically attached to the land in any way, they are attached to certain other things which are themselves directly attached to the land. These other things are said to be the conduit tubing, the push button controls, the motors, and the guards over the driving belt gear. These things no doubt in 1935, were themselves chattels; and in 1936, it is said they had become annexed to the realty and formed a part of it; and the printing machines having been physically attached to those things, in all the circumstances the machines themselves were in 1936 part of the realty. I do not think it necessary to analyse the position further or to discuss the evidence in detail. The mode in which the machines are connected, the object for which they were connected, the nature of the machines, the position of the parties, and the relevant cases have all been considered by me. But the claim in this case is made for the return of the machines only, and these machines, it is conceded, are in no wise physically attached to the soil, but stand secure by their own weight.

After the present case had been in progress for some time the researches of counsel for the defendants produced an important case, which had not been discovered until that time and was at once disclosed, and which had not been referred to in the better known cases which followed. It is the *Northern Press and Engineering Co. v. Shepherd* (7). It is a decision of EVE, J., and the facts bear an astonishing resemblance to the present facts, and it has been of the greatest help to me in the decision of the present case. In that case EVE, J., dealt with the relevant facts. He said, at p. 715:

Alexander & Shephard, Ltd., were the owners of certain leasehold premises upon which they carried on the business of printers and publishers, and these premises they mortgaged to the defendant. They subsequently entered into an agreement with the plaintiffs for the hire-purchase of the machine in dispute. The effect of that agreement was that, if the instalments were duly paid, the machine would become the property of Alexander & Shephard, Ltd., and until they were all paid the property in the machine remained in the plaintiffs. Unfortunately the instalments were not all paid, and the defendants as mortgagee took possession of the premises. The plaintiffs thereupon claimed the machine on the ground that it was a chattel and not attached to the freehold. The defendant did not accept that position and asserted that the machine was a fixture. The question, therefore, was whether the machine was a fixture or a chattel.

The facts there do bear a very close resemblance to the main facts in the case which I have to decide. EVE, J., continued, at p. 715:

It was said that it was a fixture because it was a composite machine, and the agreement (that is the hire-purchase agreement) comprised the fixed driving mechanism as well as the patented machine, and the driving apparatus was admittedly affixed to the freehold. But I think I should be introducing a dangerous principle if I were to hold that because a machine is worked by fixed mechanism, therefore the machine is a fixture. I must have regard to the nature of the machine. It is complete in itself for the purpose for which it was designed, and I cannot hold that any part of the driving mechanism is part of the machine itself. Then it is said that there are direct and indirect attachments. But it is established by the evidence that not one of the direct attachments really operates to assist the machine in discharging its functions or is necessary for its stability. With regard to the indirect attachment to the motive power, if I were to hold that that constituted a fixture, then every motive power would be a connection which would change a chattel into a fixture. I should be giving too much importance to the connecting link if I were to hold that it altered the character of the machine. I hold, therefore, that the machine is a chattel and belongs to the plaintiffs.

Many of the observations of EVE, J., which I have just read apply, I think, with great force to the facts of the present case as I have stated them, and in the present case, therefore, I hold that these printing machines never lost their chattel nature and were not fixtures, and were not comprised in the mortgage, and the defendants, therefore, had no right to withhold possession of them from the plaintiff. It was agreed between the parties that questions of the value and damage should be referred.

There will, therefore, be judgment for the plaintiff in this action.

Judgment for the plaintiff with costs.

Solicitors: *Murray, Hutchins & Co.* (for the plaintiff); *J. Shera Atkinson* (for the defendants).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

R. v. DROXFORD JUSTICES, *Ex parte* KNIGHT.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Tucker, JJ.), **January 20, 1943.**]

Landlord and Tenant—Recovery of possession—Procedure before magistrates—Warrant for possession—Magistrates' refusal to suspend execution pending the hearing of an action for trespass—Small Tenements Recovery Act, 1838 (c. 74) ss. 1, 2, 3, 4.

A The respondent, who sought possession of a house of which he was the owner, served the applicant with a notice to quit under the Small Tenements Recovery Act, 1838. At the hearing before the justices, it was contended that the notice had not been explained to the tenant as required by the Act, but the justices decided against this contention and ordered a warrant for possession to issue. The tenant then brought an action for trespass under sect. 3 of the Act, alleging (a) that the notice had not been properly explained as had been already contended before the justices, (b) that the tenant was entitled to the protection of the Rent Restrictions Acts. The tenant then applied in accordance with the Act for a stay of execution, and this application under the terms of the Act took the form of an application to be bound over with two sureties to be approved by the justices to prosecute the action for trespass. The justices took the view that the matter had already been decided by them and refused to consider the question of binding over the tenant and approving the sureties :—

HELD : the justices should have considered the question of sureties and approved them or not, as they thought proper, since they were bound by the Act to bind over the tenant so long as proper sureties were produced.

D [EDITORIAL NOTE. The Small Tenements Recovery Act, 1838, provides a summary procedure for the recovery of property let at a low rent. It also provides what is in effect a peculiar form of appeal from the decision of the magistrates by an action of trespass against the person to whom a warrant of possession is granted. This action will now generally be prosecuted in the county court having regard to the fact that the Act applies only to properties let at a low rental. It seems that here the justices failed to realise that this was a statutory form of appeal and thought that the tenant was trying to litigate again a matter already determined by them. Whether or not the matter is rightly regarded as an appeal, the statute gives a clear right to bring an action of trespass, and the justices were bound by the statute to bind the tenant over provided he produced the sureties required by the Act.

E AS TO RECOVERY OF POSSESSION UNDER THE SMALL TENEMENTS RECOVERY ACT, 1838, see HALSBURY, Hailsham Edn., Vol. 20, pp. 283-285, para. 319; and FOR CASES, see DIGEST, Vol. 31, pp. 548-550, Nos. 6951-6968.]

Case referred to :

(1) *Sivyer v. Amies*, [1940] 3 All E.R. 285; Digest Supp.; 163 L.T. 118.

F APPLICATION for an order of mandamus to be directed to the magistrates of the Droxford division of the county of Southampton, who had refused a stay of the execution of their warrant of possession as required to do by the Small Tenements Recovery Act, 1838, s. 3. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

G. H. Crispin for the applicant.

G *A. E. Beecroft* for the respondents.

VISCOUNT CALDECOTE, L.C.J. : This is an application made with leave of this court for an order of mandamus directed to the justices of the peace of the Droxford division of the county of Southampton, directing them to exercise the jurisdiction conferred upon them by the Small Tenements Recovery Act, 1838, ss. 3, 4.

H The applicant was an occupier or tenant of a house which the landlord wanted for occupation by one of his men, and in due course a notice was served upon the applicant in this case under the Small Tenements Recovery Act. That is an old statute, more than 100 years old, and it was framed at a time when a great many people in humble circumstances could not read. There are elaborate provisions contained in the Act as to the form of the notice and as to the proper way of serving it and explaining it to the person upon whom it is served.

In due course the application, of which notice was given, was made to the magistrates for the order which sect. 1 of the Act permits to be made. It was said on the occasion of the application to the magistrates that the elaborate

provisions of the Act as to the service of the notice and the form of the notice had not been complied with, and that was relied upon as a reason which would lead the magistrates to refuse to issue the warrant. The magistrates, however, took the view that every requirement of the Act had been properly satisfied, and they granted the warrant, which, in due course, would be exercised, if need be, by the constable under the provision of the Act.

The present applicant, however, was not satisfied with the decision of the magistrates and he conceived himself to be entitled to take advantage of the provisions contained in sect. 3 of the Act. That section says:

In every case in which the person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant . . .

That provision, therefore, gives a cause of action in the nature of trespass to the tenant or the occupier who asserts that at the time of granting the warrant the person to whom it was granted had not any lawful right to the possession of the premises. But it occurred to Parliament to provide that while an action of trespass was being heard and determined, it would be proper to provide that the *status quo* should be preserved so far as the tenant or the occupier was concerned; and the section, therefore, proceeds to say:

. . . and in case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceedings in such action in case a verdict shall pass for the defendant or the plaintiff shall discontinue or not prosecute his action or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass . . .

An action of trespass was commenced in the county court. Under the particulars of claim it was alleged that the notice of application was not read over to, nor the purport or intent thereof explained to Hilda Gertrude Knight; and the particulars of claim proceed to allege that the warrant was improperly obtained by the defendant and that the defendant became a trespasser.

In order to take advantage of the stay for which sect. 3 provides, it was necessary to make an application to the magistrates to approve of sureties. They then took a course which I am satisfied was wrong. They said that they had already determined the question as to whether there had been a want of compliance with the provisions of the statute with regard to the service of the notice. They said nothing about the application to approve the sureties, thereby depriving the applicant of whatever rights the Small Tenements Recovery Act, 1838, s. 3, gave him with regard to a stay of the execution of the warrant which had been granted. I say I am satisfied that the magistrates were wrong. The application had nothing to do with the previous proceedings which they had already determined. It was an application which was necessary if the right which sect. 3 gave for the proceedings to be stayed was to be available to the applicant, and, although they might have had their own views as to the evidence of the parties about the service of the notice, it is quite plain, as I think, that sect. 3 provides that the magistrates shall consider the question of sureties in order to enable the tenant to make his claim and meanwhile to remain in occupation.

A number of questions have been raised which would require much more discussion than they could receive in this court as to whether or not the action in the county court which has been commenced can succeed. I express no opinion upon those contentions, and, because I hold a clear view as to the course which the magistrates took, namely, that it was a wrong course, I must not be supposed for a moment to express any opinion about the argument, for instance, which has been addressed to this court as to the effect or the relevance of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3. Those are matters which will have to be discussed at the proper time in the county court proceedings which have been commenced. I respectfully agree with what CROSSMAN, J., we are informed, said in *Sivyer v. Amies* (1), at p. 287, namely, that sect. 3 seems to provide something of the character of an appeal from the decision of the magistrates; but, whether it is to be described as an appeal or

not, the only thing with which we are here concerned is first whether the magistrates did their duty, and, secondly, whether, in the circumstances, this court should issue an order of mandamus to them to do their duty, if they have not already done it.

A I have had some doubt as to the second point. I think it is possible—I say no more than that—that these proceedings in the county court will result in a decision which will have the same effect as the decision which the magistrates have already given upon the evidence before them ; but, having formed the view which I have expressed, that the magistrates ought to have considered the question of sureties and approved them or not as they thought proper, I think that a mandamus to them to perform that duty should be granted, and the questions which have been discussed, about the lawful right of the landlord to possession, can be discussed in their proper place, namely, in proceedings which have been commenced in the county court.

B I, therefore, think that the mandamus asked for should be granted.

HUMPHREYS, J. : I so entirely agree with every word of the judgment which has been delivered by VISCOUNT CALDECOTE, L.C.J., that I find it unnecessary to add anything.

TUCKER, J. : I also agree.

Order granted.

C Solicitors : *Culross & Co.* (for the applicant) ; *Cunliffe & Airy*, agents for *Gunner & Carpenter*, Bishop's Waltham, Hants, (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

LORD AND ANOTHER v. PACIFIC STEAM NAVIGATION CO., LTD., THE OROPESA.

D [COURT OF APPEAL (Lord Wright, Scott and MacKinnon, L.JJ.), **December 17, 1942.**]

Negligence—Effective cause—Chain of causation—Plaintiff's act the natural consequence of position in which he was placed—Direct consequence of defendants' negligence—Collision at sea—Men ordered to boats—Death of seaman through boat capsizing.

E A collision occurred at sea between the Oropesa and the Manchester Regiment, whereby the latter vessel was so seriously damaged that the captain ordered the majority of the crew to take to the lifeboats. He then decided to go with 14 of the crew to the Oropesa in another lifeboat. He hoped to persuade the captain of the Oropesa to take the Manchester Regiment in tow or to arrange for salvage assistance and, in any event, to arrange for messages for help to be sent out and to obtain valuable advice. F This lifeboat capsized, as a result of which nine of the crew lost their lives. The personal representatives and dependants of one of the deceased seamen sued the owners of the Oropesa, and contended that the death was the direct consequence of the negligent act of the Oropesa in running down the Manchester Regiment. The owners contended that the chain of causation had been broken by the captain ordering the men to row to the Oropesa and the boat subsequently capsizing :—

G HELD : the action taken by the captain was the natural consequence of the emergency in which he was placed by the negligence of the Oropesa and, therefore, there had been no break in the chain of causation, and the seaman's death was a direct consequence of the negligent act of the Oropesa.

H [EDITORIAL NOTE. In the judgment herein LORD WRIGHT deals at greater length with a matter which he shortly dealt with in *Summers v. Salford Corpn.* (5). The principle dealt with is fundamental in actions for negligence because there the defendant's act must be shown to be the effective cause of the plaintiff's damage and, if it can be shown that some other act, whether of the plaintiff or a third party, was the effective cause, then the defendant escapes liability. At the same time there seems to be a considerable distinction between the case here discussed and that considered in *Summers v. Salford Corpn.* (5). Here it is obvious that the negligent navigation of the Oropesa placed the captain of the Manchester Regiment in a position of difficulty. Whether we speak of it as being placed in an emergency or under the heavy hand of the casualty is not very material, but it is clear that we are here dealing with a case where a decision

had to be made and made quickly upon what was probably imperfect knowledge of the precise position at the moment and at a time when it was extremely difficult to know what was likely to happen in the immediate future. The position of a captain seeking to save lives and his ship after a collision in mid-Atlantic during a strong gale is very different from that of a tenant of a house in which there is a window with a broken sash-cord. The latter has not to act on the spur of the moment and can usually adopt the course of having the necessary repair done himself if the landlord fails to do it within a reasonable time. There is no emergency and it would not seem right to speak of the tenant being under the heavy hand of the casualty. However, the basic principle is the same. The law regards only the effective cause of the plaintiff's damage and action by the plaintiff which is reasonable and in the ordinary course of events and taken to counteract the defendant's negligence or breach of contract affords no defence to the defendant.

AS TO EFFECTIVE CAUSE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 591-594, para. 844; and FOR CASES, see DIGEST, Vol. 36, pp. 25-30, Nos. 125-164.]

Cases referred to :

- (1) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A.C. 16; 36 Digest 120, 798; 95 L.J.P. 135; *sub nom. The Paludina*, 135 L.T. 707.
- (2) *The Metagama* (1927), 29 Lloyd L.R. 253.
- (3) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 36 Digest 122, 810; 53 L.J.Q.B. 476; 51 L.T. 529.
- (4) *The City of Lincoln* (1889), 15 P.D. 15; 36 Digest 30, 162; 59 L.J.P. 1; 62 L.T. 49.
- (5) *Summers v. Salford Corpn.*, [1943] 1 All E.R. 68.
- (6) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; 36 Digest 128, 846; 86 L.J.P. 58; *sub nom. The Amerika*, 116 L.T. 34.

APPEAL by the defendants from an order of LANGTON, J., dated June, 23, 1942.

The Manchester Regiment was a vessel of about 6,000 tons gross register, 430ft. long, and the Oropesa was a much larger vessel of about 14,000 tons gross register and 530ft. long. At about 3 a.m. on Dec. 4, 1939, both vessels were in mid-Atlantic, the Manchester Regiment proceeding almost due west and the Oropesa being on a course practically due east. There was a south-easterly gale blowing. The Oropesa was heading into the gale and the Manchester Regiment had it on her port quarter. It was a reasonably clear night when the two vessels sighted each other. The stem of the Oropesa struck the starboard side of the Manchester Regiment at an angle of about 50 degrees and did so much damage that the stokehold and engine-room rapidly filled. According to the nautical assessors, there was no steam available for working the pumps, dynamos, winches, windlasses or steam gear, and, in the event of the bulkhead going between the engine-room and the stokehold and the cargo hold, the ship would not have had sufficient buoyancy to keep afloat.

Captain Raper, the captain of the Manchester Regiment, thought that the best thing to do was to send off 50 out of the crew of 74 in three lifeboats, leaving behind with him one lifeboat and 24 of the crew. He then decided to go on board the Oropesa himself with as many men as could be spared from the Manchester Regiment, his intention being to arrange with the captain of the Oropesa that she should send out messages and stand by for salvage assistance, and then to return to his own ship. He left on board the Manchester Regiment the chief officer, the third engineer and 5 seamen, who, he thought, would be sufficient to handle the hawser if it were decided to tow the vessel, and himself set off in the remaining lifeboat with 16 men, 1 of whom was Lord, to row to the Oropesa.

About half an hour after they had started, the boat got into some very cross water and capsized, all 17 men being thrown into the sea. The captain and 7 of the others managed to scramble on to the keel of the lifeboat, but the remaining 9, including Lord, were drowned.

A collision action was brought in the Admiralty Court in the ordinary way, and LANGTON, J., apportioned the blame four-fifths to the Manchester Regiment, and one-fifth to the Oropesa, because she did not give a signal to the other vessel to show how she was directing her course. No appeal was brought from that judgment.

The plaintiffs, the parents of the deceased man, Lord, then brought an action claiming damages (i) as administrators of their son's estate, for loss sustained, including loss of expectation of life, and (ii) under Lord Campbell's Act as dependants on the deceased sons' earnings. LANGTON, J., gave judgment

for the plaintiffs and the defendants thereupon brought this appeal.

F. A. Sellers, K.C., and *Owen L. Bateson* for the appellants.

Sir Robert Aske, K.C., and *E. W. Brightman* for the respondents.

LORD WRIGHT: The question in this case is in truth a question of fact. The very able arguments which have been addressed to the court by counsel on each side do not seem to differ materially as to the principles which are to be applied; and the effective result of applying those principles is not really in dispute. I am confirmed in my view that the problem here is a question of fact by the curious differences of opinion which seem to have occurred in the two leading cases in the House of Lords which have been cited: *S.S. Singleton Abbey v. S.S. Paludina* (1), and *The Metagama* (2).

The main question which has been argued in this case is whether the death of Lord was a direct consequence of the collision which took place owing to the negligence of the *Oropesa* in colliding with the other vessel. Lord's representatives and dependants sue on the basis that the owners of the *Oropesa* owed a duty not only to the owners of the Manchester Regiment, but to the officers and crew and, if you like, the cargo; and that duty was a duty to navigate with care and skill so as not to injure them. Negligent navigation would obviously be a breach of that duty and, therefore, there is no doubt that there was here a breach of duty towards Lord. Then it is said there is no liability at all, because there is no legal connection between the breach of duty and the damage which took the form of the death of Lord. There are invoked certain well-known formulae, such as that the chain of causation was broken, that there was a *novus actus interveniens*. These somewhat august phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one could be treated as flowing directly from the other. Cases have been cited which have shown a very great difference of opinion on what is the true answer in different cases to that question whether the damage was direct or, on the other hand, to use another phrase, was too remote.

Looking at the various cases and the various possibilities of circumstances which may arise in which that question has to be determined, I confess I find it very difficult to formulate any precise and all-embracing rule. I do not think the cases which have been cited succeed in settling that difficulty. It may be said that in the law of negligence you may state general propositions; but when you come to determine whether in any particular case there has been actionable negligence, you really have to deal with that case on its facts. The principles are general, and can only be general. Unless there is real error in the formulation of the principles, the application of the principles to the actual issue is, therefore, a question of fact.

What were the facts here? The facts here, as I take it, were that Capt. Raper was faced with a very difficult proposition in considering what he was to do. Here was his ship in mid-Atlantic, helpless, without any means of propulsion, without any means of working any of its important auxiliary apparatus, a dead lump in the water, with only the saving thought that she might go on floating as long as her bulkheads did not give way. Capt. Raper had great faith in his ship. He thought she was a very strongly built ship and would go on floating. All the same he did realise (and in fact he so admits) that he was in a heavy sea, with a heavy gale blowing, a south-easterly gale, and that he was in a very perilous plight. As counsel for the respondents has pointed out in his argument, the captain of a ship is guilty of a misdemeanour under the Merchant Shipping Act, 1894, s. 220, if he refuses or omits to do any lawful act proper and requisite to be done by him for preserving his ship from immediate loss, destruction or serious danger, or for preserving any person belonging to or on board her from immediate danger to life or limb. That applies to the crew as well. So much for the position of the captain. In those circumstances he took this decision—to separate the men who remained on board, while he went himself to share the danger. I do not think there is any doubt that he thought that on the *Oropesa* he would find valuable help, and certainly valuable advice. I do not really gather that anybody says he was acting unreasonably or improperly in doing that, or in thinking as he did, or, indeed, was doing anything but his duty. That appears to me so obvious that I do not propose to develop it any further,

So far as Lord was concerned, no one can say he acted unreasonably in getting into the boat. All he did was to obey lawful orders. If he had not obeyed the lawful orders of his captain, he would have committed a criminal offence under the Merchant Shipping Act, 1894, s. 225 (1) (b). If the test is whether what was done was reasonable in the circumstances, I do not think there can be any question in this case that the action of Capt. Raper and the action of Lord were quite reasonable. Whether Capt. Raper took exactly the right course is another matter. He may have been guilty of an error of judgment; but, as I read the authorities—I think I am stating the effect of them correctly—that would not affect the question of whether the action he took and its consequences flowed directly from the negligence of the *Oropesa*.

I am not sure that counsel for the appellants does not agree with that view, anyhow to an extent; but he took another point. He says Lord was merely a spectator of the collision. He received no personal injury or shock. There was no need for special steps to be taken on his behalf in the emergency. He was not injured or affected. That being so, in getting in the boat and obeying the orders, he was merely an outsider or spectator. Counsel for the appellants did not go so far as to say that he was a busybody, but he said that he was merely doing a voluntary act which was in no legal sense associated or connected with the negligence of the *Oropesa*. As for the captain, counsel for the appellants argued, very much on the same lines, that what Captain Raper did had no legal connection with the casualty. He said that neither Capt. Raper nor Lord had any injury or casualty and the heavy hand of the casualty was not resting upon either one or the other. It was only the vessel, the Manchester Regiment, which was under the heavy hand of the casualty and Capt. Raper and Lord were not in any sense suffering from the casualty. He also says that, as to the master, he had a general purpose, no doubt, of arranging any salvage which was practicable; but he contemplated that the boat would return, and that he would return with the boat.

In my view, that is not a correct reading of the position. Having regard to the actual situation of this vessel and the situation of those on board her, I think that the vessel itself was in the grip of the casualty, or that the hand of the casualty lay heavily upon her; and that the conduct of Capt. Raper and Lord was directly caused by and directly flowed from it. There was an unbroken sequence of cause and effect between their action and the negligence which caused the ship to run into the Manchester Regiment. I think this view is confirmed by looking at the facts. The statement of the principle involves, I think, that the action was really dictated by the exigencies of the position. You cannot sever the conduct of Capt. Raper and that of Lord from the circumstances of being in mid-Atlantic and all the conditions affecting either ship. With that must be joined the duty which they were under in their positions as captain and sixth engineer.

There are some propositions that I think are well established and beyond question in connection with this class of case. One is that human action does not *per se* sever the connected sequence of acts. The mere fact that human action intervenes does not prevent the sufferer from saying that damages for injury due to that human action, as one of the elements in the sequence, is recoverable from the original wrongdoer.

There is a short and neat case which I think may usefully be referred to on this point, *The City of Lincoln* (4). That case is specially useful as it is so neat and short, and, since the judges of the Court of Appeal all agreed, we do not get the complications which we get in the cases in the House of Lords on this point. In *The City of Lincoln* (4), the question was whether the injury was directly caused by the casualty; and that great judge, LINDLEY, L.J., said this, at p. 18, on the point of what was meant by "the ordinary course of things." He said:

Sir Walter Phillimore has asked us to exclude from it all human conduct. I can do nothing of the kind. I take it that reasonable human conduct is part of the ordinary course of things. So far as I can see my way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss.

Counsel for the appellants very properly said that those words would seem very pertinent to this case; but they must not be pressed too hard, and you must

look at the facts. The facts were that there had been a collision between a steamer and a barque. The steamer was held alone to blame.

The steering compass, charts, log and log glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass which he found on board.

I am reading from the headnote, which I think is accurate. It was held that that was reasonable conduct in all the circumstances. The ship was in what has been called, in a different sense, the grip of the casualty.

A The barque while on her way, without any negligence on the part of the captain or crew, and owing to the loss of the requisites for navigation above mentioned, grounded, and was necessarily abandoned. HELD, by the Court of Appeal, that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby.

B I do not know that LINDLEY, L.J., uses the word "natural" there, except in a quotation which he makes; but there again, in essence and in principle, that case is not different from this case. The captain, being placed in the difficulty in which he was, went on navigating the ship. That was the action which he thought was reasonable, and which was held to be reasonable in the emergency. But, of course, there was a long sequence of time and of distance as well between the collision and the physical grounding of the vessel. If the vessel had remained where she was, she might have been picked up or she might still have become a total wreck; but she would not have become a total wreck in the way in which in fact she did. It was there held that, notwithstanding the human action, it was a reasonable thing to do.

C I might now pass on to another and very different set of cases and to a very different sphere of activity, and refer to the recent case in the House of Lords of *Summers v. Salford Corpn.* (5), where a woman cleaning a window was injured because the sash-cord broke and the upper part ran down and jammed her hand very badly. That is far removed from the sort of facts which we have to deal with here, but it is the same principle. Assuming, as was held in that case, that there was a breach of duty to her, the mere fact that no harm would have happened to her if she had not been cleaning the window was really immaterial. She was doing something which was reasonable and which was in the ordinary course of events.

D In all these cases the question is not whether there was what one may call negligence or not. Negligence involves a breach of duty as between the plaintiff and the defendant. The captain or Lord, or whoever was deciding what to do, were not then owing a duty to anybody except, possibly, a duty to minimise damage so far as they could; but that is not a point which is relevant here. They were acting in an emergency. If they did something which was outside the exigencies of the emergency, whether it was from miscalculation or from error, or, if you like, from mere wilfulness, they would be debarred from saying that there had not intervened a new cause. The question is not whether there was new negligence, but whether there was a new cause. I think that is what LORD SUMNER is emphasising in one of the passages in a case to which I shall refer in a moment, *S.S. Singleton Abbey v. S.S. Paludina* (1). It must always be shown that there is something which I will call ultraneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic. I doubt very much whether the law can be stated more precisely than that.

E I notice that LORD HALDANE gave a fuller description in *The Metagama* (2), which is rather different on the facts. On the facts there the whole of the ultimate damage was due to the subsequent handling of the vessel. LORD HALDANE says:

H My Lords, I therefore turn at once to the crucial question in this case: Was there fault in those responsible for the ship in reference to the use of her engines when she was on the north bank? Now this is a question of evidence; and in weighing the evidence in order to draw the proper inferences, there are certain principles which have to be kept steadily in view. When a collision takes place by the fault of the defending ship, in an action for damages the damage is recoverable if it is the natural and reasonable result of the negligent act; and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created. Further, what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they think reasonable, although unsuccessful, their mistaken judgment may be a natural consequence for which

the offending ship is responsible, just as much as is any physical occurrence. Reasonable human conduct is part of the ordinary course of things which extends to the reasonable conduct of those who have sustained damage who are seeking to save further loss.

He takes that final proposition from *The City of Lincoln* (4). I think that is an important statement of principle. If the plaintiffs do whatever they do reasonably, though unsuccessfully, then their mistaken judgment may be a natural consequence for which the offending ship can be responsible. Here it may be said that, even if Capt. Raper was acting under a mistaken impression, and was not doing quite the right thing, his mistake might be regarded as the natural consequences of the emergency in which he was placed by the negligence of the Oropesa. There was a difference of opinion in *The Metagama* (2), due to the fact that the final issue is very often a debatable issue of fact. Generally it turns on whether the discretion was exercised with sufficient reasonableness in the circumstances of the case. There was again a difference of opinion in *S.S. Singleton Abbey v. S.S. Paludina* (1). I am not going to discuss that case at any length, except to quote a few words of LORD SUMNER, at p. 28 :

“Cause and consequence in such a matter do not depend on the question, whether the first action which intervenes, is excusable or not, but on the question whether it is new and independent or not.”

It was held that there the master of the Singleton Abbey had not stopped his engines at a particular moment, and this resulted in consequent trouble with the Paludina and the Sara. It was held that that was a miscalculation in the circumstances of the case which broke the chain of causation. There, again, it is a decision on the facts. It does not take the matter any further, except possibly by way of comparison. The statement of principle by the majority of their Lordships does not in any way, I think, contradict what I have said.

The real difficulty here is the application of the principle, which is a question of fact. I am bound to say that I agree entirely with LANGTON, J., in the way he has dealt with the question. I am not prepared to say, and I do not say in this case that the fact that Lord's death was due in the circumstances to his leaving the ship in a boat, and to the unexpected and very unfortunate capsizing of that boat, prevented his death being a direct consequence of the casualty. It was a risk, no doubt ; but a boat would not generally capsize in those circumstances ; and I cannot think that that prevents it being held that his death was a direct consequence of the casualty.

There are many other cases which might be referred to. The general question of direct or remote causation has been canvassed in a great many different connections. A mere voluntary act would be a clear case where the sequence of cause and effect was broken. For instance in *Admiralty Comrs. v. S.S. Amerika* (6), one of the claims made by the Admiralty by way of damages for loss due to the collision was that they paid certain bounties to some relatives of members of the ship's crew who had lost their lives. It was held that that was purely voluntary. That is a very extreme but obvious illustration of a loss resulting from the collision, which as a matter of fact did not result in any legal sense in such a way as to impose a legal liability. It was a pure case of loss incurred by purely ultraneous conduct.

I think for these reasons the appeal should be dismissed and the judgment of LANGTON, J., should be affirmed. There is no question of amount ; and the respondents will have the costs of the appeal.

SCOTT, L.J. : I agree ; and I wish to add only this. We were advised in the same way as LANGTON, J., below was advised, that the position throughout in these happenings was one of critical danger to all those on board the Manchester Regiment. I am satisfied that the action of the captain was taken in order to save the lives of those for whom he was responsible and was reasonable ; and, therefore, there was no break in the chain of causation. I agree entirely with the judgment which has just been delivered.

MACKINNON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : Middleton, Lewis & Clarke, agents for Batesons & Co., Liverpool (for the appellants) ; Gibson & Weldon, agents for John Whittle, Robinson & Briley, Manchester (for the respondents).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. LARKIN.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Asquith, JJ.), **December 15, 1942.**]

Criminal Law—Direction to jury—Direction that verdict of not guilty is not open to jury—Unambiguous evidence of prisoner's guilt—Questions by judge to jury after verdict—Direction as to adding recommendation to mercy.

A The deceased died from a throat wound which, it was not disputed, was inflicted by a razor held by the appellant. There was strong evidence of provocation, and the appellant, when arrested, told the police that he had cut the deceased's throat. At the trial he said that it was an accident and that the deceased fell against the razor. On appeal counsel for the appellant contended (a) that the judge was wrong in the following direction to the jury: "upon the facts of this case there are only two verdicts, one of which you must return; one is a verdict of murder, the other is a verdict of manslaughter, and in this case I direct you as a matter of law you cannot return a verdict of not guilty"; and (b) that the judge misconstrued the verdict of the jury in that he wrongly failed to accept the jury's verdict that the accused met her death accidentally. The second contention was based on the answers of the foreman of the jury when the judge, for the purpose of fixing the sentence to be passed, asked him whether the jury based their verdict upon a finding that the deceased accidentally fell upon the razor or upon a finding of provocation:—

B HELD: (i) since the facts were not in dispute, it was perfectly right for the judge to tell the jury that it was not open for them to return a verdict of not guilty.

D (ii) where a jury returns a consistent verdict which is plain and unambiguous, questions should not be asked by the judge as to the meaning of such verdict.

(iii) the reference by the judge in his summing up to the fact that the jury could recommend the appellant for mercy was a practice which should not be followed; juries should not be concerned with the consequence of their verdict.

E [EDITORIAL NOTE. The judgment herein deals with the practice to be followed in criminal trials and more particularly in trials where the accused is charged with manslaughter and murder. In this case the trial judge for the purpose of fixing the sentence wished to know whether the jury reduced the crime from murder to manslaughter because they took the view that there had been provocation or because they took the view that the injury had been inflicted by the deceased accidentally falling on the razor while it was held open in the accused's hand. As the court point out, this is a practice which ought not to be followed, since, while the jury is the best tribunal for deciding a question of fact, it is not a tribunal that in most cases can give a satisfactory reason for its verdict. The judgment concludes by dealing with the question of a recommendation to mercy. This, it states, should always be a spontaneous act on the part of the jury. It loses its force if it follows from an appeal to the jury from counsel or from an intimation by the judge that it is within their province to add a rider to this effect. In every case it is essential to the proper functioning of the jury system that they are not concerned in any way with the consequence of their verdict.

AS TO JUDGE'S SUMMING UP, see HALSBURY, Hailsham Edn., Vol. 9, pp. 170, 171, para. 247; and FOR CASES, see DIGEST, Vol. 14, pp. 302, 303, Nos. 3186-3194.

AS TO QUESTIONS AFTER VERDICT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 177, 178, paras. 255, 256.]

H APPEAL against conviction for manslaughter and sentence of 5 years' penal servitude passed by OLIVER, J., at Liverpool Assizes. The facts are set fully out in the judgment.

Rose Heilbron for the appellant.

T. R. Fitzwalter Butler for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: This is an appeal against a conviction for manslaughter. The appellant was indicted for the murder of the woman who passed as his wife, and with whom he had been living for some 10 years. It is not disputed that that woman died as the result of

her throat being cut with a razor, there being in her throat a deep wound which had severed the jugular vein on the left-hand side, a wound which stretched from underneath the ear to the middle line, and which caused her almost immediate death. It was admitted that, at the moment when that occurred, a razor was in the hand of the appellant, and it was his razor.

It is said here, as the first ground of appeal, that OLIVER, J., was wrong in directing the jury as follows :

I tell you that upon the facts of this case there are only two verdicts, one of which you must return : one is a verdict of murder, the other is a verdict of manslaughter, and in this case I direct you as a matter of law you cannot return a verdict of not guilty.

It is said that that was wrong. Whether it was right or wrong depends upon the facts of the case.

The facts may be shortly stated in this way. On Sept. 8, the appellant went to look for the woman whom I have referred to as his wife, the deceased woman. He wanted to see her for the perfectly proper purpose of getting from her some money, inasmuch as he was in the habit of giving her the whole of his wages, and, if his work necessitated his going out to dinner and paying for it himself, he would go to her and get a shilling or two for his dinner money. He found her at what has been described as a party, but which might be more accurately described as a drinking bout with two other women and a man. That man, called Nielsen, who was by common consent at the trial treated as a worthless fellow, was a man of whom the appellant was rightly jealous, for there can be no doubt that Nielsen and the deceased woman had been engaged in committing what would have been adultery if the woman had been a married woman. Finding those persons together, the accused was undoubtedly upset, and after having a drink he went away. Nobody asked him to stay, as he said, so he left. He went back to his own place, and there for a space of about half an hour—and I am quoting his own words—he brooded upon the matter. He came to the conclusion that the man Nielsen and the deceased woman were treating him very badly and making a fool of him, and he decided to take his razor out of its case and put it in his pocket when he went off, as he did, to seek either Nielsen or his wife or both. He, in fact, went to the place where he had left them, and there they were still in the basement of the house of a woman named Morgan, a person whose morals would not bear scrutiny. What happened there was in very great doubt. No reliable witness was called to say what happened. Nielsen professed to have seen what happened. He may or may not have done, but the jury were directed to pay very little attention to his evidence, having regard to his character and the inconsistencies in his evidence. The only other person who gave evidence as to the actual occurrences was the accused himself, who had made a statement to the police, and gave evidence in the witness box.

The case for the prosecution was that the accused slashed the woman across the throat with the razor ; that he chased Nielsen down the stairs, and was heard to say : " It is your turn next " ; he then went out into the street, and there he saw a fellow-lodger, a man named Laverty, and told him in terms that he had caught his wife, Bessie as he called her, red-handed with the Belgian and had cut her throat. The police came and he was arrested, and to the police he made a statement which was reduced into writing and signed by him. He said in that statement that he had taken the razor with him to scare the Belgian ; that he had gone on tip-toe down the stairs ; he heard somebody, probably Mrs. Morgan, invite those two persons, the deceased and Nielsen, to go upstairs and use a bedroom which was there and, to use his own expression, as they were going upstairs to the bedroom, he rushed in. He said that Nielsen fled downstairs again. Then according to his own words in his statement to the police :

I said to Bessie : " You are making a fool of me properly " ; I pulled the razor out of my pocket and cut her throat. I ran out of the house and along the street after Nielsen, but I did not catch him.

When it came to the trial, he gave evidence, and he told a different story. He said that, having taken the razor for the purpose of frightening Nielsen, in the belief that, if he terrified Nielsen by the show of the razor, he would drive him away permanently, he heard Mrs. Morgan say : " Why don't you go up to Biddy's bed for an hour or so." He said he waited in the lobby, and when he saw Bessie, the deceased woman, turn to go up to the bedroom, he dashed in,

snatching the razor from his pocket as soon as he saw Nielsen, who, when he saw what he was doing, promptly bolted downstairs. He said that his intention, and his only intention, was to terrify that man Nielsen by the show of that razor. Then he added that the deceased woman, being groggy with drink, swayed against him when the razor was in his hand, he using it in that way to frighten Nielsen, and so it was that her throat was cut by accident. He also denied that he had made the statements attributed to him by the police and by the witness, Laverty, saying: "I did not tell them I had cut her throat; I said her throat got cut."

A That, of course, was a matter for the jury. It was upon that state of affairs, that OLIVER, J., told the jury, in terms, that, if they accepted the prisoner's story to the full, they must still find him guilty of manslaughter.

The ground of appeal alleges that OLIVER, J., misdirected the jury as to the law in so directing them, but in argument to-day counsel for the appellant has admitted, or perhaps I should say has agreed, that as a matter of law OLIVER, J., was right in saying this, and I now refer to the language actually used by OLIVER, J., in the course of his summing up:

B A man who rushes into a house flourishing a naked razor and wounds someone, even accidentally, is still guilty of manslaughter if that person dies . . . I have told you the law is for me, and I will tell you on my responsibility that in threatening a man with a naked razor because you wanted to scare him, however good reason you may have for disliking him, you are doing an unlawful act.

C \ Perhaps it is as well that once more the proposition of law should be stated which has been stated for generations by judges and, so far as we are aware, never disputed or doubted. (If a person is engaged in doing a lawful act, and in the course of doing that lawful act behaves so negligently as to cause the death of some other person, then it is for the jury to say, upon a consideration of the whole of the facts of the case, whether the negligence proved against the accused

D person amounts to manslaughter, and it is the duty of the presiding judge to tell them that it will not amount to manslaughter unless the negligence is of a very high degree; the expression most commonly used is unless it shows the accused to have been reckless as to the consequences of the act. That is where the act is lawful. Where the act which a person is engaged in performing is unlawful, then, if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter. | If, in doing that dangerous and unlawful act, he is doing an act which amounts to a felony he is guilty of murder, and he is equally guilty of murder if he does the act with the intention of causing grievous bodily harm to the person whom, in fact, he kills. That series of propositions of law is to be found in many old cases, and they are summed up quite accurately in ARCHBOLD'S CRIMINAL PLEADING,

E 30th Edn., at pp. 900-903, where the authorities are given. It is not now contested that OLIVER, J., in the passage last quoted, correctly stated the law. It is quite true, and counsel for the appellant is quite right in drawing our attention to the fact, that OLIVER, J., did give as an illustration of what would amount to manslaughter something which was certainly an unhappy illustration to choose, because he did use these words:

F The question is this: Were you doing something unlawful with your motor car; were you driving it to the public danger? If you were, and you kill someone, you are guilty of manslaughter.

G That cannot be defended as a correct definition of manslaughter by negligence, because in driving a motor car a person is doing a lawful act. But, while we might have had to consider the accuracy or otherwise of that definition if the jury had in this case returned a verdict of murder, in point of fact the jury found manslaughter, and the only question, therefore, which arises here is not whether the reasons given by OLIVER, J., for his ruling were correct, but whether he was right in law in giving the direction to which I have referred, which, in our opinion, was a perfectly correct direction.

H Counsel for the appellant argued in this way. Although the direction was, as an abstract statement of the law correct, OLIVER, J., ought to have left it to the jury to say whether the act was lawful in this case or not. That, we think, is not so. Where facts are proved and accepted, then whether those facts amount to a crime or not must be a question of law, not of fact. Where the facts are

in dispute, it is always for the jury to determine what are the true facts. They must have a direction as to what their verdict must be if they accept the facts one way, or if they accept the facts the other way. But where the facts are proved in such a way that there can be no question about them, then it is perfectly right for the judge to tell the jury: Those facts amount to a lawful or an unlawful act. In this case, in our opinion, it was perfectly right for OLIVER, J., not to leave to the jury any question of acquittal, but to tell the jury, as he did, on the facts of the case, accepting the evidence of the accused man to the highest extent, that it was not open to them to return a verdict of not guilty. Therefore; that point fails. A

The other ground of appeal is:

That the judge misconstrued the verdict of the jury in that he wrongly failed to accept the jury's statement that they had found that deceased had met her death accidentally.

It is very difficult to understand what is being aimed at in that ground of appeal. The verdict of the jury was perfectly plain, unequivocal and unambiguous, and was accepted by everybody and recorded. That is shown from the following questions put by the clerk of the court to the foreman of the jury and the latter's answers: B

Members of the jury, are you agreed upon your verdict?—We are all agreed.

Do you find Henry Larkin guilty or not guilty?—We find him guilty of manslaughter. C

You find Henry Larkin is not guilty of murder but he is guilty of manslaughter, and that is the verdict of you all?—That is the verdict of us all.

The verdict was then recorded. There was an end of the function of the jury, and it was then that OLIVER, J., as he said a little later, for his own purposes, no doubt to assist him upon the question of sentence, asked the jury in effect what was the ground upon which they had reduced the crime from murder to manslaughter. It might have been on one of two grounds. This was a case D in which it was alleged there was great provocation, and there was evidence of provocation, and no one could be surprised if the jury found a verdict of manslaughter upon the ground of provocation, which may, and often does, reduce the crime of murder to manslaughter, but which, incidentally, can never be a ground for acquittal. The other was that the jury had accepted the evidence of the accused, and in that event OLIVER, J., had told them in terms that, if they accepted that, it would be right that they should find a verdict of manslaughter, because there was no deliberate voluntary act on the part of the accused intending to do injury to anybody. E

Then OLIVER, J., said this to the foreman of the jury:

May I ask you this question: Did you come to the conclusion that this woman accidentally fell upon the razor? F

In the opinion of this court, that was a most undesirable question to put. To begin with, it is put to the foreman, and there is no indication from OLIVER, J., that he wished the jury as a body to answer the question, but in fact it was answered by the foreman, apparently without consultation with his colleagues at all, and the answer was:

We did, Sir.

Then OLIVER, J., said:

It was an accident? That was the reason?—Yes, it was an accident. We have come to the conclusion that we can find no evidence to prove that it was murder. G

Then OLIVER, J., begins to explain:

It is not a question of murder. I said if it was done deliberately it was not murder if, in your view, there was provocation, and, whether you thought it was provocation or whether you thought it was an accident, the verdict would be manslaughter just the same. I do not know whether you did come to any conclusion about it or not, whether it was an accident or whether it was provocation. In either case your verdict is valid. I want to know for my own purposes whether you did come to the conclusion that it was an accident or was provocation. H

Then the foreman said "Provocation." It was perfectly plain that nobody was suggesting that the verdict of the jury should be altered, or that they were being asked to return any other verdict than the one they had returned; but no

better illustration could be found of the undesirability of a judge, having accepted in a criminal case a verdict of a jury, then inviting the jury to explain what they mean by their verdict. As we in this country think, trial by jury is the best method yet devised for dealing with serious criminal cases, and the jury is the best possible tribunal to decide whether a man is guilty or not guilty and, if he is guilty, of what he is guilty, subject to the direction in law of the judge; but no one has ever suggested that a jury is composed of persons who are likely to be

- A able to give at a moment's notice a logical explanation of how and why they arrived at their verdict. That was what OLIVER, J., was inviting the jury to do in this case, and, as has been already observed, inviting the foreman to do so, and accepting from the foreman something with which, perhaps, the other eleven did not agree. The unhappy result was that the foreman, no doubt thoroughly confused, gave two totally inconsistent answers. That incident cannot, in our opinion, be of any importance whatever from the point of view of this appeal against conviction. It was something which happened after the trial was over, so far as the jury were concerned, and if it has any effect at all, it must be an effect upon the sentence. But it must be understood that this court deprecates questions being put to a jury upon the meaning of the verdict which they have returned. If the verdict appears to be inconsistent, proper questions may be put by a judge to invite the jury to explain what they mean, but where a verdict has been returned which is perfectly plain and unambiguous,
- C it is most undesirable that the jury should be asked any further questions about it at all.

There is, therefore, no ground for interfering with the conviction in this case; it must stand.

There is one other matter to which I am asked by the other members of the court, and I desire myself, to refer. OLIVER, J., in directing the jury on the difference between murder and manslaughter, said this:

- D If the evidence in this case drives you to the conclusion that in law this was a murder — murder within the definition I have given you: a deliberate killing without sufficient excuse to reduce it to manslaughter—it is, as you know, within your province, if you so choose, to give a recommendation to mercy.

Towards the end of the summing up, OLIVER, J., added this:

- E If you think this was a voluntary act and not an accident was there enough provocation to reduce the thing to manslaughter, and, if you think there was not, as I have already told you, you will have to return a verdict of murder, but you can say in the circumstances: "We recommend him to mercy."

- This is not a matter which, of course, can affect either an appeal against conviction or an appeal against sentence, but the members of this court have given consideration to this matter, and I am asked to say, on behalf of all the members of the court, that we strongly deprecate any reference by any judge trying a capital case to the privilege of the jury to make a recommendation of any sort. A jury frequently asks the judge whether they may add a rider to their verdict, and upon the judge ascertaining that the rider is a proper one, leave is given. Where such a rider takes the form of a recommendation to mercy in a capital case, it may be of great assistance to the authorities, not the jury and not the judge, but the authorities elsewhere who have the duty of advising His Majesty whether the sentence should be carried out or not. But if that recommendation to mercy comes not as the spontaneous act of the jury, who have heard all the facts, but because they are asked by the presiding judge "Would you like to recommend this man to mercy?" it loses the whole of its force, and probably has no effect at all upon the mind of any person who is considering the case.
- G It ceases to be the act of the jury, since it would indeed be a strange jury which, being asked in a murder case if they would like to add to a verdict of guilty a recommendation to mercy, refused to add those words which, after all, only express the desire of every human being that mercy should be shown.

There is another objection, and a great objection, to this practice, if it be a practice. The reason is this. It has always been impressed upon juries by judges, in trying a capital case particularly, that they are not concerned with the consequences of their verdict. That has nothing to do with the matter so far as they are concerned, and judges have frequently reprimanded counsel

when counsel have referred to any such matter as a recommendation to mercy, as counsel sometimes do. But, if judges are to make a practice of referring to the consequences of the verdict of guilty in a capital case, it is difficult to see why counsel for the defence should not have the same right, and if counsel for the defence, then counsel for the prosecution, and so a trial for murder might resolve itself into a very undignified and undesirable squabble as to whether, in the opinion of the jury, the capital sentence ought or ought not to be carried out. Those are some reasons why, in our opinion, the practice is a bad one, and this court hopes that it will not be followed in future.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *The Director of Public Prosecutions* (for the Crown).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

EVANS v. CLINICAL PRODUCTS, LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Tucker, JJ.), **November 11, December 2, 1942.**]

Sale of Goods—False trade description—Sample purchased by officer of local authority—Procedure prescribed by Food and Drugs Act, 1938, not applied—Merchandise Marks Act, 1887 (c. 25), s. 2 (1) (d)—Food and Drugs Act, 1938 (c. 56), s. 70 (1).

The appellant, an official of the local authority, purchased from a retail distributor a sample of the article of food called "Lem Lem," a substitute for lemons, with a view to having it analysed. He laid an information against the respondent company, the manufacturers, charging them with an offence under the Merchandise Marks Act, 1887. The appellant failed to divide the sample into three parts as required by the Food and Drugs Act, 1938, s. 70 (1). The respondent contended that this section was of general application and applied equally to a prosecution for giving a false trade description under the Merchandise Marks Act, 1887, s. 2 (1) as to proceedings under the Food and Drugs Act, 1938:—

HELD: the procedure directed by the Food and Drugs Act, 1938, s. 70 (1), on the purchase of a sample of food with the view to its being analysed has no relation to prosecutions under the Merchandise Marks Act, 1887.

[EDITORIAL NOTE.] The sampling procedure is commonly associated with the Food and Drugs Act, 1938, but, as the judgment herein points out, there are other Acts providing for a similar procedure. This fact and the fact that in the 1938 Act the procedure is introduced as part of the administrative provisions of that Act are made the main basis of the decision that that procedure has no general application and, therefore, no application to the Merchandise Marks Act, 1887. It is also pointed out that there might be a preliminary objection that the respondents were not the seller within the terms of the 1938 Act providing for sampling. The seller is the retailer and here the proceedings are against the wholesaler. It may well be that an objection that no sample was taken can only be urged by the retailer, that is, the seller of the food.

AS TO MISDESCRIPTION ON LABEL, see HALSBURY, Hailsham Edn., Vol. 15, p. 161, para. 263; and FOR CASES, see DIGEST, Vol. 43, pp. 241, 242, Nos. 852-860.]

CASE STATED from a decision of the justices of Welshpool. The facts are fully set out in the judgment.

Bertram Reece for the appellant.

Eric Neve, K.C., and *A. S. Diamond* for the respondent.

HUMPHREYS, J. [delivering the judgment of the court]: This case stated by justices of the borough of Welshpool raises a question which, in the event of

the decision of the justices being upheld, may become of considerable importance.

A The respondent is a limited company and is the manufacturer at Richmond, Surrey, of an article of food described as "Lem Lem, the national substitute for lemons." The respondent appeared by counsel at a court of summary jurisdiction sitting at Welshpool to answer an information charging him with having on Oct. 1, 1941, at the borough of Welshpool, unlawfully applied to goods, to wit a packet of "Lem Lem," a false trade description contrary to the Merchandise Marks Act, 1887, s. 2 (1) (d). The alleged false trade description consisted of printed matter appearing on the packet in question. Facts were proved which constituted a *prima facie* case against the respondent.

B Counsel for the respondent, without going into the merits of the case, then contended that the prosecution must fail on the ground that the appellant, an officer of the Montgomery County Council, who had admittedly purchased the packet in question at Hunter's Stores, Welshpool, as a sample of food with the intention of submitting it to be analysed by a public analyst, had failed to comply with the requirements of the Food and Drugs Act, 1938, s. 70 (1) (a). That section runs as follows :

C A person purchasing a sample of any food or drug with the intention of submitting it to be analysed by a public analyst, or taking a sample of food on any premises with the intention of submitting it to be so analysed, shall, after the purchase has been completed or the sample has been taken, forthwith inform the seller or his agent who sold the sample, or, as the case may be, the occupier of the premises or the person for the time being in charge thereof, of his intention to have the sample analysed by the public analyst, and shall then and there divide it into three parts, each part to be marked, and sealed or fastened up, in such manner as its nature will permit, and shall (a) if required so to do, deliver one part to the seller or his agent, or, as the case may be, to the occupier of the premises or the person for the time being in charge thereof.

D The rest of the subsection is immaterial for this case. It was admitted that the appellant had not complied with the requirements of that section, in that he failed to divide the contents of the packet into three parts ; nor did he deliver any part of the contents to the seller or his agent. The justices upheld the objection and dismissed the information, but stated this case.

E Before I deal with the case as argued before us, I draw attention to a point of a preliminary character which was not referred to in the arguments addressed to us. If it is assumed that compliance with the requirements of sect. 70 is a condition precedent to proceedings under the Merchandise Marks Act, 1887, against the seller of any article of food, it might be argued that, since the respondent in this case was not the seller nor the agent of the seller, proof of the purchase of the sample at Hunter's Stores, Welshpool, was not an essential part of the case against him, except, perhaps, for the purpose of giving jurisdiction to the court of summary jurisdiction at Welshpool. In that case it might be necessary to consider whether non-compliance with sect. 70 affords a defence to anyone other than the seller of the sample. However that may be, the case was argued in this court on the footing that the respondent company was the seller of the sample in question. It was contended by counsel for the respondent that the requirements of sect. 70 are of universal application, so that failure to comply with them on the purchase, by any person, of a sample of food or a drug with the intention of submitting it to be analysed by a public analyst, is a complete bar to any prosecution of the seller based upon that sample for any offence against any Act of Parliament.

H The established rule of construction, however, requires that words in a section of an Act of Parliament are to be construed in their context, and the Food and Drugs Act, 1938, s. 70, is only one of a group of sections to be found in Pt. VI of the Act, ss. 64-76, headed "General and Miscellaneous" under the sub-heading "Administration," and dealing with the enforcement of the provisions of that Act—a strange place in which to find so general and far-reaching a change in the law. The argument for the respondent was based to a great extent upon the hardship likely to be caused to an accused person by his being prosecuted in respect of an article sold by him which he has had no opportunity of having analysed by his own analyst. An examination, however, of sects. 69 and 70 show how very limited is the protection in that respect afforded by the latter section to persons selling food and drugs even in prosecutions under the Food

and Drugs Act. It is only in cases where the purchaser buys with the intention of submitting the sample to a public analyst that he is required so to inform the vendor and to divide the sample. There appears to be nothing in the section to prevent any person, other than a sampling officer, who has purchased an article of food or a drug, from analysing the sample himself or sending it to a private analyst and subsequently instituting a prosecution against the seller under sect. 3 of the Act for selling to the prejudice of the purchaser an article not of the nature, substance or quality demanded or, if the facts so warrant, under sect. 6 for the offence of giving an article of food sold by him a label calculated to mislead; and in such a case there is no need for the purchaser to comply with the directions in sect. 70. In such a case, however, oral proof must be given of all the facts relied upon including the composition of the article in question, since the certificate of an analyst, if one is employed, is not admissible in evidence.

In my opinion, the safeguards provided by sect. 70 are mainly designed to meet the case where the prosecution is enabled under sect. 81 of the Act—"in any proceedings under this Act" are the words—to prove the composition of the impugned article by mere production of the certificate of a public analyst, and the conclusion at which I have arrived is that non-compliance with the terms of sect. 70 does not operate as a bar to any prosecution, except one for an offence against the Food and Drugs Act. There is nothing in the Merchandise Marks Act, 1887, referring in any way to the procedure laid down in the then existing Sale of Food and Drugs Act, 1875, s. 14, which contained directions almost identical with those now to be found in sect. 70 of the 1938 Act, as to dividing into three parts a sample of food purchased for the purpose of analysis. On the other hand, the Margarine Act, 1887, passed in the same year as the Merchandise Marks Act, provided, in sect. 12, that all proceedings under that Act were to be the same as those prescribed by the Sale of Food and Drugs Act, 1875, ss. 12-24, so incorporating the provisions of sect. 14. Again, it will be noted that the Merchandise Marks Act, 1926, s. 9, which confers upon an officer of a local authority compulsory powers of purchase of samples of imported foodstuffs, contains directions as to dividing the sample and leaving one part with the vendor, somewhat similar to but differing essentially from those contained in sect. 14 of the 1875 Act. Similar provisions are to be found in the Public Health (Preservatives, etc., in Food) Regulations, 1925, as amended in 1926 and 1927, which remain in force by virtue of the Food and Drugs Act, 1938, s. 101. Examples are to be found in reg. 6 (3), where the provisions of the Sale of Food and Drugs Act, 1875, s. 14, are expressly incorporated, and in reg. 9 (2), where the procedure, to be followed by an officer taking a sample for the purpose of analysis, is laid down.

It cannot be said, therefore, that the legislature has omitted to provide in plain terms safeguards for the seller of articles of food who may be charged with breaches of the law where it has been thought desirable to do so. The Food and Drugs Act, 1938, is largely a consolidating Act reproducing, as it does, most of the provisions of the 1875 Act and amending Acts. It forms a code in itself and, in my opinion, sect. 70 is a part of the procedure code of that statute and has no relation to prosecutions under the Merchandise Marks Act, 1887.

For these reasons I think that this appeal should be allowed and the case remitted to the justices to be dealt with upon its merits.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *G. R. W. Harrison*, Welshpool (for the appellant); *Sedge, Fiske & Co.* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re A. SINGER & CO. (HAT MANUFACTURERS), LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.),
January 25, 1943.]

Companies—Winding-up—Alleged fraudulent preference—Application of creditor to join sureties as third parties—Third party procedure not available in winding up—Companies Act, 1929 (c. 23), ss. 164, 265, 305.

A *Practice and Procedure*—Third-party procedure—Not applicable in winding-up of company.

The liquidator attacked a payment to the appellant bank upon the ground that it was a fraudulent preference of the bank, or in the alternative of two alleged guarantors or sureties for the debt. It was not suggested that the bank had acted otherwise than quite properly. The bank applied for leave to issue third-party notices upon the sureties for the debt so that all parties concerned might be bound by any judgment that was given. It was contended that third-party procedure was available in winding-up proceedings:—

B HELD: (i) the jurisdiction of the Companies Court is limited to the jurisdiction of the High Court in winding-up matters and since, the issue between the bank and the sureties had nothing to do with the winding up, the application should be refused.

C (ii) third-party procedure is not applicable in winding-up matters.

[EDITORIAL NOTE. Since the decision in *Re Land Securities Co.* (3), it has generally been accepted that third-party procedure is not available in winding-up proceedings. The matter was, however, never tested in the Court of Appeal, but in the present appeal that court has confirmed the general view and it is definitely held that third-party procedure is not available in the Companies Court.

D AS TO WINDING-UP PROCEDURE, see HALSBURY, Hailsham Edn., Vol. 5, pp. 648, 649, para. 1072; and FOR CASES, see DIGEST, Vol. 10, pp. 907-909, Nos. 6193-6212.]

Cases referred to:

(1) *Re Stanley (G.) & Co., Ltd.*, [1925] Ch. 148; Digest Supp.; 94 L.J.Ch. 187; 133 L.T. 37.

(2) *Re Lyons, Ex parte Barclays Bank, Ltd. v. The Trustee* (1934), 152 L.T. 201; Digest Supp.

(3) *Re Land Securities Co.* (1895), 2 Mans. 127; 10 Digest 907, 6193.

E (4) *Re Conley, Ex parte Trustee v. Barclay's Bank, Ltd., Re Conley, Ex parte Trustee v. Lloyds Bank, Ltd.*, [1938] 2 All E.R. 127; Digest Supp.; 107 L.J.Ch. 257; 158 L.T. 323.

APPEAL by the applicants Lloyds Bank, Ltd., from an order of SIMONDS, J., dated Dec. 7, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

F A. J. Belsham for the appellants.

B. Mark Goodman for the respondent, the liquidator.

Belsham: It is court is not bound by the decision in *Re Land Securities Co.* (3). If this were a voluntary winding up, there would be nothing to prevent the issue of a third-party notice because the liquidator would have had to take out an originating summons. The respondent to the summons in the present case has been properly brought before the court. The court, however, is directed by the

G Supreme Court of Judicature (Consolidation) Act, 1925, s. 39, to do justice not only as between the applicant and the respondent, but also as between the respondent and third parties. That is a direction of a general nature and it applies to the Companies Court. Whether the winding up is voluntary or compulsory, the liquidator commences an action and the action falls within the words of R.S.C., Ord. 16A. Before 1938 it was the practice to join both the creditor and the surety but the practice seems to have ceased since the decision in *Re Conley* (4). The liquidator is an officer of the court and the court has jurisdiction over him. He could be directed to recommence these proceedings by writ of summons, in which case the appellants would undoubtedly be entitled to the benefit of the third-party procedure. [Counsel referred to *Re Stanley (G.) & Co., Ltd.* (1) and *Re Lyons, Ex parte Barclays Bank, Ltd. v. The Trustee* (2).]

H Goodman: It is not the function of either the Companies Court or the liquidator to settle questions which do not arise out of the liquidation. Any proceedings brought against third parties must be entirely separate proceedings. There is no suggestion that the bank was a party to the fraudulent preference and the

liquidator sympathises with their position. It is, however, the duty of the liquidator to get in the assets as cheaply as possible. The Companies Court is not concerned with a dispute between the bank and its customers. The sole jurisdiction of the High Court in the winding up of companies is that conferred by the Companies Act, 1929. Apart from that Act, the High Court has no jurisdiction in winding up and, therefore, R.S.C., Ord. 16A does not apply to the procedure in winding up.

LORD GREENE, M.R. : By the joint operation of the Companies Act, 1929, s. 265, and the Bankruptcy Act, 1914, s. 44, transactions made with a view to giving a creditor or any surety or guarantor for the debt due to such creditor a preference over other creditors are, in the circumstances stated, to be deemed to be fraudulent preferences and they are invalid accordingly.

In the present case the liquidator is attacking a payment made to the appellant bank upon the ground that it was a fraudulent preference of the bank itself, which had granted an overdraft to the company, or, in the alternative, of two alleged guarantors or sureties for the debt. There is no suggestion in this case of any conscious action by the bank in the matter of a fraudulent preference, but the liquidator, in exercise of his duty to get in the company's assets, has made as respondent to the summons the bank alone, for the obvious reason that the bank is unquestionably solvent and, if the liquidator's allegation is established, the money will be recovered from the bank. The bank, perhaps not unnaturally, dislikes being singled out in that way and wishes to bring before the court the two sureties, whose release was purported to be effected by the payment to the bank, which is being attacked. The bank endeavours to bring them before the court, so that all persons affected may be present and bound by any judgment that is given, in any one of three suggested ways.

I will deal with the second and third ways first, in order to get them out of the way, but the really interesting point arises on the first alternative, which the bank prefers. The third suggestion is that the liquidator should be ordered to discontinue his summary proceedings by summons in the winding up and institute proceedings by writ against the bank. If that were done, the bank would have an opportunity of bringing in by third-party notice the guarantors who are alleged to have been personally preferred. SIMONDS, J., declined to exercise his discretion in that matter; and, in my opinion, he was manifestly right. It is no part of the duty of the court to direct competent and perfectly adequate and sufficient proceedings in a winding up to be discontinued in order that different proceedings may be brought which will enable what is, no doubt, a very interesting question to be litigated and satisfy the bank who wishes to have it decided. No possible attack can be made on the judge's decision in that respect.

The second alternative is that the liquidator be ordered to add the two sureties as parties to this summons. The question whether or not a liquidator can obtain direct relief against a surety in such a case as this is one in regard to which the authorities are not conclusive and, indeed, they differ from one another. I do not propose to go into the matter more than to say that EVE, J., in *Re G. Stanley & Co., Ltd.* (1) took the view that the persons actually preferred, namely, the sureties, could be made liable to repay, whereas CLAUSON, J., as he then was, in *Re Lyons* (2), took the opposite view. Both those cases were bankruptcy cases and I see no reason to think that the observations contained in them would not apply to a winding-up case. However that may be, the question whether a surety can be made directly liable in the case of fraudulent preference is one which admittedly is an open question. If this court acceded to the suggestion that we should direct the liquidator to add the sureties as parties, we should in effect be directing the liquidator to bring before the court persons in whom he is not interested, because he has a perfectly solvent respondent to deal with. He does not need to have them there for the purpose of discharging his duty of getting in the assets and, if we ordered them to be added as respondents, we should merely be doing so in order to enable a quite irrelevant question of law—irrelevant, at any rate, for practical purposes—to be decided for the comfort of the bank.

I can well understand and sympathise with the desire of the bank to have the matter decided, but it is no part of the function of this court in exercising

its discretion to grant concessions to a desire of that kind, however reasonable it may be. The practical question is raised by the liquidator and there is no need to go beyond the question so raised by raising these further speculative, if interesting, matters.

A That brings me to the first of the alternative grounds. The relief that is asked for is that the bank should be given leave to serve third-party notices on these two sureties. SIMONDS, J., held that third-party procedure was not applicable to such a case and he voiced what, so far as my experience goes, has for many years been the experience of all of us who have been interested in company matters: that no attempt has been made to introduce third-party procedure into the summary jurisdiction of the court in company matters since the unsuccessful attempt was made in *Re Land Securities Co.* (3). In that case, which was a misfeasance case, an attempt was made by the directors who were being attacked to bring in shareholders as third parties. VAUGHAN WILLIAMS, J., B held that there was no jurisdiction to make such an order and also that, even if there were jurisdiction, it would be discretionary and such discretion could not be exercised in the case before him; but it is a perfectly clear authority that there is no jurisdiction.

C That authority is attacked before us and it is said, quite rightly, that we are entitled to review it. When the basis of the jurisdiction in companies winding up is examined, it appears to me to be quite plain that the third-party procedure is not applicable. The jurisdiction of the High Court to wind up companies in England is, by the Companies Act, 1929, s. 164, to be exercised by a judge or judges of the Chancery Division assigned for the purpose by the Lord Chancellor. The jurisdiction, therefore, that is conferred by the order of the Lord Chancellor nominating the company judges is confined to the jurisdiction of the High Court to wind up companies.

D The winding-up rules are made under sect. 305 of the Act and the power to make them is the power to:

... make general rules for carrying into effect the objects of this Act so far as relates to the winding up of companies in England.

R. 1 of the Winding-up Rules describes the scope of the rules as follows:

E ... these rules shall apply to the proceedings in every winding up under the Act of a company, which shall commence on and after the date on which these rules come into operation.

The precise procedure to be followed is found in rr. 5 and 6 and the following rules. Summarising them, so far as is necessary for present purposes, an application of the kind with which we are here dealing, the liquidator's application, is an application which may be heard in chambers, and under r. 7 the registrar, under the general or special directions of the judge, is to hear it. Under r. 8 (2), every application in chambers is to be made by summons.

F Accordingly, we have here an application under the summary jurisdiction made pursuant to those rules. The application of the liquidator is made to the High Court exercising the winding-up jurisdiction and comes before the judges nominated by the Lord Chancellor to exercise that jurisdiction.

G It seems to me, therefore, to be clear that the only jurisdiction which can be exercised in winding up under the Companies Act and the winding-up rules is jurisdiction relating to the winding up of companies. What is the jurisdiction which the company judge would be exercising if leave to serve a third-party notice could be granted? In deciding the issues raised by such a notice he would not be deciding anything relevant to the winding up. The only matter in the winding up is the controversy between the liquidator and the bank. The question whether as the result of the decision of that controversy the bank has a right over against the sureties (the third parties) is a matter which has nothing to do with the winding up. H What would be the position of the judge sitting and dealing with the issue and adjudicating upon it? Would he be exercising the winding-up jurisdiction conferred upon him as the judge nominated for the purpose by the Lord Chancellor? It seems to me to be quite clear that he would not. He would be exercising a jurisdiction having nothing to do with winding up and would, therefore, not be doing the only thing that he is there to do; in other words, if this argument were correct, it would have the effect of bringing a third person before a winding-up court and forcing him to submit to the jurisdiction of the winding-up court, whose jurisdiction is *ex hypothesi* limited

to winding-up matters. It seems to me, therefore, that when this matter is examined, having regard to its fundamental basis, it is quite impossible to find any jurisdiction in the court to apply the third-party procedure and take into its consideration disputes which have nothing to do with the winding-up.

Reference was then made to r. 224 of the winding-up rules, which provides that :

... where no other provision is made by the Act or rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court.

It was said that, so long as the rules are silent on third-party matters, by that rule the provisions of the Rules of the Supreme Court with regard to third-party procedure are imported. R. 224 cannot possibly be read as importing procedure from the Rules of the Supreme Court which would have the effect of conferring or purporting to confer on the companies court a jurisdiction which by statute it does not and cannot possess. Therefore, no assistance is to be gained from that argument.

It seems to me that when the language of VAUGHAN WILLIAMS, J., in *Re Land Securities Co.* (4) is looked at, it was precisely this aspect of the matter which he had in mind, because he says, at p. 128, 129 :

The liquidator may avail himself of any rights which the directors may have against the shareholders, but he can only do so in a court in which the directors could themselves recover, and the directors cannot recover in winding up.

That is to say, the directors could not recover against the persons whom it was there sought to bring in as third-parties in the winding up. The reason, I venture to think, is the reason which I have given : that the winding-up court has no jurisdiction to settle disputes between persons who are for the purpose of those disputes altogether outside the winding up.

That, in my opinion, is sufficient to dispose of this appeal.

I have not taken up time in considering whether proceedings of this kind are an action within R.S.C., Ord. 16A, which deals with third-party procedure. I find it unnecessary to say anything one way or the other with regard to that, because the reasons which I have given satisfy me that this appeal should be dismissed.

MACKINNON, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Appeal dismissed.

Solicitors : *Stofford Clark & Co.* (for the appellants) ; *Peachey & Co.* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

PERFORMING RIGHT SOCIETY, LTD. v. GILLETTE INDUSTRIES, LTD.

[CHANCERY DIVISION (Bennett, J.), January 26, 1943.]

Copyright—Performance in public—Diffusion of broadcast programme in factory—Copyright Act, 1911 (c. 46), ss. 1 (2), 2 (1).

The plaintiffs were the owners of the performing rights of 5 pieces of music, which were broadcast by the B.B.C. in their programme of "Music while you work," such broadcast being for the purpose of diffusion in factories. The defendants had a wireless installed in their factory with 33 loud speakers, and the broadcasts were heard in 19 different departments of the factory. The plaintiffs contended that such performances of the said pieces of music were an infringement of their copyright therein :—

HELD : such performances constituted performances in public and were, therefore, an infringement of the plaintiffs' rights.

[**EDITORIAL NOTE.** The point here in question has been litigated on two or three previous occasions, and it is clear that on the authorities it would be impossible to hold that there was not a performance in public. The authorities do not require that there should be a general admission of the public to the performance. All that can be

said is that there is a performance in public when the performance is not a domestic one, and the word "domestic" seems to be confined to its narrowest terms.

AS TO PERFORMANCE IN PUBLIC, see HALSBURY, Hailsham Edn., Vol. 7, p. 572, para. 888; and FOR CASES, see DIGEST, Vol. 13, pp. 214, 215, Nos. 501-510.]

Cases referred to:

- (1) *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, [1934] Ch. 121; Digest Supp.; 103 L.J.Ch. 210; 150 L.T. 119.
- (2) *Duck v. Bates* (1884), 13 Q.B.D. 843; 13 Digest 214, 507; 53 L.J.Q.B. 338; 50 L.T. 778.
- (3) *Harms Incorporated and Chappell & Co. v. Martans Club*, [1927] 1 Ch. 526; Digest Supp.; *sub nom. Harms Incorporated v. Embassy Club, Ltd.*, 96 L.J.Ch. 84; 136 L.T. 362.
- (4) *Jennings v. Stephens*, [1936] Ch. 469; [1936] 1 All E.R. 409; Digest Supp.; 105 L.J.Ch. 353; 154 L.T. 479.

A ACTION asking for a declaration that the diffusion of broadcasts of certain pieces of music was an infringement of the plaintiffs' copyright. All the facts are set out in the judgment.

C. Harman, K.C., K. E. Shelley, K.C., and F. E. Skone James for the plaintiffs.
R. F. Roxburgh, K.C., and G. S. W. Martin for the defendants.

C BENNETT, J.: This action raises a question of some importance, particularly to the plaintiffs, who are the owners of a large number of performing rights. They are a company limited by guarantee, and they own the performing rights in the five musical compositions referred to in para. 1 of the statement of claim: "Calling all workers," "That's a promise to you," "Sing, everybody, sing," "Keep the ball rolling" and "Hold your hats on."

D The defendants make razor blades, and I understand that at the present time they also make munitions of war. They have a large factory which covers a ground space of about 2½ acres. The factory is on the Great West Road near Isleworth. In the factory there are a number of workshops on the ground floor, and these workshops are surrounded on three sides by a 3-floored building; that is to say, a building with a ground floor and two upper floors. This part of the building is divided up into rooms—offices. In the months of June and July, 1942, they employed about 1,100 hands.

E For some time past there have been inquiries made by persons interested in industry into the causes of fatigue and boredom which are involved in a great many modern industrial operations, and people have taken the view that the monotony which results from many industrial operations is relieved if those in industry listen for limited periods of time to a musical entertainment. The result has been that the British Broadcasting Corpn. every day includes as an item in its daily programme three half-hourly performances of music—programmes which they entitle "Music while you work"—with the intention that in factories there shall be installed wireless receiving sets, and that the programmes which the B.B.C. broadcast should be diffused throughout the factories for the benefit of those who are working in them, who may thus be induced to make better efforts while they are working.

G The defendants, who pride themselves upon the conditions under which their employees work, installed on their premises a wireless receiving set, and they connected up that receiving set with 33 loud speakers. These loud speakers are distributed over the ground floor, over the first floor and over the second floor. A plan prepared by the defendants and put in by the plaintiffs shows that by these means the daily programmes of "Music while you work" broadcast by the B.B.C. are made audible in 19 different parts of the defendants' factory, excluding one room in which there are three loud speakers, that room being excluded because the workers in it dislike to be disturbed, as they think, by **H** having to listen to these programmes. The defendants tune in their wireless set to these programmes and diffuse them by the means I have stated throughout their factory. It is admitted on the pleadings that this diffusion is made by the defendants for the purposes of their business and with a view to lessening the industrial fatigue of their employees and of increasing the amenity of their employment.

Throughout the year 1942, the position between the plaintiffs and the British Broadcasting Corpn. was regulated by an agreement which has now expired and which is now the subject of negotiation between the plaintiffs and the B.B.C.,

by which the B.B.C. were authorised to perform or broadcast or allow to be performed or broadcast all or any musical works as at any time during the continuance of the licence were or might be included in what is called the repertoire of the plaintiffs, that is to say, as I understand it, musical works the performing rights in which were owned by the plaintiffs. The licence authorised and covered the audition or reception of the plaintiffs' repertoire by means of broadcasting for domestic and private use only.

Thus the plaintiffs had authorised the B.B.C. to broadcast the works mentioned in the statement of claim upon the conditions set out in the licence to which I have referred. But as soon as the programme "Music while you work" became a daily feature in the programmes of the B.B.C., the plaintiffs took the view that the diffusion of these programmes by factory owners throughout their factories was a violation by the factory owners of the plaintiffs' rights as owners of the performing rights. In 1940 they were willing, in consideration of the payment of a fee of £1 ls. per annum to authorise factory owners who wanted to diffuse these programmes amongst their workers to do so. But apparently the programmes grew in popularity, with the result that the plaintiffs felt that the fee of £1 ls. per annum was inadequate; and so they offered to grant licences to factory owners in accordance with what they have described as "Tariff W," a tariff which varies with the number of employees in a particular factory and is based upon the view that the factory owner shall pay 1d. per annum for every employee for 1 hour's music a day, upon the footing that the minimum fee per annum is £1 ls. Apparently a number of factory owners have taken licences from the plaintiffs upon the basis of Tariff W; but the defendants, conceiving that they were in no way infringing the plaintiffs' rights in respect of the five musical compositions in question, have refused to take a licence; and hence these proceedings.

The admitted facts are that the defendants tuned in their wireless set on June 30, 1942, on July 7, 1942, and on July 21, 1942, and on those occasions upon the dates set out in para. 3 of the statement of claim there were performances diffused throughout their factory of the five musical compositions, the names of which I have already stated. Those five musical compositions were made audible, so it is estimated by the defendants, to 600 of their employees. It was estimated by one of the defendants' witnesses, Kayser, that that would be approximately the number of employees on the premises on the days in question who would be able to hear the programmes "Music while you work" which were broadcast on those days. The only other matter of fact is that the defendants are at pains to exclude from their factory all strangers, having a system by which every visitor to the factory is met upon reception and escorted to the person whom it is his business to see.

The rights of the parties depend upon the provisions of the Copyright Act, 1911. The material provisions are to be found, first of all, in sect. 1, which confers copyright upon, among other things, every musical work, subject to certain conditions to which it is not necessary to refer. Sect. 1 (2) provides that "copyright" means the sole right, amongst other things, to perform the work in public. Sect. 2 (1) provides that :

Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright . . .

The last provision to which it is material to refer is the definition of "performance," which is to be found in sect. 35 (1) :

"Performance" means any acoustic representation of a work . . .

Those are the provisions of the statute which define the rights which the plaintiffs have in the five musical compositions to which I have referred.

It is settled law that a man in control of a wireless receiving set who tunes in his set and picks up and makes audible a musical composition which is being broadcast, either by the B.B.C. or by anybody else, performs that musical composition. That was settled by the Court of Appeal in *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.* (1), where LAWRENCE, L.J., in the course of his judgment, says, at p. 137 :

I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation causes an acoustic representation of a musical work which is

being broadcast to be given at the place where the receiving set is installed and is therefore himself performing or authorising the performance of the musical work within the meaning of the Copyright Act, 1911.

On the same page ROMER, L.J., as he then was, says :

In my opinion a man performs a musical composition when he causes it to be heard.

A It is quite plain upon the admitted facts in this case that the defendants here performed the five musical compositions in question. The only point in the case is that, having performed them without the authority of the plaintiffs, whether they performed them in public and so violated the plaintiffs' rights. That is the only point in the case.

B Looking at the matter apart altogether from authority, I think, without attempting in any way to define what is meant by a performance in public, it is reasonably plain that the half-hourly performances given by the defendants at their works were programmes of music given publicly.

C The antithesis is that they were private performances. The facts are that these performances were given at least twice daily. I am not using my own term; I am using Kayser's term. They were broadcast throughout the defendants' factory; they were made audible on every floor and in a number of separate compartments on every floor. They were made audible to at least 600 people. The performances were given for the purpose of refreshing, stimulating and entertaining those who heard them. The performances were all given for business reasons, namely, in order that the defendants might get from their servants better service. There is no question about that. Without attempting to define anything, I think that when you have got all those facts in combination, the conclusion that the performances were not in private but were in public is irresistible upon any reasonable interpretation of the words "in public."

D There is—and I will refer to it—a considerable body of authority; but it is difficult—at least, I have found it difficult—to extract from the authorities any real principle which can be said to govern every case and can be said to lay down some or indeed any general rule for defining what is meant by a performance in public.

E The first and earliest of the decisions was *Duck v. Bates* (2), decided in 1884 long before the passing of the Copyright Act, 1911, and is a decision upon the Dramatic Copyright Act, 1833. That Act gave to the authors of a dramatic piece the exclusive right to perform at any place or places of dramatic entertainment whatsoever. The courts took the view that upon the true interpretation of that Act what was given to the author of a dramatic piece was the sole right to perform it in public; and it is for that reason that, although decided upon the language of a different statute, *Duck v. Bates* (2) is one of the authorities upon which reliance has been placed in interpreting the Copyright Act, 1911.

F That was a case in which the defendant was a member of a dramatic society, and he, along with others, took part in a performance of a dramatic piece called "Our Boys" in the court room of Guy's Hospital. There was one performance given for the benefit of the nursing and medical staff. The plaintiff, who owned the copyright, sued the defendant for an infringement of it. The Court of Appeal decided that there had been no infringement, because, as a majority of the court held, the play had not been performed in public but was performed

G in circumstances which enabled the court to say that the performance was a domestic performance. That is no real authority here, for it is not possible to say of the performances of these pieces of music by the defendants that they are for domestic purposes.

H The next case to which I was referred was *Harms Incorporated and Chappell & Co. v. Martans Club* (3), a decision of the Court of Appeal. There the plaintiffs were the owners of the copyright of a musical play called "Tip Toes." The defendants, Martans Club, Ltd., were the owners of a proprietary club, their business being to invite members of the public of a certain social standing, with the right amount of money, to become members of a club which was called the Embassy Club. On becoming members of that club, members of the public paid the plaintiffs an annual subscription, and, in return for the subscription, they enjoyed the amenities of the club provided by the defendants; and the defendants included as one of the amenities a band which played in order that the members of the Embassy Club might dance. It was the band that played,

as the plaintiffs said, in violation of their rights, extracts from this musical play called "Tip Toes." The defendants endeavoured to establish that they had not, when their orchestra performed at the Embassy Club, performed in public. The Court of Appeal rejected that argument. The basis of the decision, I think, is to be found in the judgment of SARGANT, L.J., in which he came to the conclusion on the facts that there was no real distinction between the defendants in that case and a theatrical entrepreneur who, in a public theatre, produced an opera and admitted those members of the public who were able to pay the price of admittance to come and hear the performance of the opera. The plea that the performance was domestic was rejected; but again, I do not find in that case any principle laid down which governs the present case.

The last case and the one which is most relied upon by the plaintiffs is *Jennings v. Stephens* (4). In that case the defendant was the president of a dramatic society which performed in a village hall for the entertainment of a women's institute a play called "The Rest Cure," the performing right in which was owned by the plaintiff. The plaintiff alleged that that one solitary performance of the play in the village hall before an audience composed exclusively of members of a women's institute was a performance of the play in public, and so a violation of her rights under the Copyright Act, 1911. The Court of Appeal unanimously came to the conclusion that in those circumstances the defendant had performed that play in public.

The members of the court were LORD WRIGHT, who was then the Master of the Rolls, LORD ROMER, then ROMER, L.J., and the present Master of the Rolls, LORD GREENE, then GREENE, L.J. LORD WRIGHT thought on the whole that it was not possible to distinguish the facts in *Jennings v. Stephens* (4) from the facts in *Harms* case (3). ROMER, L.J., put the ground upon which he came to the decision that the performance by the defendant was not a domestic performance, and, not being a domestic performance, it was a performance in public. GREENE, L.J., put his decision upon a third ground. He took the view that the matter was to be looked at from the point of view of the owner of the copyright. The question that he asked was whether, if the owner of the copyright had done what the defendant did, the owner of the copyright would have been exercising his statutory right of performing in public, and, coming to the conclusion that he would have been, decided the case in favour of the plaintiff on the ground that the audience who listened to the performance were, from the point of view of the owner of the copyright, his public.

I find it impossible to find any real distinction between the facts of the present case and the facts which in *Jennings v. Stephens* (4) the Court of Appeal held to be a performance in public; and, as I say, without attempting to define what is meant by "in public," regarding the case as one in which the antithesis to "in public" is in private, I have come to the clear conclusion on the facts that these defendants when every day they broadcast these half-hourly performances of "Music while you work" are giving performances in public, and that any item of music included in the programme is therefore being performed in public.

For these reasons, in my judgment, the plaintiffs have established that their rights in the five musical compositions in question have been infringed by the defendants. The plaintiffs are not asking in the circumstances for an injunction; they are content that they should have their rights determined; and I think the declaration that I am prepared to make is this, that the performances by the defendants of the five musical compositions mentioned in para. 1 of the statement of claim by means of a wireless receiving apparatus connected with loudspeakers as alleged in the statement of claim were performances in public of the said musical compositions and infringements by the defendants of the sole right during the continuance of the copyright thereof or any extension thereof of performing the same in public owned by the plaintiffs.

Judgment for the plaintiffs with costs. Liberty to apply for an injunction.

Solicitors: Syrett & Sons (for the plaintiffs); Bell, Brodrick & Gray (for the defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

GEORGE v. MITCHELL AND KING.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **January 18, 19, 29, 1943.**]*Emergency Legislation—Essential work—Unauthorised dismissal of employee—Rights of the parties under contract of employment—Acceptance by workman of work with a different employer provided by the man-power board—Essential Work (General Provisions) Order, 1942 (S.R. & O., 1942, No. 371).*

A A workman, employed as a foreman in engineering works to which the Essential Work Order applied, was replaced by another man and was offered other work by the same firm at a lower wage. The workman was unwilling to accept lower wages and the employers consequently stopped paying further wages and treated the contract of employment as at an end, although the national service officer, supported by the local appeal board, had refused permission to the employers to dismiss him. The workman filed a plaint for wages due and asked for declarations that the employers could not terminate his employment except under the provisions of the Order and that, if work should not be available in his usual occupation, he was entitled to his normal rate of pay for any other services which he might perform. The employers contended that the workman had been deprived of his right of action for wages because the Essential Work Order had superseded the contract of employment and he had, therefore, no remedy except to prosecute them for a statutory offence :—

C
D HELD : (i) the rights of the parties under their contract were not annulled by the order, they were merely subjected to the condition of written leave from the national service officer and to the condition that without such leave the obligation of the employer to pay the "normal wage" would continue as long as the employed person and his proper work continued to be available within the meaning of the order. The workman was, therefore, entitled to his wages up to the time when he obtained work elsewhere.

(ii) when the workman took service with another master, his contract with his first master was determined and he had no right to have his earnings after that date made up to his former rate of pay.

E [EDITORIAL NOTE. Under the Essential Work (General Provisions) Order, 1942, an employee can be dismissed only with the leave of the national service officer. This case is mainly concerned with the position of an employee who is dismissed by his employer without the leave of the national service officer. This is obviously a breach of the provisions of the order for which the employer could be prosecuted; but it was contended that the terms of the order were such that, from the time when the order came into operation, the contract of service had ceased to exist so that, when the employee was improperly dismissed, he could no longer sue for his wages. It is held that the contract was not superseded and by reason of the terms of the order the purported dismissal was of no effect. The servant was, therefore, entitled to his wages until such time as a new employment was available to him. From that time, however, his contract was determined and, if his new employment was at a lower rate of wages, he could not, as was here sought to be argued, claim to have his remuneration brought up to his former rate of pay. Even if it had been decided that the order superseded the contract of service, it would not necessarily follow that the only remedy was by prosecuting the employer for an offence under the order. It might have been held that an action lay for breach of statutory duty, but it was not necessary to determine this point.

G AS TO ESSENTIAL WORK (GENERAL PROVISIONS) ORDER, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION [14] 128.]

Cases referred to :

- (1) *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex.D. 441; 42 Digest 759, 1850; 46 L.J.Ex. 775; 36 L.T. 761; *revsg.* (1871), L.R. 6 Exch. 404.
- (2) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 42 Digest 752, 1758; 67 L.J.Q.B. 635; 78 L.T. 569; *affg.* S.C. *sub nom.* *Peebles v. Oswaldtwistle Urban District Council*, [1879] 1 Q.B. 625.
- (3) *Neville v. London "Express" Newspaper, Ltd.*, [1919] A.C. 368; 17 Digest 155, 560; 88 L.J.K.B. 282; 120 L.T. 299.
- (4) *Monk v. Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.
- (5) *Shepherd v. Hills* (1855), 11 Exch. 55; 42 Digest 758, 1846; 25 L.J.Ex. 6.
- (6) *Cohen v. Hall*, [1922] 2 K.B. 37; 42 Digest 758, 1848; 91 L.J.K.B. 497; 127 L.T. 130.
- (7) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 42 Digest 759, 1858; 67 L.J.Q.B. 862; 79 L.T. 284.

APPEAL from a judgment of His Honour JUDGE CAVE, dated Aug. 12, 1942, given at Andover County Court, in favour of the defendants in an action by an employee for arrears of wages, £92 2s. 10d., and for two declarations: (1) That the employers were not entitled to terminate the plaintiff's contract of employment except as provided for by the Essential Work (General Provisions) Order, 1942; (2) That, if work should not be available in his usual occupation of night foreman, he was entitled to his normal rate of pay, £11 per week, for any other service he might perform.

Gerald Gardiner and D. G. A. Lowe for the appellant.

P. E. Sandlands, K.C., and R. J. White for the respondents.

SCOTT, L.J. [read by GODDARD, L.J.]: The questions in the appeal turn upon the proper construction of certain provisions of the Essential Work (General Provisions) Order, 1942, (hereinafter referred to as the Order) when superimposed upon an ordinary contract of employment between master and servant. The respondents were a manufacturing company engaged on munitions work and the appellant was one of their engineer foremen. The problems of interpretation in the appeal depend in part on how far the order supersedes the contract; and we have to consider the effect of the two together upon the appellant's right to wages and upon the respondents' right to exercise the normal contractual powers of the master and upon the duties of each under the combined effect of the two sources of legal obligation.

Before dealing with the facts it is necessary, in order to appreciate their bearing, to state the chief features of the Order. It was made on Mar. 2, 1942, by the Minister of Labour and National Service, under the powers of the Defence (General) Regulations, reg. 58A, the marginal title of which is "Control of Employment," and to understand the Order attention to the regulation is essential. By para. (1), the Minister is given authority to:

... direct any person in Great Britain to perform such services in the United Kingdom ... as may be specified by [or described in] the direction; ...

and para. (2) provides that any services required by a direction:

... shall be performed upon such terms as to remuneration and conditions of service as the Minister [or a national service officer] may ... direct, provided that regard shall be had to any rates of ... wages for the performance of those services which appear to the Minister to be usual, and, in particular, in the case of services usually rendered under a contract of service shall have regard ...

in short, to trade union agreements between employers and employed. Para. (3A) requires the consent of a national service officer to the employment of a person, so directed, on other employment, and makes a breach an offence. Para. (4) authorises the Minister by order to regulate the engagement of workers and the duration of their employment. Para. (4A) is important. It provides that:

The Minister may by order make provision for securing that enough workers are available in undertakings engaged in essential work and may in particular provide by any such Order:—

(a) for securing that, except in circumstances and to the extent provided by the Order, persons employed in any such undertaking shall continue to be employed in that undertaking, and shall not be caused to give their services in any other undertaking;

(c) for requiring payment to every person so employed of wages for periods during which, though work is not available for them in their usual occupation, they are capable of and available for work, and willing to perform services which they can reasonably be asked to perform.

It defines "essential work" as:

... work appearing to the Minister to be essential for the defence of the realm or the efficient prosecution of the war or to be essential to the life of the community, and references to an undertaking shall include references to a branch or department of an undertaking.

Para. (4B) authorises the making of an order to regulate the dismissal or suspension of persons employed in essential work. Reg. 92 imposes severe penalties for breaches. The Order was duly made under the enabling powers of reg. 58A, and has, therefore, statutory force. "Essential work" is given the same meaning as in the regulation, and it is common ground that the work on which the parties to this appeal were both engaged, as employer and employed, was "essential work" within the Order; and, further, that the appellant was a

"specified person" within art. 2 of the Order, and, therefore, that both parties are subject to its terms.

Art. 4 of the Order is the important one. It provides as follows :

1 (a) : the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person or without terminating such employment cause him to give his service in some other undertaking (except in case of emergency for a period not exceeding 14 days), except with the permission in writing of a national service officer ;

A (b) a specified person shall not leave his employment except with such permission as aforesaid ;

(c) not less than 1 week's notice of the termination of the employment of a specified person shall be given by that person or by the person carrying on the undertaking as the case may be, so, however, that this provision shall not apply where the specified person is dismissed for serious misconduct ;

B (d) without prejudice to any terms and conditions more favourable to persons employed that may be provided for by the Conditions of Employment and National Arbitration Order, 1940, or by that Order as amended by any subsequent Order ;

... the person carrying on the undertaking shall in respect of every prescribed period pay to every specified person (except as otherwise provided in this Order) a sum which is not less than the normal wage for the prescribed period if that person is during the normal working hours :—

(i) capable of and available for work ; and

C (ii) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.

For the present purposes it is not necessary to refer to the definitions which follow in sub-para. (d) beyond saying that "prescribed period" means, in the present case, "each week." Sub-para. (h) is indirectly relevant as a help in interpretation, because it shows unequivocally that the Order is grafted on to and keeps alive the contract. Under (i) it permits the employer to give D "a notice suspending the guaranteed wage" in case of an illegal strike. Under (ii) it says (a) that on such a notice having been given, the obligation of the employer to make any payment during the "authorised suspense period" is suspended. (c) and (d) are as follows :

(c) on giving such notice as may be provided for in the contract with his employer the specified person may, on the expiration of that notice leave his employment at E any time during the authorised suspense period without obtaining the permission or giving the notice required by sub-paras. (b) and (c) of this paragraph ; and

(d) if a specified person who does not leave his employment during the authorised suspense period fails without reasonable excuse to present himself for work on the day specified in the notice that work is available, his employment shall be deemed to have terminated on the day immediately preceding that day . . .

Art. 4 (4) says (*inter alia*) :

F Notwithstanding any permission of a national service officer given under the provisions of this Order, the terms of any contract in so far as they relate to the giving by either party of notice to terminate the contract or the length of such notice shall remain in force. . . .

Art. 5 defines the powers of the national service officer and provides for appeals from him to a local appeal board.

G I can now state the facts in their relevance to the Order. The applicant worked as night foreman from his appointment in Jan., 1942, to Mar. 26, 1942, when he was away ill for a day. The respondents then took the opportunity of putting another foreman in his place ; and when he returned the next day, or on the following day, told him they had no further use for his services. The national service officer, however, refused leave to dismiss him ; and, on appeal, the local appeal board on Apr. 17 confirmed the national service officer's refusal. H The respondents, however, did not reinstate the appellant in his work as foreman, although they paid him his wages of £11 per week from March onwards. At first they asked for no work in return. On May 12, the appellant was ordered to report for work ; he did so and was then offered work, not as a foreman, but as an operative, on a centre lathe, at £8 per week. The appellant was ready and willing to do the work, but insisted on his right to his wage of £11 per week. As from May 8, the respondents stopped his wages, as found by the county court judge. The appellant then consulted a solicitor, who wrote to the respondents asking for the payment of the £11 weekly wage to be continued, presumably

on the footing that the appellant continued "available" within the meaning of the Order, and that his work was also "available" but for the act of the respondents in putting in another man; but the respondents refused to pay. On June 18 the man power board found the appellant a temporary job at £8 per week with another firm, to fill the place of an employee who was away for a time. The man returned on August 31, and the appellant was then released from that work.

As the respondents were then in fact, whether effectively or not in law, refusing to treat him as any longer in their employ, the appellant's action in accepting other employment of a temporary kind through the man power board was obviously reasonable. What effect his action had on his legal position I will discuss presently. When the respondents showed no sign of altering their attitude, he filed his plaint in the county court, and on July 21, 1942, delivered his particulars of claim, asking for the sum of £92 2s. 10d. money due for wages, and two declarations.

At the hearing below on Oct. 27 last, the respondents contended that the Order superseded the contract of employment altogether, and deprived the appellant of his right of action for wages, whether on the contract or under the Order, leaving him with no remedy but to prosecute for a statutory offence committed by the respondents through their breach of the provisions of the Order. The county court judge found all the facts in the appellant's favour, and was evidently disposed to decide the question of law in his favour; but in the result he felt bound to decide against the appellant on the ground that the Order "contained nothing to safeguard his civil rights."

There is a passage in the judgment of the county court judge which I will quote in full because of the important findings of fact which it contains:

I am satisfied that the defendants deliberately put another employee, at first temporarily, and later permanently, into the plaintiff's employment, taking advantage of the 1 day's illness he suffered about Mar. 26. They now contend by reason of what they did that the plaintiff's usual occupation was not available. To accede to that would be to reduce to a farce this part of the Order and to make it depend upon the whim of the employer. It is clearly not the meaning of the paragraph. It is circumstances beyond the control of the employer that are contemplated, i.e., plant damaged by enemy action or needing overhaul, shortage of material and the like. If circumstances of that kind arise, it can be said that the work is not available for him; therefore the employer is entitled to offer him reasonable work in another capacity, but he cannot remove him from one employment to another and offer his old employment to another, and then come and say his original employment was not available. That would be to render nugatory the provisions of sub-para. (d) (ii). In my view, the plaintiff's usual occupation was "available for him" on May 12, and that is shown by these facts, that the defendants put another man in and then said the work was not open. That is immaterial. Had they liked, they could have put him into the work.

The defendants were not entitled to seek to compel him to do work in another capacity. If his usual occupation had clearly been not available, the nature of the work offered would in the circumstances have been reasonable. If the defendants were justified in offering the plaintiff work as a turner on the lathe, they could only do so at wages not less than £11 per week, applying sub-para. (d) to this case. I consider his normal wage was £11 and the prescribed period 1 week. The usual occupation was that of a night shift foreman, and I find he was capable and available and willing to perform the services required on May 12.

Of the two declarations asked for by the appellant, the first was that the respondents could not terminate the appellant's employment except under the provisions of the Order; the second, that "if work should not be available in his usual occupation of night foreman he is entitled to his normal rate of pay, namely, £11 per week for any other services which he may perform." The county court judge refused both. In the present case they were both discretionary, and I do not think we should interfere with his exercise of his discretion; the more so as the main points raised in each of them are covered by our decision on the money claim.

The final decision against the appellant was in reality based on para. 7 of the amended defence (that the "plaintiff has no right of action"); or, as the county court judge put it, "the Order does not safeguard the appellant's civil rights." Whichever way it is stated, I think that view is erroneous. It is founded on a misconception. On the appeal counsel for the respondents put it forward on the footing that it was covered by the principle of statute inter-

pretation, that if a statute creates a duty, and also provides a remedy, there is *prima facie* no right of action at the suit of a person injured for a breach of the statutory duty; and he cited *Atkinson v. Newcastle Waterworks* (1), *Pasmore v. Oswaldtwistle Urban District Council* (2), *Neville v. London "Express" Newspaper Ltd.* (3), per VISCONTI HALDANE, at p. 391, and *Monk v. Warbey* (4), per MAUGHAM, L.J., at pp. 84, 85. The last citation is enough to dispose of the argument of counsel for the respondents for present purposes. The question of interpretation cannot be answered *in vacuo*; it must be answered upon a due consideration of the language of the particular statute concerned. In the present case there are features in the statute (for the Order is, as it were, a chapter of delegated enactment) which are conclusive: (a) the statute does not create the duty; it assumes its inheritance in the underlying contract: (b) the statute preserves the contractual rights and duties of the parties save in so far as it alters them: (c) the contractual obligation of the employer to pay is recognised expressly, and its quantitative measure is left to the operation of the contract; although, (d) the right of action for wages is also clothed with statutory force. The rights of the parties to dissolve their contract are not annulled; they are only subjected to conditions of written leave from the national service officer, and to the condition—or express reminder—that without such leave the obligation of the employer to go on paying “the normal wage” will continue as long as both the employed person and his proper work continue to be “available,” within the meaning of the Order. Thus, whilst there is nothing in the Order to deprive the appellant as a “specified person” of his contractual right of action for his wages, the Order does confer upon him an additional right, viz., to sue on the Order, as for a statutory debt; on the principle of *Shepherd v. Hills* (5), per PARKE, B., at pp. 66, 67; and *Cohen v. Hall* (6).

For these reasons, the appellant was, in my opinion, clearly entitled to sue for his £11 per week, from May 8 to June 18, when he was found work at £8 per week elsewhere under the “temporary arrangement.” What his rights were thereafter is a much less simple question. Although the county court judge decided against the appellant on legal grounds, he gave a finding on the question of amount and held that if the plaintiff was entitled to succeed the amount due for wages was £92 2s. 10d., as claimed. That sum included wages at £11 per week for 6 weeks from May 8 to June 18, the balance, as I understand it, being for the £11 less £8 per week earned by the appellant during his temporary employment, arranged by the man power board, between June 18 and Aug. 31. Whether this latter sum can be regarded as legally due in the circumstances of this case is not, in my opinion, an easy question to decide. There was no evidence before the judge that the national service officer had consented to the employment of the appellant being terminated in June, still less of a written consent to that course. All that was proved was that the national service officer had in March refused to permit its termination and that the respondents’ appeal from his refusal had been dismissed. *Prima facie*, therefore, the employment continued, and because it continued the obligation to pay wages at £11 per week also continued. But we know nothing of what happened when the man power board found the appellant the “temporary employment” elsewhere. At first, I was disposed to draw the inference that it had been done with the approval of the national service officer as a temporary measure, with the consent of the respondents, in order not to break the contract of employment between the appellant and the respondents and for the purpose of enabling the appellant at a later date to revert to his post as night foreman to the respondents. But on further reflection I do not think the two facts in evidence that it was temporary and that the step was taken through the man power board are sufficient to justify that inference. On the other hand, there is difficulty in holding that the contract of employment was brought to an end in the absence of positive evidence of a written consent by the national service officer for that purpose. The truth is that for either alternative the court can only reach a conclusion by guessing; and in that dilemma I think the only safe solution is that preferred by my brethren, that is to say, that as the appellant took service with another master the presumption that he left the service of his first master must prevail. This result does not seem to me consistent with the spirit of the Order and I arrive at the conclusion that the appellant can recover nothing beyond the 6 weeks at £11 per week, down to June 18, with

reluctance. In regard to costs, I think that, as he had to come to the Court of Appeal to get anything, he is entitled to costs here and below, the latter on Scale C.

MACKINNON, L.J. [read by DU PARCQ, L.J.] : I have not, before this case, had occasion to consider the Essential Work (General Provisions) Order, 1942. Its terms are very remarkable. I gather that the defendants carry on business as engineers, and the Minister, under art. 2 of the Order, has scheduled their undertaking as one engaged on essential work. By art. 4 the defendants were forbidden to terminate the plaintiff's contract of employment, except with the consent of a national service officer, which was refused. Therefore, the notice the defendants gave to the plaintiff was ineffective, and his contract of employment continued. The defendants refused to let him work. I do not agree with the county court judge that the only result of this was that the defendants became liable to prosecution, but the plaintiff had no claim for his wages. I think he had a claim for wages while, pursuant to the Order, his contract of employment continued in existence. If he had such a claim, the judge thought it would amount to £92 2s. 10d., that is, £11 per week from May 8 to June 18, and £3 per week from June 18 to September 22. The plaintiff took another job, with permission of the national service officer, on June 18, at £8 per week, and the £3 per week is in the nature of damages. I do not think this part of the claim is good. I think he can only claim £11 per week while in the defendants' employment, but he ceased to be in such employment on June 18. His claim, therefore, is properly for £66. This appeal should be allowed and judgment entered for the plaintiff for £66.

I am tempted to add some remarks as to this startling Order. The defendants are engineers, a business involving technical knowledge and skill. Apparently those who managed the business regarded the plaintiff as inefficient, and desired to put another man in his place. The amount of his pay suggests that his post was one of importance. I do not know what are the qualifications of a national service officer, nor of members of a local appeal board, except that under art. 5 (4) the board is to consist of one member to represent employers, one to represent workers, and a chairman appointed by the Minister. To decide the question raised by these employers, namely, whether the plaintiff had been doing his work so inefficiently that they ought to be allowed to replace him by a man in whom they had more confidence, would really require either personal knowledge of the particular trade (and, if such questions were multiplied, of every trade in the district), or the hearing of such technical evidence, and perhaps a visit to the factory to see how the man worked. But I observe that by art. 4 (3) a national service officer shall "so far as is practicable" give or refuse permission within 7 days of receiving the application; and by art. 5 (2) the local appeal board is "so far as is practicable" to give its decision within 7 days. These provisions do not seem calculated to provide for a serious consideration of the employers' claim that the man has not been doing his job with proper efficiency, and they would hardly do so even if the national service officer and the members of the board possessed (as I suspect they do not) expert technical knowledge of the trade in question.

For these reasons, as they seem to affect this case, I find the provisions of this Order disconcerting, if not alarming. If the employers, who, presumably, know their own business, want to replace a man they regard as incompetent by one who is more efficient, and are forbidden to do so in 7 or 14 days, by those who cannot have been able to form a reasonable judgment on the merits of their claim, I cannot imagine anything less calculated to conduce to the smooth and effective conduct of an essential business "for the efficient prosecution of the war, or maintaining supplies or services essential to the life of the community."

GODDARD, L.J. : The first and principal question may thus be stated : If a person carrying on an undertaking, to which the Essential Work (General Provisions) Order applies, purports to dismiss a workman without obtaining the consent of the national service officer so to do, does the contract of employment still subsist, or is the only effect that the employer renders himself liable to a penalty ? If the contract remains in force, it follows that the workman remains in the service of the employer and, consequently, is entitled to his wages

until the contract is lawfully terminated. The Order is made under the Defence (General) Regulations, reg. 58A, and para. 4 (a) of that regulation confers on the Minister of Labour and National Service power to make orders for securing that enough workers are available in undertakings, and, in particular, for securing among other things, that persons employed in such undertakings shall continue to be employed in that undertaking, and shall not be caused to give their services elsewhere, and also for requiring payment to persons so employed of wages for periods during which, though work is not available for them in their normal occupation, they are capable of and available for work and willing to perform services which they can normally be asked to perform. By para. 4 of the Order it is provided that the person carrying on the undertaking shall not terminate the employment of any specified person, except for serious misconduct, without the permission of a national service officer, nor except with such permission may a specified person leave his employment. With the policy of the Order or the effect, whether beneficial or otherwise, that it may have on employer or employee, we have nothing to do. Its object, which it is legitimate to consider when its construction is in question, is clear enough. It is to secure adequate supplies of labour to essential factories and to prevent competition in obtaining labour or situations. The county court judge has held that though by dismissing the plaintiff the defendants have committed a breach of the Order, his civil rights, as he puts it, are not safeguarded, and he cannot recover any wages or other form of compensation after he was dismissed. He bases his decision, I think, mainly, on the class of case of which *Atkinson v. Newcastle Waterworks* (1), and *Pasmore v. Oswaldtwistle Urban Council* (2), are leading examples, which lay down that where statutory duties are created and a penalty is provided for their non-observance, *prima facie* a person injured by the breach does not acquire a right of action and the party in default is liable only to the penalty provided by the statute. In my opinion, these cases have little or no bearing on the question here in issue, though, if they had, it would at least be necessary to consider with care those other cases, such as *Groves v. Lord Wimborne* (7), where, though a penalty is provided, a cause of action has also been held to be given by the statute. This is legislation of a very special and highly novel kind. In the last war, though many factories were made what were called "controlled establishments," I do not remember that there was any provision like the one we are now considering. It seems to me that the Order imposes a statutory condition or provision on the contract. If a statute says that a person shall not terminate a contract except with the permission of a third person, in my opinion, it follows that he is incapable of terminating it without that permission. If he refuses to employ the person, he commits an offence, but the contract is not terminated. I cannot see that there is any difference between saying a person shall not terminate an employment, and an employment shall not be terminated. If the employment cannot be terminated, it remains in force with all its consequences; the employed person remains in the service, and consequently has a right to his wages, and it is only fair that he should have this right as he cannot enter employment elsewhere unless and until he gets permission of the national service officer. The only reason why this man was not given his ordinary work was that the defendants did not wish to employ him, not that there was not work in his usual occupation for him to do, so it is unnecessary to consider the offer of alternative work at reduced wages which was made.

The plaintiff was paid wages down to May 8, though no work had been found for him to do since Mar. 27. On June 18 he entered the service of another firm. This had been found for him by the man power board, and though the national service officer gave no consent in writing to his taking that employment, at least there was no evidence that he did, I think we must infer that he in fact consented. This was described by the county court judge as temporary work, and so in a sense it was, as the plaintiff left that employment when another man was ready to come back, but his evidence was that nothing was said on his engagement as to the work being temporary or permanent. His wages were less than those which he had been receiving at the defendants' works, and he now claims, not only £11 per week for the 6 weeks that he was standing by, and still in their service, as I think he was, but also the difference between his former wage and what he earned in the new employment. As is shown by the declarations for

which he asked, he in fact wants to establish that, no matter who he is serving, he is entitled to £11 per week, I suppose for as long as the Order is in force, and that any difference between that sum and what he actually earns must be paid to him as damages. This would, in effect, give him an annuity for the rest of the war, and I cannot think the Order was intended to have any such effect. In my opinion, he is not entitled to more than his wages for 6 weeks. As soon as he entered into the new employment, which we must assume he did lawfully, the former contract was at an end. I do not think the Order gives him a claim for damages for wrongful dismissal, or is intended to secure that a workman shall always receive the wage that he was receiving when the Order came into force. So long as he remains in his employment he must be paid the normal wage. He left that employment when he took work elsewhere. In my opinion, he is entitled to judgment for £66 and the appeal should be allowed to that extent. There is no need to make the first declaration for which he asks and he is not entitled to the second.

Appeal allowed. Judgment for plaintiff for £66 and costs.

Solicitors: *W. H. Thompson* (for the appellant); *E. C. Randall* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL OF ALBERTA *v.* ATTORNEY-GENERAL OF CANADA AND OTHERS.

[PRIVY COUNCIL (Viscount Maugham, Lord Russell of Killowen, Lord Macmillan, Lord Romer, Lord Clauson), **November 23, 24, 25, 26, 30, December 1, 2, 3, 1942, February 1, 1943.**]

Privy Council—Canada—Dominion and provincial legislation—Right of province to pass act dealing with bankruptcy and insolvency—British North America Act, 1867 (c. 3), ss. 91 (21), 92—Debt Adjustment Act (Alberta), 1937 (c. 9).

In order to alleviate the distress of farmers and others, caused by a great drought, the Legislature of Alberta passed the Debt Adjustment Act, 1937. The purpose of the Act was to relieve persons resident in the province from enforceable liabilities to pay debts incurred before July 1, 1936, and in many cases to compel the creditors to accept compositions approved by a board set up by the Act. Persons resident in the province were precluded from access to the courts of Alberta to enforce their rights against any persons resident in the province without the permission of the board, which might be withheld. It deprived creditors of their remedies because it precluded or stayed proceedings by way of execution, attachment or garnishment or the enforcement of mortgages or similar legal proceedings in relation to the recovery of land, unless the board's consent had been obtained. The Act required the board to bring about an amicable arrangement for the payment of the resident debtors' indebtedness and to effect settlements either in full or by composition. The board had power to refuse consent in the case of a creditor who did not accept the settlement suggested and thus had power to secure by a method amounting to compulsion the consent of the parties to a proposed arrangement. The appellants contended that they were competent to pass the Act, which was concerned only with matters enumerated in the British North America Act, 1867, s. 92, under the heads of property and civil rights in the province; the administration of justice in the province and matters of merely local or private nature in the province. The respondents contended that the Act was *ultra vires* because (a) it did not come within any of those heads; (b) it was legislation within the words "bankruptcy and insolvency" in the British North America Act, 1867, s. 91 (21); (c) it was legislation in relation to other subjects enumerated in sect. 91 and affected promissory notes, interest and the status of banks and companies incorporated under the authority of the Parliament of Canada; and (d) it was in conflict with a number of acts validly enacted by the Parliament of Canada:—

HELD: the Act was legislation in relation to insolvency which is a subject within the exclusive legislative authority of the Parliament of Canada and,

under certain conditions, deprived the creditor of his right to present a bankruptcy petition under the Dominion Bankruptcy Act. The Act constituted a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency and obstructed and interfered with the actual legislation of that Parliament on those matters, and was *ultra vires*.

[EDITORIAL NOTE.] As is pointed out in the judgment of their Lordships, the Board were not concerned with the expediency or the wisdom of the Act in question, but merely with the legal question whether, having regard to the provisions of the British North America Act, 1867, the provincial legislature was competent to pass such a measure. The Act, as its terms show, provided something more than a moratorium for debtors and, in effect, operated to debar creditors from all remedies in respect of their debts apart from what appears to be a compulsory deed of arrangement to be settled by a board. This their Lordships have decided was a substantial invasion of the power to legislate in relation to bankruptcy and insolvency which is given exclusively to the Dominion.

As to POWER OF PROVINCIAL LEGISLATURES, see HALSBURY, Hailsham Edn., Vol. 11, pp. 91-94, paras. 156-158; and FOR CASES, see DIGEST, Vol. 17, pp. 434-445, Nos. 131-180.]

Cases referred to:

- (1) *North American Life Assurance Co. v. McLean* (1941), 1 W.W.R. 430.
- (2) *A.-G. for Alberta and Winstanley v. Atlas Lumber Co., Ltd.*, [1941] S.C.R. 87.
- (3) *A.-G. for Dominion of Canada v. A.-G. for Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700; 17 Digest 431, 119; 67 L.J.P.C. 90; 78 L.T. 697; 1 Cam. 542.
- (4) *A.-G. of Ontario v. A.-G. for Dominion of Canada*, [1894] A.C. 189; 17 Digest 435, 132; 63 L.J.P.C. 59; 70 L.T. 538; 1 Cam. 447.
- (5) *Re Sahler* (1914), 84 L.J.K.B. 1275; 5 Digest 105, 948; 112 L.T. 133.
- (6) *A.-G. for British Columbia v. A.-G. for Canada, Re Farmer's Creditors Arrangement Act*, [1937] A.C. 391; Digest Supp.; 106 L.J.P.C. 67; 156 L.T. 313.
- (7) *Royal Bank of Canada v. Larne and A.-G. for Canada*, [1928] A.C. 187; Digest Supp.; 97 L.J.P.C. 49; 139 L.T. 562; 2 Cam. 455; *affg.* S.C. *sub nom.* *Belanger, etc. v. Royal Bank of Canada*, [1926] S.C.R. 218.
- (8) *A.-G. for Manitoba v. A.-G. for Canada*, [1929] A.C. 260; Digest Supp.; 98 L.J.P.C. 65; 140 L.T. 386; 2 Cam. 534.

APPEAL by the Attorney-General of Alberta from a decision of the Supreme Court of Canada given on Dec. 2, 1941, upon a reference under the Supreme Court Act, s. 55. The facts are fully stated in the judgment of their Lordships.

VISCOUNT MAUGHAM [delivering the judgment of their Lordships]: This appeal by special leave is presented by the Attorney-General of Alberta against the decision of the Supreme Court of Canada dated Dec. 2, 1941, which answered certain questions concerning the constitutional validity of the Debt Adjustment Act, 1937, of the Province of Alberta as amended by five later Acts. These questions had been referred to the Supreme Court for hearing and consideration pursuant to the Supreme Court Act (Revised Statutes of Canada, 1927, c. 35), s. 55, by the Governor-General in Council by an order made on May 19, 1941. The Supreme Court decided that the Act in question is *ultra vires* of the legislature of Alberta. The Attorney-General for Saskatchewan as a respondent and the Attorneys-General for Manitoba, Ontario and New Brunswick as intervenants supported the appeal.

Distress of a very serious nature was rife in Alberta and the adjoining Prairie Provinces from at any rate the year 1920, and divers statutes were passed in those provinces and in particular in Alberta directed to the relief of the inhabitants. In the view their Lordships have taken, it does not seem to be necessary to give even a summary of these statutes beginning with the Drought Area Relief Act, 1922, c. 43. The Act now under consideration (to be hereinafter generally referred to as the Act) is the last of a series of legislative attempts to relieve the distress of resident farmers and others while keeping within the legislative powers of the province as laid down in the British North America Act, 1867, as amended. Their Lordships approach the important questions before them on the assumption that there was sufficient and it may be said grave need for legislation for the relief of distress in the province. They desire, however, to point out that the question before them is not as to the expediency, still less as to the wisdom, of the Act. The question is simply one as to the power of the province to pass it. If the answer should be in the negative, it

must necessarily follow that the Dominion has full power to pass a statute dealing with the matter or such part of it as is beyond the power of the Province.

Before stating the nature of the Act, it should be mentioned that it contains amendments designed to deal with the objection that a preceding Act encroached upon the matter of Bankruptcy and Insolvency which, under the British North America Act, 1867, s. 91 (21), is within the exclusive legislative authority of the Parliament of Canada. O'CONNOR, J., had decided in favour of this objection (*North American Life Assurance Co. v. McLean* (1).) Certain compulsory composition provisions mentioned by the judge are now removed; but the important provisions of sect. 8 (which will be stated in detail later) remain. The consideration of the Act (as it now stands) came before the Supreme Court of Canada in the year 1940 in *Winstanley's case* (*A.-G. for Alberta v. Atlas Lumber Co., Ltd.* (2)). This was an action brought without a permit under the Act against a resident debtor in Alberta upon a promissory note. It was there held (the judgment of DUFF, C.J., being concurred in by RINFRET, CROCKET, DAVIS, KERWIN, HUDSON, and TASCHEREAU, JJ., affirming the judgment of EWING, J.), that sect. 8 (a) of the Act so far as it extends to actions upon bills of exchange and promissory notes is repugnant to the enactments of the Dominion in the Bills of Exchange Act (c. 16 of the Revised Statutes of Canada, 1927, and amendments thereto), and that the absence of a permit to bring the action was, therefore, not a defence.

The Act is now under consideration in a proceeding which involves its validity as a whole. It is in four Parts; but Pt. II has been repealed. There is a preliminary part containing definitions including one stating that a "resident debtor means a person who is a debtor and who is an actual resident of and personally living in the province and includes the personal representative or representatives, son, daughter, widow or widower of a deceased resident debtor and includes a family corporation which is a debtor" as therein mentioned. There is also an elaborate definition of "resident farmer." In sect. 3 there is provision for the constitution of a Debt Adjustment Board to consist of one, two, or three members appointed by the Lieutenant-Governor in Council. The powers of the board can be exercised by any single member or by any person designated by the board with the approval of the Lieutenant-Governor. Under sect. 6 the board has power to make "inquiries . . . with regard to the property of any resident debtor or resident farmer" and may examine the debtor or any other persons under oath and has the same power as a commissioner under "The Public Enquiries Act." Pt. I of the Act begins with sect. 8 (1), which enacts as follows:

8.—(1) Unless the board or any person designated by the board under the provisions of this Act, issues a permit in writing giving consent thereto: (a) no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforceable by virtue of any rule of law or equity or by virtue of any statute, except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services; and (b) no proceedings by way of execution, attachment or garnishment; and (c) no action or proceeding for the sale under or foreclosure of a mortgage on land, or for cancellation, rescission or specific performance of an agreement for sale of land or for recovery of possession of land, whether in court or otherwise; and (d) no action or proceeding to sell land under or in satisfaction of any judgment or mechanic's lien; and (e) no seizure or distress under an execution or under any lease or any tenancy howsoever created, lien, chattel mortgage, conditional sale agreement, crop payment agreement or in attornment as tenant under any agreement for sale or mortgage, and no sale or other proceeding thereunder either by virtue of rights of property at common law or under a statute passed prior to this Act; (f) no proceedings by a lessor, mortgagee, vendor or other person claiming possession of a share of crop in any case where the provisions of The Crop Payments Act apply; and (g) no action respecting such other class of legal or other proceedings as may be brought within the provisions of this section by order of the Lieutenant-Governor in Council, shall be taken, made or continued by any person whomsoever against a resident debtor in any case.

Subsect. (3) provides that the section shall not apply to any contract made or entered into by a debtor where the whole of the original consideration for the contract arose on or after July 1, 1936; but shall apply to (amongst other things) any judgment obtained before July 1, 1936. By subsect. (5) the board may at any time in its discretion cancel or suspend any permit which has been previously issued under the section by the board. Under sect. 9 no permit is

to be granted in respect of any proceedings on a mortgage of farm-lands or an agreement for sale thereof, if those proceedings lead to foreclosure by reason only of the temporary impossibility owing to abnormal depreciation in values of realising the probable normal value of the security. Under sect. 10 a creditor may apply for a permit to commence or continue any action against a resident debtor, and the board in that case must make its proper inquiries and thereupon may issue a permit or refuse or adjourn the application for such period as it thinks fit. By sect. 11 it is provided that the time during which proceedings are prohibited by the board does not run against the creditor under the Limitation of Actions Act, 1935.

Pt. III of the Act relates to negotiations for agreements for the adjustment of debts of resident debtors.

Sect. 21 provides that any resident debtor or the creditor of any resident debtor can by written application call on the board to investigate the resident debtor's financial position, and to endeavour to negotiate an agreement for the settlement of the debtor's debts, either in full or by a composition. The board is to have all the extensive powers of inquiry conferred by the Act. Any agreement between a resident debtor and a creditor made through the agency of the board, however informal, is to be binding (sect. 22); and the board (sect. 23) is to endeavour to bring about an agreement between the resident debtor and his creditors whereby the secured and unsecured debts of the debtor are reduced to an amount which in the opinion of the board is in accordance with the ability of the debtor to pay, either presently or in the future having regard to the productive capacity of the farm and its equipment and the average net prices of agricultural produce between the date of the debt being incurred and the date of adjustment (see sects. 22 and 23).

Pt. IV contains provisions specially applicable to resident farmers.

Sect. 26 provides that a resident farmer who is in default on a proposal formulated and confirmed under the Farmers' Creditors Arrangement Act, 1934 (a Dominion Act: Statutes of Canada, 1934, c. 53) cannot be proceeded against by his creditor by any of the proceedings set out in the Debt Adjustment Act, 1937, s. 8, unless the board issues a written consent under that section. Sect. 27 provides that a chattel mortgage given by a resident farmer after May 1, 1934, to secure a past debt shall be invalid unless approved by the board within 60 days. By sect. 28 a resident farmer can be authorised by the board, in order to supply his own necessities or fodder or seed grain, to sell free of encumbrance any goods or chattels subject to a chattel mortgage given by him. By sect. 29 a resident farmer who is a lessee of land under a crop share lease may be authorised by the board to retain for his own use crop deliverable to the lessor.

Pt V contains miscellaneous provisions of which sect. 36 is the most noticeable. It provides for an appeal by any person who deems himself aggrieved by the action of the board in granting or refusing a permit or its other orders "to a judge of the Supreme Court sitting with a jury of 6 persons." Subsect. 8 provides that the question as to the action of the board in withholding or granting a permit or in giving any direction under the Act is:

... to be a question of fact for the determination of the jury under proper instructions from the judge and there shall be no appeal from such determination or from any judgment or order made thereon.

The question of fact is nowhere defined. Sect. 32 is a penal section. It provides for the imposition of a penalty, namely, a fine not exceeding \$250, and in default of payment, a term of imprisonment with hard labour not exceeding 3 months, or both on any person:

... who wilfully takes or continues any action or proceeding or makes or continues any seizure, or sells or disposes of a chattel in violation of the provisions of this Act or the regulations.

The questions referred, and the answers given by the majority of the Supreme Court of Canada (DUFF, C.J., RINFRET, DAVIS, KERWIN, HUDSON and TASCHEREAU, J.J.) were as follows:—

Question 1: Is the Debt Adjustment Act, 1937, being the Statutes of Alberta, 1937, c. 9, as amended by the Statutes of Alberta, 1937, c. 2 (3rd session), the Statutes of Alberta, 1938, c. 27, the Statutes of Alberta, 1938, c. 5 (2nd session), the Statutes of Alberta, 1939, c. 81, and the Statutes of Alberta, 1941, c. 42, *ultra vires* of the Legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent?

Answer: The said Act as amended is *ultra vires* of the Legislature of Alberta in whole

Question 2: Is the said Act as amended operative in respect of any action or suit for the recovery of moneys alleged to be owing under or in respect of any bill of exchange or promissory note?

Answer: The said Act as amended is not operative in respect of any of the matters mentioned. A

Question 3: Is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit for the recovery of moneys owing under or in respect of any bill of exchange or promissory note?

Answer: The said Act as amended is not operative in respect of any of the matters mentioned. A

Question 4: Is the said Act as amended operative in respect of any action or suit for the recovery of money or interest thereon, or both, not being money or interest alleged to be owing under or in respect of any bill of exchange or promissory note, whether or not such money or interest is secured upon land situated in the said province, in the following cases, namely, where such an action or suit is for the recovery of: (a) the principal amount of such money and interest, if any, where the same are payable in the said province; (b) the principal amount of such money and interest, if any, where the same are payable outside the said province; (c) the interest only upon such money? B

Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Question 5: If the answer to any of the parts (a), (b) and (c) of question 4 is in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit in respect of which such answer is given? C

Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

CROCKET, J., who dissented, was of opinion that the Act is not *ultra vires* or inoperative except in so far as its provisions conflict with existing valid legislation of the Parliament of Canada.

The contention on behalf of the appellant was that the Act was concerned only with matters coming within the classes of subjects enumerated in the following heads of the British North America Act, 1867, s. 92, namely: D

(13) Property and civil rights in the province.

(14) The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction and including procedure in civil matters in those courts.

(16) Generally, all matters of a merely local or private nature in the province. E

The contentions of the respondents which ranged over a wide ground may be stated thus: First, a denial of the contention that the Act was within any of these heads; secondly, an argument that the Act is legislation within the words "Bankruptcy and Insolvency" in the British North America Act, 1867, s. 91 (21); thirdly, a claim that the Act is legislation in relation to various other subjects enumerated in sect. 91 and affects *inter alia* the regulation of trade and commerce, bills of exchange and promissory notes, interest, and the status of banks and companies incorporated under the authority of the Parliament of Canada, and, fourthly, that the Act is in conflict with a number of Acts validly enacted by the Parliament of Canada. F

In the view of their Lordships, there is no need, at any rate on this occasion, for any new statement as to the true construction of the British North America Act. The main propositions are now well-established and are re-stated here mainly as a matter of convenience. It is well-settled that in case of conflict between the enumerated heads of sect. 91 and the heads of sect. 92 the former must prevail. The words in sect. 91 and particularly the emphatic sentence: G

... and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ... must be given their natural effect. The final words of the section inserted from abundant caution were these: H

... and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

It follows that legislation coming in pith and substance within one of the classes specially enumerated in sect. 91 is beyond the legislative competence of the provincial legislatures under sect. 92. In such a case it is immaterial

whether the Dominion has or has not dealt with the subject by legislation, or, to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given *exclusive* legislative authority as to "all matters coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter the provinces are competent to legislate, is therefore unsound: *A.-G. for Canada v. A.-G. for the Provinces of Ontario, Quebec and Nova Scotia* (3), at p. 715. There were however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since the year 1894 it has been a settled proposition that, if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in sect. 91 and is properly within one of the subjects enumerated in sect. 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation: *A.-G. of Ontario v. A.-G. for Canada* (4). It is this proposition which, from the nature of the case, too often leads to difficulty. Legislation since the year 1867 has assumed many forms in dealing with the greater complexity of modern trade and civilisation. It is sometimes difficult to determine whether a particular matter, the subject of a Provincial Act, is in "pith and substance" within one of the enumerated heads of sect. 91 or whether it is merely ancillary or incidental to one of the subjects there enumerated. This may raise questions as to the precise meaning to be attached to one or more of the enumerated heads of sect. 91 and sect. 92; and finally, there may be a doubt whether the legislative field is or is not clear.

It must not be forgotten that where the subject-matter of any legislation is not within any of the enumerated heads either of sect. 91 or of sect. 92, the sole power rests with the Dominion under the preliminary words of sect. 91, relative to "laws for the peace, order and good government of Canada."

Their Lordships propose now to consider the contention that the Act in its main character and object constitutes an attempt to legislate in relation to "bankruptcy and insolvency," the 21st head of subjects in sect. 91. Some observations may usefully be made on the meaning of the words "bankruptcy and insolvency." Bankruptcy in England is a creature of the legislature and at the date of the British North America Act (and until 1869) was available only for traders. The only relief afforded to non-traders was provided by divers Acts "for the relief of insolvent debtors." The common law, it should be remembered, permitted debtors who could not pay their debts to be committed to prison by any creditor; and the state assumed no liability to keep them from starvation. That was assumed to be left to the benevolence of any creditor who had caused the imprisonment. (See HOLDSWORTH, *History of English Law*, Vol. VIII, pp. 229 *et seq.*) When a debtor was in difficulties there was generally an unseemly race by creditors to obtain a first charge upon his property by obtaining judgments and executions. It was obviously necessary in any legislative effort to introduce a little humanity into the matter in dealing both with traders who had committed defined acts of bankruptcy and with other insolvent debtors, that is to say, all persons who were unable to pay their debts and obligations as they became due. This circumstance had been recognised in England before the passing of the British North America Act.

In 1867 the statutory law of bankruptcy in England depended on the Bankruptcy Law Consolidation Act, 1849, as amended by the Bankruptcy Act, 1861, of which the full title was "An Act to amend the law relative to bankruptcy and insolvency in England." The collocation of the two words may be noted. Like all subsequent Acts of the same nature the Act of 1849 as amended aimed in substance at two things, justice to the creditors as a body and some measure of consideration to the debtor. The latter's property (speaking generally) was taken from him upon adjudication and vested in trustees for the benefit (subject to certain exceptions which need not be here mentioned) of all the creditors. The Bankruptcy Court had large powers of examining the debtor as to his affairs. If he had acted without dishonesty and certain kinds of impropriety he would ultimately get his discharge. During the proceedings he was protected from arrest and vexatious litigation by his creditors. After

obtaining his discharge he would be free from his previous liabilities (with certain exceptions) and could start in business again. The Act of 1861 also made certain provisions for non-traders and elaborate provision for the suspension of bankruptcy proceedings and for substituting a deed of arrangement subject to the approval, and under the control, of the court; and further, it enabled creditors to wind up a debtor's estate under a deed of composition subject to the jurisdiction of the court without taking any proceedings in bankruptcy at all (Bankruptcy Act, 1861, ss. 185-200). After the notice of the filing and registration of such deed no process against the property or person of the debtor was permitted without leave of the court. The previous Acts "for the relief of insolvent debtors" were repealed (sect. 230). It is manifest from a perusal of the Acts mentioned that they were passed on the assumption that the debts due to the creditors were enforceable by action and execution against the debtor and his property. That fact was one of the main reasons for the Act of 1861. Imprisonment for debt was in full operation in England (see sects. 98-107 of the 1861 Act. The law as to imprisonment for debt was amended by the Debtors Act, 1869). In England it has always been held that, subject to the statutory exception as to debts payable at some certain future time, the petitioning creditor's debt and the debts provable must be debts recoverable by legal process. For example, a debt barred by the Statute of Limitations is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy (see HALSBURY, Hailsham Edn., Vol. 2, pp. 59, 268). The Dominion Act is very similar to the English Bankruptcy Acts so far as those matters are concerned and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words "debt due." It should be added that in the usual case of a moratorium proclamation the debts become payable at a certain fixed time and therefore such debts are not within the above-mentioned principle: *Re Sahler* (5). In the Dominion of Canada there was no general Bankruptcy Act until the year 1919 (Bankruptcy Act, 1919, c. 36). The existing law in the Dominion is to be found in R.S.C., 1927, c. 11, as amended by 21-22 George V, c. 17 and c. 18; and 22-23 George V, c. 39. This legislation relates both to bankruptcy and insolvency, that is, it contains provisions for vesting the property of debtors in trustees (*a cessio bonorum* as it is sometimes called), and also for assignments and compositions by insolvent debtors without bankruptcy. It is, however, provided that Pt. I of the Act as amended, dealing with acts of bankruptcy, bankruptcy petitions and receiving orders, is not to apply "to wage-earners or to persons engaged solely in farming or the tillage of the soil."

In 1934 an Act entitled "The Farmers' Creditors Arrangement Act, 1934," was passed by the Parliament of Canada. It is stated that it shall be read and construed as one with the Bankruptcy Act, and it provides elaborate provisions for compositions and schemes of arrangement by farmers unable to meet their liabilities as they become due. The proposals for such compositions or schemes have to come from the farmers and to be approved by the court. Powers in relation to proposals were given to "Boards of Review" not very unlike those given to the board under Pts. III and IV of the present Act.

The validity of this Act was challenged in a proceeding instituted by the Attorney-General for British Columbia, and there was an appeal from the judgment of the Supreme Court of Canada to the Privy Council: *A.-G. for British Columbia v. A.-G. for Canada* (6). The judgment of the Board delivered by LORD THANKERTON contains a full statement of the main provisions of the Act there in question. The board, affirming the decision of the Supreme Court of Canada, held that the Act was *intra vires* of the Dominion Parliament under sect. 91 (21). The following passage in the judgment, at p. 402, is material to the present appeal:

Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters. Further, it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation.

In the opinion of their Lordships, there can be no doubt as to the pith and substance of the Act. It is legislation in relation to insolvency, that is, in

relation to a class of subject within the exclusive legislative authority of the Parliament of Canada. Its plain purpose is to relieve persons resident in the province and their estates from an enforceable liability to pay debts incurred before July 1, 1936, and in many cases to compel the creditors to accept compositions approved by the board. This is effected by precluding persons from any access to the courts of Alberta to enforce their rights against any persons resident in the province without the permission of the board which may never be obtained. It no doubt does not for all purposes destroy the rights of the creditors; but it deprives them of the remedies by which alone in the vast majority of cases those rights can be enforced. If judgments in respect of the debts in question have already been obtained it precludes or stays any proceedings by way of execution, attachment or garnishment unless the permit of the board has been obtained. Proceedings to enforce mortgages or other similar or analogous legal proceedings in relation to the recovery of land are subject to the same restriction. The debts or liquidated demands may have been incurred outside the province. It is plain from many sections of the Act (e.g., sects. 6, 8, 9, 21, 23, 26 and 28) that its main purpose is to relieve resident debtors where they are unable to pay their debts as they become due.

On the other hand, the board has the duty upon the application of a resident debtor or any creditor of such a person to "endeavour to bring about an amicable arrangement for the payment of the resident debtor's indebtedness," and to effect a settlement either in full or by a composition; and the proposed settlement is to be one by which the debts secured or unsecured, are reduced to an amount which is in accordance with the ability of the debtor to pay presently or in the future. The board clearly has power to refuse any permit to a creditor who does not accept the settlement suggested by the board. Their Lordships agree with the Supreme Court that it is impossible to escape the conclusion that Pt. III of the Act contemplates the use of the board's powers under sect. 8 to enable it to secure by a method amounting to compulsion the consent of the parties to the proposed arrangement.

Their Lordships also agree with the opinion expressed by the Supreme Court that, as regards debts where the creditor and the debtor reside in the province and the debt is payable in the province, the creditor is deprived of his right to present a bankruptcy petition under the Dominion Bankruptcy Act. For the reasons already given, fortified by a consideration of all the relevant sections in that Act, it must be held that in respect of an obligation to which the Act (of 1937) applies, there is no "debt owing" to the creditor within the meaning of the Bankruptcy Act, s. 4. It is not immaterial to note that the Act would be practically useless if, upon its true construction, it had the result of leaving any creditor or creditors with a debt or aggregate debts amounting to five hundred dollars at liberty to present a bankruptcy petition. In their Lordships' opinion, the Act of 1937 seriously interferes with the existing legislation of the Dominion.

On these grounds their Lordships have come to the conclusion, in agreement with the Supreme Court, on the one hand, that the Act as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and on the other hand, that it obstructs and interferes with the actual legislation of that Parliament on those matters. Moreover, if some of the less important provisions contained in the Act were to be regarded as merely ancillary to general Acts relating to bankruptcy and insolvency, such as those already referred to, that conclusion would not avail the appellant since in their Lordships' view the ancillary matters must be regarded as being within the domain of bankruptcy and insolvency, and the provincial legislature is precluded from entering into that now occupied field (*Royal Bank of Canada v. Larue* (7)).

Having arrived at this conclusion it would not be in accordance with the practice of the board for their Lordships to express their opinions on the other important matters discussed and decided in the judgment of DUFF, C.J., concurred in by RINFRET, DAVIS, KERWIN, HUDSON and TASCHEREAU, JJ. On these matters their Lordships think it right to express no opinion, and they desire to adopt the observations of LORD SUMNER in delivering the judgment of the Board in *A.-G. for Manitoba v. A.-G. for Canada* (8), as to the difficulties in which the provincial legislatures find themselves in matters like this, and the desire of their Lordships not to appear to say anything which might restrict

their authority in any case distinguishable from the present.

It should be mentioned that an argument was based on sect. 39 of the Act. It is there said in effect that the provisions of the Act shall not be so construed as to authorise the doing of anything not within the legislative powers of the province. The section cannot in this case at least assist the appellant. If apart from sect. 39 the Act is *ultra vires* it must be construed and treated as such; it remains a nullity and the section is plainly inoperative.

Their Lordships' attention was called to the fact that a result of the Act's total invalidity would be that the protection afforded by sect. 11 would disappear, and that rights which, in view of the Act, had not been enforced might have become time-barred. The hardship and injustice of such a result are undeniable, but they can only be avoided by an Act of the legislative assembly of the Province of Alberta.

In the result, the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed without costs, and that the opinion of the Supreme Court should be affirmed.

Appeal dismissed without costs.

Solicitors : *Blake & Redden* (for the Attorney-General of Alberta); *Charles Russell & Co.* (for the Attorney-General of Canada); *Lawrence Jones & Co.* (for the Canadian Bankers Association and the Mortgage Loans Association of Alberta); *Blake & Redden* (for the Attorney-General of Saskatchewan and the Interveners The Attorneys-General of Manitoba, Ontario and New Brunswick.

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

DAVIES v. RUSTPROOF METAL WINDOW CO., LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), **January 14, 15, 29, 1943.**]

Practice—Payment into court—Denial of liability in notice inconsistent with pleadings—Admissions of negligence and special damage in defence—R.S.C., Ord. 22, r. 1.

In an action for personal injuries suffered by the plaintiff, the defendants paid into court £750 with a denial of liability. On the same day the defendants delivered a defence in which they admitted negligence, the loss of two fingers by the plaintiff in consequence and certain items of special damage. The plaintiff contended that the notice of payment in with a denial of liability was inconsistent with the defence and asked to have the notice set aside. The master took the view that the plaintiff was not embarrassed by the notice because money paid into court under R.S.C., Ord. 22, whether with admission or denial of liability, cannot now be taken out of court except in satisfaction, and refused to make the order:—

Held: R.S.C., Ord. 22, does not permit a defendant to pay money into court with denial of liability in respect of a cause of action which has been admitted on the record. The notice was, therefore, bad, and should be set aside.

[EDITORIAL NOTE.] This decision is based upon *Cumper v. Potheary* (1), but it is now expressly decided that, where there is a payment into court with denial of liability, there must be no inconsistency between the notice and the pleadings. In other words, the defendant cannot admit liability in the defence and deny it in the notice. The Court of Appeal, however, express the view that as a matter of practical convenience the rule should be altered. A defendant may well be willing to admit both liability and some damage, but not all that the plaintiff claims. In such a case, the court, as at present advised, sees no reason why in such a case the plaintiff should not be allowed to admit liability as to part of the damages claimed, deny liability for damages in excess of that amount, and pay into court the sum admitted and a further sum with denial of liability. This, however, is not allowed under the present rules and could only be given effect to by an amendment of the Rules of the Supreme Court. The matter, it seems, is to be brought before the Rule Committee.

AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62-64, paras. 100-107, and FOR CASES, see DIGEST, Practice, pp. 479-484, Nos. 1591-1637. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 369-377.]
Cases referred to:

- (1) *Cumper v. Potheary*, [1941] 2 K.B. 58; [1941] 2 All E.R. 516; Digest Supp.; 110 L.J.K.B. 577; 165 L.T. 243.
- (2) *Critchell v. London & South Western Ry. Co.*, [1907] 1 K.B. 860; Digest, Practice, 87, 736; 76 L.J.K.B. 423; 96 L.T. 603.

(3) *Munday (J. R.), Ltd. v. London County Council*, [1916] 2 K.B. 331; 36 Digest 122, 812; 85 L.J.K.B. 1509; 115 L.T. 99.

APPEAL by the plaintiff from an order of CASSELS, J., dated Dec. 4, 1942. The facts are fully set out in the judgment.

M. Turner-Samuels for the appellant.

Humfrey H. Edmunds for the respondents.

A GODDARD, L.J. [delivering the judgment of the court]: The appellant, the plaintiff in the action, took out a summons before the master asking that a notice of payment into court by the defendants of the sum of £750 with denial of liability should be set aside as inconsistent with the defence. The master refused to make an order and his decision was upheld by CASSELS, J. This appeal is now brought, by leave of this court, against his decision.

B The action is brought to recover damages for negligence resulting in personal injury. By their defence the defendants admit the negligence and they admit that, as a result, the plaintiff's hand was injured and that two fingers had to be amputated, but otherwise do not admit the particulars of injuries. They also admit the items of special damage claimed, which amount to £83 10s., some of which was stated to be continuing. It follows that they have admitted a complete cause of action in which the damages must be not only £85 10s. but something more for the loss of two fingers and the pain and suffering thereby involved.

C On the same day as they delivered their defence they made the payment into court. The notice of payment, which is in the form prescribed by the rules, states that they have paid into court £750, and they say that that sum is enough to satisfy the plaintiff's claim for damages, but deny liability therefor; that is to say, they deny liability for any damages at all. Both the master and the judge appear to have taken the view that the plaintiff is not embarrassed by this notice, because money paid into court under R.S.C., Ord. 22, in its present form,

D cannot now be taken out except in satisfaction, whether paid in with admission or denial of liability. But there is this material difference. If money is paid in with an admission of liability, it follows that liability is admitted up to the amount paid in and judgment cannot be given for less, which is not the case where it is paid in with denial of liability. Unless, therefore, the rules permit a defendant to pay in with denial in respect of a cause of action that has been admitted on the record, it is, in our opinion, open to the plaintiff to say that,

E if the defendant desires to avail himself of his right to pay into court, he can only do so in accordance with his defence. He need not make any payment into court, but if he does he must admit liability for what he has paid in.

The question depends entirely on the construction of R.S.C., Ord. 22. In its present form r. 1 (1) permits money to be paid into court at any time after appearance in satisfaction of the claim or of one or more of the causes of action, and provides for notice of the payment being given to the plaintiff. Subrule (3) provides

F that the notice shall be in form 3 in Appendix B and shall state whether liability is admitted or denied. R. 2 provides for the plaintiff taking the money out of court, which now he can only do in satisfaction, whether liability is admitted or not. R. 3 provides that, if the whole of the money is not taken out, the money remaining in court shall not be taken out except in satisfaction of the claim or specified cause of action and in pursuance of an order of the court or a judge. This

G rule is meant to deal with the case of payments in made in respect of different causes of action. A plaintiff may desire to take out the money paid in in satisfaction of one cause of action but not in respect of another, but it is clear under r. 2 that he cannot take out part of a sum paid in in respect of a particular cause of action and continue to pursue his action in respect of it.

The present position, unlike that which obtained till 1933 when the rule was altered, is that money however paid in must be taken out in satisfaction or not

H at all. In our opinion the order contemplates that the notice should follow the pleading, and it does not permit a defendant to admit liability in his defence and deny it in his notice of payment into court. Indeed, the matter is really concluded by the judgment of this court in *Cumper v. Potheary* (1). The court dealt with an application to amend a notice of a payment in, which had been refused by the judge in chambers. In upholding his decision the court gave as one of its reasons that the notice was objectionable in that the notice denied the damage which had already been admitted in the defence. But, as we desire to call the attention of the Rule Committee to the matter, we think we may with

advantage deal with what the position was before the order was altered in 1933.

Formerly a defendant could pay money into court with admission of liability either before or with his defence. The plaintiff could take the money out and continue the action in the hope of getting more. A payment in with denial of liability could only be made with, and had to be stated in, the defence. In this case, if the money was taken out, the action was at an end. There was no provision whereby a defendant could say, "I admit I owe you £x which I bring into court, and for the sake of peace I am willing to offer you a further sum which I also bring into court"; nor is there in the present rules. This put defendants in some difficulty. They might be unwilling by admitting liability to put the plaintiff into the position of being able to continue the action with their money, while, at the same time, they did not wish to incur the expense of putting the plaintiff to the proof of negligence which was, in reality, not in dispute. Those who were in practice before the alteration of the rule will remember that where a plaintiff recovered no more than was paid into court with a denial, the common form of order as to costs was that the plaintiff got the costs of the issue of liability though not of that relating to damages after the payment into court.

The first reported attempt to avoid the difficulty is *Critchell v. London & South Western Ry.* (2). There the defendants denied both negligence and damage in their defence and paid a sum into court. At the same time they wrote to the plaintiffs saying that the denial of negligence was only formal and that they intended and undertook to admit it at the trial. The Court of Appeal struck out the defence as being an abuse of the process of the court. This case is closely analogous to that which we are now considering. The letter was not a pleading, but it plainly showed that the defence was inconsistent with the defendant's real case. Here the notice under R.S.C., Ord. 22, r. 3, which also is not a pleading, is equally inconsistent with the real defence. If the defence in *Critchell's* case (2) was not allowed to stand, neither ought the notice in the present case.

Then came *J. R. Munday, Ltd. v. London County Council* (3). There negligence was not put in issue, but damage, a necessary part of the cause of action, was. The court held that this was legitimate. It showed quite clearly that the issue to be tried was whether the plaintiff had sustained damage and, if so, what the amount should be. This form of pleading has often been adopted. But it may happen, as in the present case, that the defendant is willing to admit both negligence and some injury and damage, but not all that the plaintiff alleges. We are unable to see why, in such circumstances a defendant should not be allowed, if he so desires, to pay into court a sum in satisfaction of the damage that he admits and at the same time make an offer of a further sum which he could pay into court with denial of liability. We do not suggest that this should be limited to actions based on negligence; we see no reason why it should not apply generally. We hope it will be considered whether subrule 3 may not be altered so as to allow a part of the payment to be made with admission and the excess with a denial of liability. It might also be considered whether a defendant should not be allowed, as of right at any time to increase, but only by leave of the court to reduce, the amount paid in, whether with admission or denial of liability. There may be some good reason why this has not been hitherto allowed, but, if there is, we are not aware of it. The alterations we have suggested would at any rate enable the realities of the situation to be clearly set out in the proceedings. It would, for instance, in personal injury cases enable the defendants to admit the extent of the injuries which were not in dispute. In contract it would do much to make clear the measure of damage for which the defendant would contend where a breach was admitted. In the present state of R.S.C., Ord. 22, this cannot be done, and for the reasons given we are of opinion that the notice in the case before us must be set aside.

The appeal is allowed, with costs to the plaintiff here and below in any event.
Appeal allowed with costs.

Solicitors: *J. H. Milne & Son*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *Barlow, Lyde & Gilbert* (for the respondents).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

ROBINSON v. ROBINSON.

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), **January 19, 1943.**]

Divorce—Ancillary relief—Conduct of parties—Information not disclosed at hearing of petition—Res judicata—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

A A wife was granted a decree of dissolution of marriage on the ground of the husband's adultery. The husband did not raise the question of the wife's adultery at the hearing of the petition, although he could, by the exercise of care, have been in the possession of this information. He first raised the point at subsequent proceedings under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. On behalf of the wife it was contended that it was no longer open to the husband to raise the issue of her adultery because the fact was *res judicata*. The husband contended that, on the question of maintenance and security there was a statutory direction that there must be an inquiry as to the conduct of the parties. The wife further contended that it was against public policy to permit a petitioner to stand by and get a decree, which could have been avoided by the disclosure of information which could have been in his possession, and then to set up those facts in subsequent proceedings:—

C HELD: (i) the wife's adultery was never determined as a fact at the hearing, and therefore, that fact was not strictly *res judicata*.

(ii) the husband could not be allowed to use information during proceedings under sect. 190, which he had refrained from using at the hearing of the petition and which, but for his carelessness, would then have been in his possession.

D [EDITORIAL NOTE.] This case considers an important point on *res judicata*. A question of fact once litigated between parties is not allowed to be litigated a second time between the same parties. Here the wife's adultery, if it had been disclosed on the hearing of the petition for divorce, would have been a discretionary bar to the decree. The husband, however, did not contest the petition and, indeed, did not himself know of the adultery, although he could have learnt of it by inquiry of his solicitors. The fact, therefore, was not litigated on the hearing of the petition and the omission to do so may be said to have been the result of the husband's carelessness. E The court has held that in such circumstances the law does not allow a husband to stand by and permit a decree of dissolution to be made and then to raise this question on an application for maintenance.

AS TO CONDUCT OF PARTIES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 788, 789, para. 1249; and FOR CASES, see DIGEST, Vol. 27, pp. 501, 502, Nos. 5361-5378.] Cases referred to:

(1) *Lindsay v. Lindsay*, [1934] P. 162; Digest Supp.; 103 L.J.P. 100; 151 L.T. 283.

(2) *Mould v. Mould*, [1933] P. 76; Digest Supp.; 102 L.J.P. 21; 148 L.T. 499.

F (3) *Restall v. Restall*, [1930] P. 189; Digest Supp.; 99 L.J.P. 123; 143 L.T. 225.

SUMMONS on an inquiry relating to maintenance on an application for secured maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. The facts are fully set out in the judgment.

Harold Brown for the petitioner.

D. Armstead Fairweather for the respondent.

G HENN COLLINS, J.: This is a summons which I adjourned into open court because it appeared to me to raise a matter which required more argument than could be given to it under the ordinary conditions in which a summons is heard. It seeks an order, on the part of the husband respondent to a divorce suit in which there has been a decree grounded on his adultery, that an issue should be tried as to whether or not his wife, who was the petitioner in the suit, has committed adultery, for the purpose of an inquiry which is taking place under H the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, in the matter of payments secured or otherwise to the wife for her maintenance. It is said, on the part of the wife: It is no longer open to my husband to raise the issue of my adultery, because it is *res judicata*.

As I pointed out in the course of the argument, the phrase *res judicata* is used to cover two separate states of things. First and foremost the state of things in which a judgment has passed between the parties and there is involved, as a basis of that judgment, a finding or findings of fact. Both parties are then precluded from disputing those facts in any subsequent litigation between them.

The other aspect of the term is rather different. It is used where the facts sought to be set up in some subsequent proceeding are facts which, though not involved in the judgment given in a former suit, would, or might if they had been set up in that suit, have altered the position. That is not, strictly, raising any issue which has already been adjudicated, but the phrase *res judicata* is often used in relation to that set of facts.

In this case I have to consider both aspects. First of all, on the strict interpretation of *res judicata*, is the issue of the wife's adultery involved in the decree that has passed in that suit? If it is, then in ordinary cases outside this division there would be no further question to be asked about it. The decision would be final and concluded between the parties, and neither could dispute the facts that were fundamental to it. But it is said that that is not so here, having regard to the terms of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190.

Let me first of all, before I consider that supplemental and subsidiary point, deal with the question of *res judicata* in its strict aspect. It was a wife's suit for dissolution on the ground of her husband's adultery. To such a suit, an allegation of the wife's adultery might, but not necessarily would, have afforded a conclusive answer. She might still, although convicted of adultery, have obtained a decree, because her adultery would only be a discretionary bar. In that state of things, taking the decree *nisi* or decree absolute and looking within the four corners of it, could anybody say, Aye or No, whether the wife's adultery had ever been determined as a fact? It does not seem to me to be an issue of fact fundamental to the decree, nor necessarily involved in it. I, therefore, do not think that the wife's adultery is a matter *res judicata* in the strict sense of the term.

Another aspect of the matter is: Was the husband, respondent in this particular case, in a position to bring before the court, at the trial of the suit, the facts which he now wants to raise by way of issue? Well, as to that, the state of facts agreed is that he did not, in fact, know the material he now finds available, but that he could have ascertained it by communicating with his solicitors, and could have acted accordingly in the suit.

If, after the decree in the suit, he had made an application to extend the time for appearing, on the ground that he had not got the material at the moment desired, the short answer to such an application would have been: "Well, that is your own fault; you could, on the facts, have got it with reasonable diligence."

I have to ask myself, in those circumstances, leaving aside for the moment any special question which arises on sect. 190, whether he ought now to be permitted to avail himself of that evidence. The answer, clearly, is No.

That, of course, as counsel for the respondent has urged, does not necessarily dispose of the matter, because, as he points out, there is the statutory direction that, among other matters, the conduct of the parties has to be inquired into upon the question of maintenance and security. He says that is a statutory obligation and that the conduct of the party who has to pay, in not producing the evidence when he could, has nothing to do with that aspect of the matter.

On the other hand, counsel for the petitioner says that in the public interest a man ought not to be allowed to stand by and get a decree which he could have avoided, or, at any rate, if he could not have avoided it, it should not have passed without the court knowing all the facts, and that it is against public policy to permit him now to set up facts of that kind.

That is the aspect of the matter which, to my mind, raises the greatest difficulty. I think this particular question would not have arisen at all but for a doubt which SIR BOYD MERRIMAN, P., had and expressed in *Lindsay v. Lindsay* (1), where he says, on p. 166:

In *Mould v. Mould* (2), BATESON, J., held that the rule laid down in *Restall v. Restall* (3) extended to maintenance proceedings in a case of dissolution of marriage in which there had been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer to the original petition, if pleaded. Speaking for myself, I should desire to consider the matter further before holding that that result followed from the decision in *Restall v. Restall* (3).

Then he proceeds to give his reasons for that conclusion. It was a question in which the misconduct which was sought to be set up in maintenance proceedings would, in fact, have had no bearing at all upon the matters in issue between the parties, and, therefore, SIR BOYD MERRIMAN, P., if I may respectfully

say so, very wisely reserved that question—or, rather, declined to regard *Restall v. Restall* (3) as extending to such a case. But *Restall v. Restall* (3) does clearly cover a case in which the matter sought to be raised on a subsequent occasion might have afforded a possible defence to the original petition; and it seems to me that this case falls within the principle of *Restall v. Restall* (3).

The view I have come to in this case is that, although proceedings under sect. 190 are separate proceedings, a party ought not to be allowed to refrain from using information which he has, or of which by carelessness he has failed to get possession, and then, when it begins to affect his pocket under sect. 190, to turn round and say: "Now I am proposing to prove it and put you to all the expense of a separate issue." The summons must, therefore, be dismissed.

Summons dismissed.

Solicitors: *Pritchard, Englefield & Co*, agents for *Chamberlain & Martin*, Bognor Regis (for the petitioner); *Marcy, Russell Cook & Co.* (for the respondent).

[Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.]

TRAWLERS (GRIMSBY), LTD. v. CROUCHEN.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.). **January 21, 1943**].

Workmen's Compensation—Compensation—Increase in basic rate of wages—Increase of more than 20 per cent.—Poundage—Increase in total amount of poundage but not in rate of poundage.—Workmen's Compensation Act, 1925 (c. 84), s. 11 (3).

A workman, who was the third mate on a trawler, received injuries to his hand which incapacitated him from carrying on his employment. Previous to the accident his earnings consisted of a basic wage of £2 5s. 6d., food estimated for the purposes of wages at 12s. 6d., and poundage of 12s. The last item was remuneration arising out of his right to share in the profits of the trawler, calculated on a basic rate of 4d. in the pound. On a review under the Workmen's Compensation Act, 1925, s. 11 (3), the workman contended that during the 12 months previous to the review his hypothetical earnings would have been a basic wage of £2 9s., food 18s., risk money payable during the war amounting to £1 5s., and increased poundage amounting to £7 8s. The poundage was still calculated at the same rate of 4d. in the pound, the increase in the total amount being due to the greatly increased earnings of the trawler. The employers contended that, the rate of poundage being the same, the increase in the total poundage had not to be taken into consideration under the Workmen's Compensation Act, 1925, s. 11 (3):—

HELD: on the true construction of sect. 11 (3), a distinction must be drawn between "rates of remuneration" and "average weekly earnings" and it is the rate which must be taken into consideration and not the actual amount received. In this case, since the rate of poundage remained constant, the increase in poundage due to increased profits was not to be taken into consideration; but the increases in the basic wage, the food and additional item of risk money which was really an increase in wages, had to be taken into consideration.

[EDITORIAL NOTE.] The subsection here in question allows a review by reason of a fluctuation in the rates of remuneration. It had already been decided that the subsection can only be applied in a case where the rates of remuneration have changed and not where men may be earning more by reason of the fact that there is more work to be done but paid for at the same rate. In this case this principle is applied to the poundage paid to trawlermen, which is a share of the profits payable to the men as part of their wages. This payment by way of poundage has very greatly increased since the outbreak of war, but it is still paid at the same rate although on very greatly increased profits. Since it is paid at the same rate, it has not to be taken into account on a review of the compensation.

AS TO REVIEW ON FLUCTUATION IN WAGE RATES, see HALSBURY, Hailsham Edn., Vol. 34, p. 955, para. 1306; and FOR CASES, see DIGEST, Vol. 34, p. 415, Nos. 3371-3373]. Case referred to:

(1) *Hill v. Wolverhampton Corrugated Iron Co., Ltd.*, [1939] 2 K.B. 469; [1939] 3 All E.R. 72; Digest Supp.; 108 L.J.K.B. 536; 161 L.T. 6; 32 B.W.C.C. 129.

APPEAL from an award of His Honour JUDGE LANGMAN, at Great Grimsby County Court, dated Sept. 3, 1942. The facts are fully set out in the judgment of SCOTT, L.J.

F. W. Beney for the appellants.

G. C. Dare for the respondent.

SCOTT, L.J. : This is an appeal from an application to review and depends upon the proper construction of the Workmen's Compensation Act, 1925, s. 11 (3). I think that it is convenient to read the subsection first :

Where the review takes place more than 6 months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than 20 per cent. than his average weekly earnings during the 12 months previous to the accident . . . the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident.

In this case an application was made on behalf of the workman, in proceedings initiated by the employers for review, for the benefit of that subsection. The workman was the third mate of a trawler. He had been injured by an accident affecting one hand, and the county court judge had found as a fact that he was incapacitated from continuing his work as third mate in a trawler. Before the accident his earnings had consisted in (a) basic wage, £2 5s. 6d.; (b) food, estimated for the purposes of wages at 12s. 6d., and (c) poundage 12s. The first two items call for no explanation. The third item was remuneration arising out of his right to share in the profits of the trawler. That right of sharing was calculated in his case on a basic rate of 4d. in the pound. His average weekly earnings by way of poundage, as it was called, amounted to 12s. The total of the three made £3 10s.. He was incapacitated, I think, in 1938 or 1939, but the dates that are relevant here are later dates. The wage of £3 10s. so calculated is agreed, including the rate of poundage at 4d. The case for the respondent was that by reason of increased rates of remuneration during the 12 months previous to the review his hypothetical earnings would have been (a) £2 9s. basic wage; (b) food, 18s. instead of 12s. 6d.; (c) an additional element in the rate of the basic wage called "risk money," payable during the war, which in terms of weekly remuneration amounted to £1 5s.; and (d) a very large addition to the total earnings under the head of poundage, which raised them from the original earning of 12s. to an earning of £7 8s. The total, so hypothetically earned in the 12 months before the review, amounts to £12. The county court judge held that all those items must be taken into account under the subsection, with the result that the respondent would be entitled to the full total of 30s. per week, as compensation under the Act. The appeal is from that decision and it raises the question of the meaning of the subsection.

The county court judge, in my view, did not distinguish between rates of remuneration and average weekly earnings. Take the item of poundage as the test. The reason why in each average week of 12 months before the review his figure of poundage would have been £7 8s. as compared with 12s. in the earlier year, was that before the war the difficulties in the way of trawlers making large profits were many; there were many trawlers; prices varied; there were gluts; there was waste of fish; and various other causes. The share of profits attributable to this particular workman was low, because the total profits were low. During the war the number of trawlers competing with each other was very much reduced, with the result that the catches of fish per trawler had increased enormously in amount; and, further, prices had been controlled during the war, so that the risk of losses and of bad prices had been very much reduced. Hence the very great disparity between the two periods. In my view, the county court judge misconceived the meaning of the subsection. The £7 8s. brought into the account not merely the 4d. rate, which was the respondent's share of whatever profits might be made, but applied it to the actual profit. The basis of the actual increase was not, as he thought, that the rate was altered, because the rate remained the same; it was that the total profits were enormously increased by reason of the quantity of the catch, week in and week out during the year, and by reason of the much better prices received. Quite shortly, the total profits were enormously increased, but the rate remained the same. I need not refer to the particular language of the judgment further than to say that the county court judge uses the word "rate" in my view as equivalent to "*quantum*," which it essentially is not. Hesays towards the end of his judgment:

It may be that the rate is now abnormally high because of the grave risks, but the workman would be earning that rate if uninjured. The employers benefit from the high rate of wages paid to a partially incapacitated man at the present time. In normal times this workman would probably have no market for his labour in his injured condition. That reasoning has no application to the fundamental mistakes he makes in treating the rate of remuneration as in effect equivalent to average earnings. If we look at the subsection, the language is very definite, and very clear:

(3) Where the review takes place . . . and it is claimed and proved that, had the workman . . . continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration . . .

At the outset, the subsection contemplates one cause only for taking into account the increase or decrease as the case may be, and in the last four or five lines of the subsection it says that in that case:

. . . the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident.

Prima facie, that language assumes that other things remain equal in the two periods of comparison. You must take the first period as the basis and with it compare the second period for one purpose, and one purpose only, that of looking at the rates of remuneration. If those, and those alone, make a difference of more than 20 per cent. either way, then the later period is to be taken into account, but not otherwise. In order to do that you must assume that the facts of the first period are treated as "constants," to use a mathematical term, for examination of the second period. If the remuneration in the first period was based upon time, then you must take the same time for the second period. If it was based upon piecework, you must take the piecework *quantum* of the first period to work out the average earnings in the hypothetical period. It is only by making the assumption of complete parity of other factors that you get the comparison directed by the section of the change in rate of remuneration and are able then to see whether by reason of its fluctuation the quantitative difference in earnings contemplated has been brought about.

This very question came before this court in *Hill v. Wolverhampton Corrugated Iron Co., Ltd.* (1). In that case it was a question of a decrease of rates, and it is not necessary to go into the facts. I cite it in order to refer to the language of the court in giving judgment upon the meaning of the section. The court consisted of MACKINNON and LUXMOORE, L.J.J., and MACNAGHTEN, J. MACKINNON, L.J., said at the outset that he had read the judgments prepared by LUXMOORE, L.J., and MACNAGHTEN, J., and he agreed with their conclusions and did not think it necessary to add anything. LUXMOORE, L.J., said, at pp. 477, 478 ([1939] 3 All E.R., at p. 77):

Sect. 11 (3), while directing that two particular periods shall be contrasted, provides that the difference in the average weekly earnings in those periods is to be the result of fluctuations in the rates of remuneration. This appears to me to exclude from consideration any alteration due to the time factor. On this construction the phrase "rates of remuneration" requires to be read as being equivalent to rates of wages. It was argued on behalf of the employers that this was not the correct construction, because although the phrase is not actually used in any other part of the Act there are to be found in sect. 10 references to "the rate per week at which the workman was being remunerated" and to "the rates of remuneration" and that such references are synonymous with "average weekly earnings." In considering the meaning of this phrase it is, I think, legitimate and proper to bear in mind that a general rise or fall in wages has always been held to constitute a change of circumstances within the meaning of the Workmen's Compensation Act, 1906 (see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., p. 333, and cases there cited). Bearing this in mind, it is, I think, impossible in the subsection under consideration to construe the phrase "rates of remuneration" as equivalent to "average weekly earnings."

Then MACNAGHTEN, J., said, at p. 482 ([1939] 3 All E.R., at p. 80):

It was said in argument for the respondents that the subsection is obscure because it does not say in express terms what is the amount of employment which the disabled workman is to be supposed to have had during the 12 months preceding the review. But it seems obvious that he must be supposed to have had during the 12 months preceding the review exactly the same amount of employment—no more and no less—as he in fact had during the 12 months preceding the accident.

Applying that interpretation of the section, as I do, to the facts of the present case, the result is that we treat the poundage rate as remaining unaltered. The total earnings before the accident were the £3 10s. I have referred to. The

total calculated in accordance with the subsection amounts to £5 4s., namely, £2 9s. basic wage, 18s. for food, the £1 5s. for additional wages during the war, and 12s. for poundage. The difference between those two is 34s., and half that difference is 17s. That is the amount of the compensation, in my view, which ought to be treated as payable as the result of the review. The appeal will, therefore, be allowed.

MACKINNON, L.J.: I agree. For the purposes of this case the material part of the man's earnings in the pre-accident period was a percentage on the profits of the trade and part of the remuneration of the men in the trade in the pre-review period was a similar percentage. It is conceivable that the whole remuneration of the men in the trade in both periods might have been a percentage on such profits. If that were so, under sect. 11 (3) as interpreted by this court in *Hill v. Wolverhampton Corrugated Iron Co., Ltd.* (1), the question would be to compare the percentage of the profits in the one period with the percentage ruling in the second period. If the percentage in the pre-review period was higher than the percentage in the pre-accident period the difference as a percentage on the profits in fact made in the pre-accident period would give the figure required to show how much the man ought to be awarded. In fact, in this case the percentage in both periods was the same, 4d. in the pound. The county court judge has not applied the formula which I have suggested is the correct one. He has calculated not the result of the percentage on the pre-accident profits, but compared the difference between the result of the percentage of the pre-accident profits and the result of the percentage of the pre-review profits. That, I think, is wrong. In the rate of remuneration by a percentage of profit there has been no change at all; the change has been in the amount of profits to which that percentage has to be applied. That factor, the amount of profits in the two periods which is sought to be applied, I think is not one properly to be considered in the application of sect. 11 (3). I think, therefore, for that reason the county court judge was wrong in his construction of the Act and that this appeal succeeds in the manner which has been indicated by SCOTT, L.J.

GODDARD, L.J.: I agree. There are four items we have to consider. It is agreed by counsel for the appellants that the basic rate of remuneration so far as the basic wage is concerned has risen because the risk money is no more than an increase in wage. It has not been suggested that the difference in the value of the allowance for food is otherwise than a difference in the rate of remuneration. When one comes to the poundage, the county court judge has read the words "rate of remuneration" it seems to me as equivalent to "average amount of remuneration." I can see no reason for reading the words in that way. The rate of remuneration remains the same, just as the rate of interest remains the same, although the capital sum on which it is charged or paid may no doubt have been increased. The rate of remuneration in this case remained always constant in the case of the poundage at 4d. in the pound. If we held otherwise it seems to me that, though it would work a benefit to the applicant in the particular case, it would be disastrous to workmen as a whole because under this section not only are workpeople entitled to ask for an increase but employers are entitled to ask for a decrease and, if the words "rates of remuneration" had the meaning which the county court judge in this case has put upon them, it seems to me it would be open to an employer to come to the court at any time and say: "Although at the time that this workman met with the accident his average weekly wage, which I ask you to say means his rate of remuneration, was, let us say, £3, I will show you that all men in his grade are no longer earning more than £2 per week and, therefore, I ask for the award to be cut down." That would be bringing into the calculation of the compensation the state of the labour market. So long as the rate of remuneration, whether it is per piece, per hour or per week, remains the same, the employer cannot ask to reduce any more than the workman can ask to increase. That is why I say that, if we adopted the construction which the county court judge puts upon this subsection, I am sure that in the long run it would work very much against the interests of the workmen. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Smith & Hudson*, agents for *Walter West*, Great Grimsby (for the appellants); *Maude & Tunnicliffe*, agents for *James Young*, Great Grimsby (for the respondent). [*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Re THARP, LONGRIGG v. THE PEOPLE'S DISPENSARY FOR SICK ANIMALS OF THE POOR, INCORPORATED AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon, and Luxmoore, L.JJ.),
February 4, 1943.]

A *Charities—Misdescription—Will giving many charitable gifts to institutions.*

By her will dated Jan. 17, 1934, the testatrix, who died on Jan. 19, 1940, after making certain pecuniary legacies, divided the residue of her estate in equal shares among 34 institutions, all of them connected with the welfare of animals and the prevention of cruelty to animals. One such share was given to The Tangier Society for the Prevention of Cruelty to Animals, care of the Dispensary for Sick Animals, 14, Clifford Street, Bond Street, London." It was not disputed that the institution referred to as "The Dispensary for Sick Animals" was the appellant society which was a beneficiary of residue under cl. 13, para. 6, of the will. The question that arose related to the words "The Tangier Society for the Prevention of Cruelty to Animals." There had never been any society bearing that name nor had there been any society which had confined to Tangier its operations in respect to the prevention of cruelty to animals. In 1924, however, the appellant society established a branch organisation at Tangier and that branch had existed ever since. There was documentary evidence that the testatrix had regularly subscribed for many years to something she called "The Tangier Fund," and that the subscriptions had been sent to the secretary of the appellant society:—

D **HELD:** on the true construction of the will, the recipient of the legacy in question was intended by the testatrix to be and must be taken to be the appellant society, the gift being earmarked for the work of its Tangier branch.

Decision of BENNETT, J. ([1942] 2 All E.R. 358) reversed on this point.

[**EDITORIAL NOTE.** The point here considered was a subsidiary point in the judgment of BENNETT, J., and on the main question before him there was no appeal. The question is purely one of the construction of this particular will and is included here because the decision of BENNETT, J., on this point, which is reversed, was reported together with the principal question debated before him. BENNETT, J., treated the question as one of a misdescription of the appellant society, but the Court of Appeal have treated it as a misdescription of a branch of the appellant society.]

AS TO MISDESCRIPTIONS OF CHARITIES, see HALSBURY, Hailsham Edn., Vol. 4, p. 180, para. 243; and FOR CASES, see DIGEST, Vol. 8, pp. 310-312, Nos. 911-933.]

F **APPEAL** by the defendants, the People's Dispensary for Sick Animals of the Poor, Incorporated, from an order of BENNETT, J., dated July 22, 1942, reported [1942] 2 All E.R. 358. The facts are fully set out in the judgment of LORD GREENE, M.R.

Harold Lightman (for *R. W. Goff* on war service) for the appellants.

G. D. Johnston for the first respondent, representing the next of kin.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *H. O. Danckwerts* for the Attorney-General.

P. L. Bushe-Fox (for *B. F. Mendel* on war service) for the respondent executors.

TH **LORD GREENE, M.R.:** The question raised by this appeal relates to one of the charitable gifts contained in the will of Mrs. Madeleine Jane Tharp, who died on Jan. 19, 1940. Her will was dated Jan. 17, 1934, and after certain pecuniary legacies she dealt with her residuary estate by dividing it in equal shares among 34 institutions, all of them connected with a matter which the testatrix had deeply at heart, namely, the welfare of animals and the prevention of cruelty to animals.

The particular gift as to which the present controversy arises is No. 26 in cl. 13 of the will and is in these terms:

... to the Tangier Society for the Prevention of Cruelty to Animals, care of The Dispensary for Sick Animals, 14, Clifford Street, Bond Street, London.

It is not in dispute that the institution referred to as "The Dispensary for Sick Animals" in that clause is in fact an institution the true name of which is The

People's Dispensary for Sick Animals of the Poor, Incorporated. That particular society by part of its correct name is one of the beneficiaries of residue under para. 6 of cl. 13. It is there described as "The People's Dispensary for Sick Animals," omitting the words "of the Poor, Incorporated," but nevertheless there is no controversy as to the identity of the particular society referred to by that description.

The question that does arise relates to the words "The Tangier Society for the Prevention of Cruelty to Animals." There is not and never has been any society bearing that name, nor has there been any society which has confined to Tangier its operations in respect of the prevention of cruelty to animals. But there is in evidence a number of matters which, in my judgment, leave no room for doubt as to what the testatrix meant.

It appears from the affidavit of Bridges Webb, the general secretary of The People's Dispensary for Sick Animals of the Poor, Incorporated, that some years before the year 1924, going back at least as far as the year 1918, there was a society called "The Society for Prayer for the Prevention of Cruelty to Animals" of which a Miss Burgess was the head. That society had a representative in Tangier in those days, but it never did any work of treating or relieving animals; it confined its operations to prayer and propaganda. In the year 1924, Miss Burgess approached a Mrs. Dickin, who was one of the founders of the appellants society, and suggested that that society should extend its work to Tangier, and Miss Burgess provided the society with the sum of £1,500 towards the cost of opening a dispensary there. In accordance with these directions in the year 1924, the society established a branch organisation at Tangier, and that branch has continued in existence ever since. It started with a dispensary and an inspector, but now, apparently, it has a hospital where animals are received and undergo treatment. It has never been anything more than a branch of the appellants society and has never had any separate constitution of its own, but it was administered by a local committee acting under an authority delegated by the council of management of the appellants. It is carried on in the main from local subscriptions, that is to say, of people in and about Tangier. The appellants society has in Tangier a banking account in its own name, and all monies collected for its work in Tangier are used exclusively for that work and are paid into that account. It has no other separate fund or account earmarked for work in Tangier.

That is the position with regard to the appellants society's connection with work in Tangier. There are in evidence documents kept by the testatrix, the principal one being an account book in which she kept, with the greatest care, records of the very large sums which she annually subscribed to charities in connection with animals. In that account book the following history appears. Commencing with the year 1918, and going down to the year 1924—I take that year for this purpose because that was the year in which the society opened its branch at Tangier—in every year beginning in 1918, and ending in 1924, there is recorded a subscription to what the testatrix called "The Tangier Fund for Animals." That is the regular description which she gives down to August, 1924. In some cases she indicates the persons to whom those subscriptions were sent. The first mention of an individual is in October, 1919: "The Tangier Fund for Animals sent to Miss Cobb, Arnside, Balmoral Road, Parkstone." In the year 1920, it was again sent to Miss Cobb. In the year 1921, there is no name given nor is there in the year 1922, but in 1923 the money is sent to Miss Burgess instead of Miss Cobb. That is obviously the lady mentioned in Bridges Webb's affidavit, the lady who induced the appellants society to open a branch in Tangier and provided £1,500 for the purpose. In August, 1924, the entry is "The Tangier Fund for Protection of Animals in memory of my mother," with no name of the person or address to which the money was sent. There is a similar entry in August, 1925, but in August, 1926, there comes a change because there the entry is "Tangier Fund in memory of my mother sent to Mrs. Dickin, 14, Clifford Street, People's Dispensary for Sick Animals of the Poor." Mrs. Dickin at that time was, I think, the general secretary or, if not the general secretary, she was a member of the council of management of the appellants society. It is to be observed that these payments were sent regularly every year. In August, 1927, the money is sent to Mrs. Dickin, 14, Clifford Street, without mentioning the name of the appellants society whose address that was.

In August, 1928, the money is sent to the secretary of the Dispensary for Sick Animals, 14, Clifton Street, which is obviously an error for Clifford Street. In August, 1929, it is sent to Mrs. Dickin. In August, 1930, it is sent to Mrs. Dickin. In March, 1929, there is a special entry: "Gave to a bazaar my silver-plated fruit basket in aid of the Tangier Fund for Animals got up by the P.D.S.A.", which is, of course, the appellant society.

- A That completes the references to the Tangier Fund in that document, but there is another document which, from the entry, apparently relates to the year 1931, which again refers to the payment of a subscription to the Tangier Fund addressed to the Dispensary for Animals at Clifford Street. I do not think I mentioned the last entry in August, 1930, "sent to Mrs. Dickin." There was also an address book that the testatrix kept which has some significance. It contains the addresses of various charities to which she was evidently subscribing. On p. 3 it has this entry: "Tangier Fund for the Protection of Animals sent to Mrs. Dickin. The People's Dispensary for Sick Animals of the Poor, 14, Clifford Street, New Bond Street, W.1.", and after that in brackets there is "better to Mrs. Dickin." It does not appear on what day that entry was made, but there are words which have been rubbed out by the testatrix but are still decipherable: "or to Miss Burgess, Potters Bar." Miss Burgess had been the founder of the Society for Prayer for the Prevention of Cruelty to Animals. One can draw the inference from what is rubbed out in the book that the testatrix did not regard Miss Burgess as being thereafter concerned in this matter at all, and indeed from 1926, and possibly from 1924—we cannot be certain about that because we have not the cheques or the accounts of the society—the change mentioned by Bridges Webb (I mean the start of the Tangier branch by the society) is reflected by these entries in the book. The course which the testatrix took in sending her subscriptions to the secretary of the appellant society agrees with the change in the situation which took place when that society started its Tangier branch, and apparently the Society for Prayer for the Prevention of Cruelty to Animals ceased to be interested in Tangier. It was suggested that these documents afford no real evidence as to the payment of the subscriptions by the testatrix or as to who received them or what happened to them when they were received. It was, however, assumed by everybody in the court below that these records were true records of what took place and that the testatrix in fact at the times mentioned sent the amounts mentioned to the addresses mentioned and for the purposes mentioned. It seems to me that it is quite impossible to suggest, in view of that, that these entries are not sufficient evidence of what they purport to show. It was then suggested that nobody can tell, so far as the evidence goes, what happened to the money when it got into the hands of the recipient. It is true some evidence might have been provided with a little more patience. The accounts of the society might possibly have been put in or the pass-books might have been searched and so forth, but one thing that is perfectly manifest to my mind, in view of the affidavit of Bridges Webb, is that it is right to assume that that money, which was sent to the secretary of the appellant society, was used by the secretary or the appropriate officer of the society for the purposes of its Tangier Branch. If it had not been used, if it had been sent to some other society, it is impossible that that would not have been mentioned in Bridges Webb's affidavit. It would have been a most deceitful affidavit to have suppressed the fact that money which it is common ground was received by the appellant society was handed over to somebody else or not used for the purposes of the appellant society. It is not expressly so stated in the affidavit, but it probably never occurred to anybody that it was necessary to say so, and I, for myself, am prepared to assume that if it had been otherwise, the affidavit would have said so.

We find, therefore, that for a number of years money had been sent to the secretary of the appellant society for the purposes of something called by the testatrix "The Tangier Fund." When the language used by the testatrix is compared with the true facts as they appear, we find that there was never a thing called "The Tangier Fund." A "Fund" might be anything, a collecting box or a society (e.g., "the National Arts Collection Fund"), or a branch of a society. But, to my mind, nobody can doubt that when the testatrix refers in these notes to the Tangier Fund, she is referring to the Tangier Branch of the

appellant society. There is nothing to suggest that those entries could in any way be identified with anything except that branch.

That, of course, does not end the matter, because what we have to deal with is the language of the will. In the will she says :

... to the Tangier Society for the Prevention of Cruelty to Animals, care of The Dispensary for Sick Animals, 14, Clifford Street, Bond Street, London.

The facts being as I have described them, there was a branch of the society which existed in her lifetime referred to her as "The Tangier Fund," for which she had been providing money every year and which carried on operations in Tangier for the prevention of cruelty to animals. Can it be doubted that in describing it in the language which she used in her will she is doing anything more than describing the recipient of the benefactions which she had made for years in the past. It seems to me that to say the contrary flies in the face of common sense. Whoever drafted this will may have been confused or was imperfectly informed as to the status of the Tangier branch of the appellant society. It may be that the testatrix herself was not sure what the precise status was as regards the purpose of what she wanted to benefit, but that does not alter the fact that for a course of years she had sent money earmarked for this purpose to this society, and the society received it.

In my opinion, on the true construction of this clause, the recipient of this legacy was intended by the testatrix to be and must be taken to be the appellant society, the gift being earmarked for the work of its Tangier branch.

BENNETT, J., took a view based, apparently, on the argument that the phrase "The Tangier Society for the Prevention of Cruelty to Animals" was a misdescription of the appellant society. That is not the argument which was presented to us, and I understand it was not the argument presented to BENNETT, J. It was not argued that those words are the description of the appellant society, but that they are a misdescription of the Tangier branch, which is a totally different thing.

In my opinion, the appeal must be allowed.

MACKINNON, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Appeal allowed.

Solicitors : Moon, Gilks & Moon (for the appellants) ; Amery-Parkes & Co. (for the next of kin) ; Treasury Solicitor (for the Attorney-General) ; Preston, Lane-Claypon & O'Kelly, agents for Longrigg & Pyc-Smith, Bath (for the respondent executors).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

LUCCIONI v. LUCCIONI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), February 2, 1943.]

Divorce—Service—Dispensing with service—Respondent resident in enemy-occupied territory—Matrimonial Causes Act, 1857 (c. 85), s. 42.

In a petition for divorce on the ground of her husband's desertion, the petitioner sought leave to dispense with service of the petition on the respondent whose last known address was in enemy-occupied territory and whose present address was unascertainable. The refusal of the German Government to allow the communication of legal process to parties in German-occupied territories rendered any form of substituted service impossible and the petitioner therefore contended that she was entitled to an order dispensing with service under the Matrimonial Causes Act, 1857, s. 42 :—

HELD : where petitions involve a change of status, the court should not dispense with service unless it is satisfied that the respondent has been made aware of the presentation of the petition and has had an opportunity of entering an answer. In the present case this requirement had not been satisfied and leave to dispense with service could not, therefore, be granted.

[EDITORIAL NOTE.] It was pointed out in *Read v. Read* (4) that it is generally speaking impossible to dispense with service in petitions founded on desertion, because it is a matter upon which it is necessary to hear both sides before making a determination..

Here the matter is carried a stage further and it is said that in matters involving a change of status where any form of substituted service is impossible, the court ought to require that the prosecution of the petition has been brought to the notice of the other side. The judgments also mentioned one or two special cases where it has been found possible to dispense with service.

AS TO SERVICE OF DIVORCE PETITION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 705-707, paras. 1055-1060; and FOR CASES, see DIGEST, Vol. 27, pp. 391-393, Nos. 3854-3856, 3860-3883.]

A Cases referred to:

- (1) *Parker v. Parker and MacLeod* (1859), 5 Jur. N.S. 103; 27 Digest 394, 3886.
- (2) *Cooke v. Cooke* (1859), 5 Jur. N.S. 103.
- (3) *Worth v. Worth* (1859), Sea. & Sm. 109; 27 Digest 393, 3929.
- (4) *Read v. Read*, [1942] 2 All E.R. 423; Digest Supp.

SUMMONS to dispense with service on the respondent under the provisions of the Matrimonial Causes Act, 1857, s. 42. The facts are fully set out in the judgment.

B *Geoffrey C. Tyndale and M. Morgan Gibbon* for the petitioner.

LORD MERRIMAN, P.: This is an application under the Matrimonial Causes Act, 1857, s. 42, by a wife, who is petitioning for divorce on the ground of her husband's desertion, for leave to dispense with service of the petition on the respondent husband. The petition, which is dated Oct. 21, 1942, charges desertion as from about October, 1936, when it is alleged that the husband left the petitioner against her will, having announced his intention of leaving her and going to Morocco or to France, saying that he was not going to ruin his life by living with her any more. In her affidavit in support of the application, the petitioner swears that the respondent went to Paris, that she ascertained his address, the last known address being 11, Jules Maitre, near Porte de Vincennes, Paris, where she verily believes that he was living until shortly after the outbreak of the present war; but she states that since then she has received no communication from him, nor from anyone on his behalf, and does not know his present whereabouts. Inquiries made through the foreign relations department of the Red Cross and St. John War Organisation in July, 1940, shortly after the capitulation of France proved abortive. That is shown by a postcard dated Mar. 14, 1942, from that organisation.

E The marriage certificate shows that the parties were married at a Jewish Synagogue in London, though I was informed that the husband was, in fact, a Catholic. It also shows that at the time of the marriage in 1934, the husband was resident in London, but that his father was a Frenchman in the employment of the French Post Office. In her affidavit the wife says that he was a French national, and it was expressly admitted before me that the husband's domicile of origin was in France. Counsel for the petitioner intimated that the wife would rely on the Matrimonial Causes Act, 1937, s. 13. This assumes that the husband had an English domicile at the time of the alleged desertion.

F Thus it will be seen that the burden lies upon the petitioner of establishing not only that her husband deserted her, but that immediately before the desertion he was domiciled in England. Counsel for the petitioner informed me that there would be no difficulty in establishing both these propositions. That may very well be so; but the question is whether she can be permitted to do so without the husband being made an effective party to the proceedings, and with the practical certainty that they cannot possibly come to his knowledge.

G The necessity for invoking sect. 42 of the 1857 Act arises because the refusal of the German government during the war to allow legal process to be communicated in any form to parties resident in Germany or German-occupied territories makes it impossible to devise any form of substituted service which would be effective. In the absence, therefore, of an order dispensing with service altogether, it would be impossible for the registrar to give a certificate under r. 30 (1) that the pleadings and proceedings are in order. Incidentally, the petition in this case could have been presented in October, 1939, instead of October, 1942, in which case there would have been no difficulty in effecting substituted service. I do not propose to base my decision on so narrow a point, for it seems to me that an important question of principle is involved.

H There was nothing novel in 1857 in legislation giving power to dispense with service. By the Common Law Procedure Act, 1852, s. 17, it was provided

that, if it should appear to the court or judge that reasonable efforts had been made to effect personal service and either that the writ had come to the knowledge of the defendant or that he wilfully evaded service of the same, and had not appeared thereto, it should be lawful to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as the court or judge might seem fit. The power to order substituted service in the common law courts was first given by R.S.C., Ord. 9, r. 2, made under the Judicature Acts, 1873 and 1875 (see WILSON, JUDICATURE ACTS, 1875 Edn., at p. 175); but it was already permitted in the Chancery, Admiralty and Probate Courts, and by the Matrimonial Causes Rules, 1858, r. 10, made under the Matrimonial Causes Act, 1857, it is provided that in cases where personal service cannot be effected, application may be made to the judge ordinary, upon motion in open court, to substitute some other mode of service or to dispense with service altogether; and some provision for substituted service has been contained in all subsequent divorce rules either expressly or by reference to the Rules of the Supreme Court. This, no doubt, accounts for the fact that the only divorce cases in which, before this war, it was sought to dispense with service altogether are reported in 1859 (see *Parker v. Parker and MacLeod* (1) and *Cooke v. Cooke* (2), and *Worth v. Worth* (3)), for in normal circumstances an order for substituted service meets any difficulty that is likely to arise. I do not think that these authorities are of much assistance in the circumstances with which I am concerned. On the other hand, I am in complete agreement with the judgment of HENN COLLINS, J., in *Read v. Read* (4).

So far as I am aware, the only instances during the present war in which an order has been made under the section dispensing with service on a respondent who was at the time in Germany or German-occupied territory are, first, in the case of a wife who had already obtained a decree of separation at a time when the husband was in this country and sought to extend this relief to dissolution on precisely the same grounds under the Matrimonial Causes Act, 1937, s. 6 (1); and secondly, in a case where the respondent had already obtained a decree of divorce in the German court. Neither of these cases was reported.

In my opinion, in the case of petitions which involve a change of status, and where any form of substituted service is impossible, the court, before dispensing with service, should require to be satisfied that the respondent spouse has become aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute it, and in either case has had time and opportunity to indicate whether he or she desires to defend. Whether this requirement is satisfied will, of course, be decided upon the merits of the individual case. It may be that in the case of a petition which, as between the spouses, does not involve a change of status, or of the service of a petition for divorce on a co-respondent against whom neither damages nor costs are claimed, or upon a woman named in a wife's petition, some relaxation may be permissible, and the same may apply to subsequent applications for ancillary relief arising out of a petition which has been duly served. Since these questions do not arise in this case, I say no more about them. On the facts of the present case I am not prepared to make an order dispensing with service of the petition altogether, and I, therefore, dismiss the summons.

Summons dismissed.

Solicitors: *Spiro & Steele* (for the petitioner).

[Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.]

SHIRLEY v. FISHER RENWICK, LTD.

[COURT OF APPEAL (Scott, Goddard, L.J.J. and Birkett, J.), January 22, 1943.]

Workmen's Compensation—Compensation—"Increase in basic rate of wages"—Increase of more than 20 per cent.—Whether "risk rate" should be considered—Workmen's Compensation Act, 1925, (c. 84), s. 11 (3).

A marine engineer, employed in coastline ships, was seriously injured in Oct., 1936. Compensation was paid by agreement on the basis of his weekly earnings of £5 16s., but subsequently, because of his then earnings, the compensation was stopped. In Dec., 1941, he had to give up work

altogether and in April, 1942, he was awarded maximum compensation from Dec., 1941, to March, 1942, and 8s. 2d. for the future. He contended that this award was too low, on the ground that the rates of remuneration for marine engineers had been raised by the addition during the war of "risk pay," and that he was entitled to increased compensation under the Workmen's Compensation Act, s. 11 (3). The employers contended that the subsection did not apply because the increase of risk during the war prevented marine engineers being in the same class of employment. They further contended that the application made in April, 1942, was a "review" within the meaning of the subsection:—

HELD: (i) the phrase "class of employment" in the subsection is a description of the kind of trade or industry in which a workman is engaged and if a workman is still carrying on his same trade or profession the fact that greater risks are involved at one time than another does not take him out of the class of employment in which he was previously engaged. "Risk pay" is an increase in the rate of remuneration within the meaning of the subsection.

(ii) the proceedings in April, 1942, were not a review, but an original decision as to liability which did not come within the scope of either sect. 11 (1) or sect. 11 (3).

[EDITORIAL NOTE. The question whether "risk pay" was an increase in remuneration which could be taken into account on a review was, in effect, decided in *Trawlers (Grimsby), Ltd. v. Crouchen* (1), but was not fully discussed in the judgments in that case. The matter is here fully considered and it is shown that the additional risk which attaches to service at sea during the war does not prevent the workman being employed within the same class of employment within the meaning of the Workmen's Compensation Act, 1925, s. 11 (3).

AS TO REVIEW ON FLUCTUATION IN WAGE RATES, see HALSBURY, Hailsham Edn., Vol. 34, p. 955, para. 1306; and FOR CASES, see DIGEST, Vol. 34, p. 415, Nos. 3371-3373.]

Cases referred to:

(1) *Trawlers (Grimsby), Ltd. v. Crouchen*, [1943] 1 All E.R. 253.

(2) *Potts v. Pope & Pearson, Ltd.*, [1940] 1 K.B. 868; [1940] 2 All E.R. 263; Digest Supp.; 109 L.J.K.B. 449; 162 L.T. 290; 33 B.W.C.C. 83.

APPEAL from an award of His Honour JUDGE HARRISON, at the Salford County Court, dated Oct. 19, 1942. The facts are fully set out in the judgment of SCOTT, L.J.

Montague Berryman for the appellant.

F. A. Sellers, K.C. and *C. H. Glidewell* for the respondents.

SCOTT, L.J.: The Workmen's Compensation Act, 1925, s. 11 (3), provides as follows:

Where the review takes place more than 6 months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than 20 per cent. than his average weekly earnings during the 12 months previous to the accident (or if the weekly payment has been previously varied on a review during the 12 months previous to that review or the last of such reviews), the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident.

The present appeal is by the workman who has been refused an increase in compensation based upon the provisions of subsect. (3). He was a marine engineer working in coastwise ships or short-sea ships; and on Oct. 30, 1936, he was injured on board his ship when in dock. There was serious injury to the left shoulder and arm. Compensation was paid without any application to the court, that is to say, by agreement, on the basis of his earnings being £5 16s. per week. Subsequently the compensation was stopped because of his then earnings. In December, 1941, he had to give up work altogether, and on Apr. 17, 1942, he was awarded maximum compensation from Dec. 9, 1941, to Mar. 28, 1942. From March, 1942, he got, with supplementary allowances, an award of 8s. 2d. for the future. Subsequently, his solicitors raised the question whether that award was not too low on the ground that the rates of remuneration

for marine engineers had been raised by the addition during the war of an increment under the head of "risk pay."

The case came before the county court judge in October last. He held that the subsection did not apply because the increase of wages under the head of "risk pay" was not an increase within the meaning of the subsection. The ground for that view was that the increase of risk during the war for marine engineers prevented marine engineers from being still "in the same class of employment" as they had been before the war. That view, in my opinion, was erroneous. The phrase "class of employment" in the subsection is, I think, equivalent to a description of the kind of trade or industry in which a workman is engaged and receives his remuneration. There are many such "classes" of employment in each industry. There are many classes of engineers. Each of the various "trades" in engineering would no doubt constitute "a class of employment." But if a man is still carrying on his same trade or profession the fact that greater risks are at one time involved in it than at another does not take him out of the "class of employment" in which he was previously spending his professional or trade life. I, therefore, think that an increase of risk is no distinction of "class." We decided in *Trawlers (Grimsby), Ltd. v. Crouchen* (1), that the so-called "risk rate" is an increase in the rate of remuneration such as is called for by the subsection; and, further, that it is wrong to take into account any changes of circumstances, occurring in the later period, as compared with the pre-accident period, which only affect the workman's actual earnings, whether measured by time or by piecework. You must assume, for the purposes of the subsection that the circumstances or conditions of the rates of remuneration are the same as in the period with which the comparison has to be made. On that footing the resultant figure is not in dispute in the present case.

The other argument addressed to us was that the application made in April, 1942, although it was the first application to the court in this man's case, and although an award was then first made of liability and amount, was itself a "review" within the meaning of the subsection. In my view, that contention is wholly misconceived. In the first place, the word review in subsect. (3) must have the same meaning as in subsect. (1) of the section; and that section is the only section of the Act which deals with a review of weekly payments. In April, 1942, there was no review. It was an original application to the court; and, even if for certain purposes it could be contended that an agreed compensation, paid without any arbitration and without any recorded agreement, could in some circumstances be said in a loose sense to be "reviewed" on such an occasion, I doubt whether it would be a "review" within the section; and I do not think in this particular case it was a review in any sense at all. It was an original decision as to liability which did not come within the scope of either subsect. (1) or subsect. (3).

That being so, the appellant must succeed here and have the addition made to his compensation which he has claimed. The appeal must be allowed and the case remitted to the county court judge to assess the correct figure unless the parties agree and communicate the figure to the registrar of the court.

GODDARD, L.J.: I agree. I am quite unable to see how war alters the class of employment in this case. A marine engineer is a marine engineer whether he sails in peacetime or in wartime. All that has happened here is that because of the war an addition has been made to a marine engineer's wages. We are not concerned with the motive of the addition. We are only concerned with whether at this time, if this man had been able to follow his occupation as a marine engineer, he would have been earning this extra money and so make the increase referred to in the section payable. I think it is quite clear that he would.

With regard to the other point, I share the same view as my Lord. I do not think the proceedings in April, 1942, were a "review" at all. It was an original application to the court to get it decided that the man was incapacitated by accident from following his employment. But whether it was a review or whether it was not a review, so far as this court is concerned the point is immaterial because in *Potts v. Pope & Pearson, Ltd.* (2), this court held that the review which was there referred to must be a review under sect. 11 (3).

For these reasons I think the award of the county court judge was wrong

and that the matter should be remitted to him to fix the amount, taking into account what is called "risk money."

BIRKETT, J. : I agree.

Appeal allowed.

Solicitors : *John Whittle, Robinson & Bailey*, Manchester (for the appellant) ; *Botterill & Roche*, agents for *Vaudrey, Osborne & Mellor*, Manchester (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

LATILLA v. COMMISSIONERS OF INLAND REVENUE.

B [HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **December 8, 9, 10, 1942, February 11, 1943.**]

Income Tax—Sur-tax—Avoidance of tax—Transfer of partnership interests to Rhodesian company—Power to enjoy income—"Income becomes payable"—"Associated operations"—Finance Act, 1936 (c. 34), s. 18.

C By an agreement dated Mar. 20, 1933, the appellant's wife, her two daughters, and a Mrs. J., being all resident at that time in the United Kingdom, sold to a company called the L. Trust, Ltd., their shares in a partnership carrying on the business of mining in Rhodesia. The shares in question were two one-third shares, of which one was owned by Mrs. J. and the other by the appellant's wife and her two daughters in equal shares. The remaining one-third share was owned by M., who lived in Rhodesia. D The L. Trust, Ltd., was resident in Southern Rhodesia and was incorporated under the laws of that country on the same day as the agreement for sale was made. The consideration for the sale consisted of shares and non-interest bearing debentures in the L. Trust, Ltd. The company declared no dividends, but applied its profits in redeeming the debentures. The appellant contended that the share of the profits of L. Trust, Ltd., derived from the mining partnership and received by his wife, was not liable to British income tax. The Crown claimed that by reason of the Finance Act, 1936, s. 18, income tax and sur-tax were payable by the appellant in respect of the income of the company, which was income which his wife had power to enjoy within the meaning of sect. 18 (3) :—

E HELD : (i) the L. Trust, Ltd., was entitled to receive, under the agreement a share of the profits of the mining partnership, and that share was income payable to it within the meaning of the Finance Act, 1936, s. 18. The transaction, therefore, fell within that section, and the appellant was liable to pay income tax and sur-tax in respect of so much of the income of the L. Trust, Ltd., as his wife had power to enjoy.

F (ii) if the income was not produced by the transfer of assets but by the activities of the partners, then those activities were "associated operations" within the definition in the Finance Act, 1936, s. 18 (2).

G *Decision of the Court of Appeal* ([1942] 1 All E.R. 214) *affirmed*.

[EDITORIAL NOTE. The House of Lords has here quite shortly affirmed the decision of the Court of Appeal. The main contention was that a share of partnership profits paid to a partner is not income payable to the partner within the meaning of the Finance Act, 1936, s. 18. This contention has been rejected by all the courts.

H AS TO EXEMPTIONS FROM INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 79-81, paras. 161, 162; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483].

Cases referred to :

- (1) *Psalms and Hymns (Baptist) Trustees v. Whitwell* (1890), 7 T.L.R. 164; 28 Digest 84, 479; 3 Tax Cas. 7.
- (2) *R. v. Income Tax Special Comrs., Ex p. Shaftesbury Homes and Arethusa Training Ship*, [1923] 1 K.B. 393; 28 Digest 84, 480; 92 L.J.K.B. 152; 128 L.T. 363; 8 Tax Cas. 367.
- (3) *Income Tax Comrs. v. Gibbs*, [1942] A.C. 402; [1942] 1 All E.R. 415; Digest Supp.; 111 L.J.K.B. 301; 166 L.T. 345.

APPEAL by the taxpayer from a decision of the Court of Appeal affirming a decision of LAWRENCE, J.

J. Millard Tucker, K.C., and Terence Donovan for the appellant.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

VISCOUNT SIMON, L.C. : My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income without sharing in the appropriate burden of British taxation. Judicial *dicta* may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres. Another consequence is that the legislature has made amendments to our income tax code which aim at nullifying the effectiveness of such schemes. The question in the present appeal is whether the Finance Act, 1936, s. 18, has the result of checkmating the design of avoiding income tax and sur-tax which was the main purpose of certain highly artificial dispositions made in 1933. The appellant contended before the Special Commissioners, before LAWRENCE, J., and before the Court of Appeal, that the avoidance of British taxation was not the main purpose of these arrangements. He failed in this contention at each stage. One of the reasons adduced in his printed case to this House is that the scheme adopted in 1933 "was a bona-fide commercial operation not designed for the purpose of such avoidance." If this were true, the scheme would have come within the exemption provided, as the law then stood, for operations not effected for the main purpose of avoiding liability to taxation, and the appellant would escape tax. His counsel prudently decided to drop the contention. The contrary finding adopted by the Special Commissioners and affirmed by both courts below, is, as LORD GREENE, M.R., says, "quite unassailable."

Nevertheless, if the Crown is unable to bring the scheme of 1933 within the range covered by the Finance Act, 1936, s. 18, the appellant must succeed. The issue turns on a comparison of the particular arrangements now before us and of the language of the section.

The arrangements, so far as relevant, can be summarised as follows. There existed in Rhodesia a partnership firm called John Mack & Co., which owned and worked an enterprise known as the Golden Valley Mine. Mack, who lived in Rhodesia, owned a one-third share. Four ladies, viz., the appellant's wife, her two daughters, and Mrs. Jane Johnson, owned the rest. On Mar. 20, 1933, by an agreement of that date, these four ladies, being all at that time resident in the United Kingdom, sold as from Apr. 1, 1932, their shares in the partnership to a limited company formed for the purpose and registered on the same date under the laws of Southern Rhodesia. The company was named the Latjohn Trust, Ltd. The consideration was £260,000, satisfied by the issue to the sellers of 10,000 £1 shares, and 250,000 debentures of £1 each. The debentures carried no interest, and there was no provision as to the period of redemption. It is manifest that they were brought into existence merely in order that their redemption might serve as a means, from time to time, of transferring part of the profit of the mine to these ladies in the form of capital. The appellant's wife was entitled to one-sixth of the consideration, viz., 1,667 shares and 41,667 debentures. Latjohn Trust, Ltd., proceeded to carry on business in partnership with Mack and the accounts show the sums receivable by the company in the various years in respect of its two-third share of the profits of John Mack & Co. Latjohn Trust, Ltd., has never declared a dividend, but has applied its profits in redeeming debentures. It has been the practice of the four ladies to borrow money from the company in anticipation of the redemption of debentures which they held. Until the Finance Act, 1936, came into force, Mrs. Latilla, as the result of these arrangements, was able to obtain for herself a share in the profits which

the Latjohn Trust, Ltd., derived from the partnership business, without incurring for herself or for her husband, the appellant, any liability to British income tax. Admittedly, by receiving sums in redemption of her debentures, she has "power to enjoy" income of Latjohn Trust, Ltd. (see the Finance Act, 1936, s. 18 (3)). The decisive question is whether the right by virtue of which she has this power to enjoy has been acquired by means of the sort of transfer to which sect. 18 applies.

A Sect. 18 (1) is as follows :

For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows :—

B (1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts.

C The appellant correctly argues that "any such transfer" in subsect. (1) means any "transfer of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable" to the company. He then contends—and this is the pinch of the case—that trade profits made by a partnership cannot be said to be income a share of which "becomes payable" to one of the partners. One partner, it is said, D is not a creditor of the partnership : the share of partnership profits to which the Latjohn Trust Ltd. became entitled could not, in this view, be described as income which "became payable" to the company.

E The answer to this argument is to be found in the powerful judgment of LAWRENCE, J., and again in a passage from the judgment of LORD GREENE, M.R., which I would respectfully adopt as expressing with the greatest clearness and precision the true view of the application of sect. 18 to the facts of this case. Speaking for the Court of Appeal, LORD GREENE, M.R., declared his disagreement with the appellant's arguments, and continued at p. 217 :

F The share of the profits of the partnership to which the company is entitled is that share which comes to it in accordance with the terms of the partnership. The company is entitled to call upon its partner to do whatever may be necessary, for example, by signing a cheque on the banking account of the partnership to enable the company to obtain its share. In the partnership accounts the company's undrawn share of profits would appear as a debt owing to the company. If the profits were under the control of the other partner, the company could by appropriate proceedings compel him to pay over its share. If this is not income "payable" to the company, we do not know what it is.

G With regard to the argument that it was not the transfer of assets which produced the income but the activities of the partners, we agree with the argument submitted by the Attorney-General that those activities are "associated operations" within the definition of that phrase in subsect. (2). By that subsection, so far as is relevant, an associated operation means, in relation to any transfer, "an operation of any kind effected by any person in relation to any of the assets transferred," words of the widest import which, in our judgment, clearly cover the operation of turning the assets to account.

H These words of LORD GREENE, M.R., completely justify the conclusion that the appellant's attempt to avoid British income tax and sur-tax by these artificial arrangements has been frustrated by the Act of 1936. This is not a case requiring an examination of previous authority, but I may add that, in my opinion, the two decisions cited by the appellant on the meaning of "annual payment" in the Income Tax Act, 1842, s. 105 (*Trustees of Psalms and Hymns v. Whitwell* (1) and *R. v. Special Commissioners of Income Tax, Ex parte Shaftesbury Homes and Arethusa Training Ship* (2)) have no bearing here. A recent decision of this House in *Income Tax Comrs. v. Gibbs* (3), goes to show that the technical view of the nature of partnership in English law cannot always be taken in applying the law of income tax.

I move that the appeal be dismissed with costs.

My Lords, I am authorised by my noble and learned friends LORD ATKIN and LORD RUSSELL OF KILLOWEN to say that they concur in the opinion which I have delivered.

LORD THANKERTON : My Lords, I concur.

LORD PORTER : My Lords, the conclusion which your Lordships have to reach in this case depends upon the construction and effect of the Finance Act, 1936, s. 18.

That section and the facts upon which its provisions must operate in the circumstances under consideration have already been set out, and it is unnecessary to repeat them. The section contains a proviso exempting cases where the subject shows to the satisfaction of the Special Commissioners that the transfer dealt with was effected for some purpose other than avoiding liability to taxation. This proviso was amended in 1938, so as to have a stricter application, but whether the earlier or later provisions be applicable the commissioners have found (and it is now conceded that we are bound by their finding) that in the present instance they are not so satisfied.

The main argument, however, presented to your Lordships was centred upon the words "payable to." It was said that those words necessitated the existence of a payer and a payee and that income could not become "payable" out of partnership funds to a company which was a member of the partnership. A partner, it was contended, was already the owner, amongst other things, of his share of the partnership profits and could no more pay himself out of those profits than an individual could pay himself out of the profits of his own business.

No doubt it is true to say that an individual cannot pay himself, if pay be used in its strict sense. But no question of an individual's ability to do so arises here. The only question is whether income can be said to be payable to a partner out of the partnership assets. I think it can. "Payable" is not a term of art, and, though a partner cannot sue the partnership or the partners individually in order to recover partnership assets, yet, as LORD GREENE, M.R., points out, he has at his disposal means whereby he can ensure that his share reaches his hands. In such circumstances it seems to me that the word "payable" is appropriately used and accurately conveys the process by which the income finds its way into the pocket of the individual. It would, I think, not inaccurately be described as having been paid to him out of the partnership funds.

The appellant, however, sought to support his argument by the suggestion that, though Sched. D, cases 1 and 2, have provided appropriate machinery for calculating what the profit of a business is, no such machinery exists in the case of sect. 18 of the Act of 1936. They maintained that this omission showed that moneys earned by the personal carrying on of a business abroad, whether alone or in partnership, were not intended to be subject to tax under this section. No doubt this is a matter for consideration, but it is an element only and not a very important one. I can see no reason why a proper estimate cannot be made where the case requires it.

As VISCOUNT SIMON, L.C., has already observed, the principles laid down in *Psalms and Hymns (Baptist) Trustees v. Whitwell* (1) and *R. v. Income Tax Special Comrs., Ex p. Shaftesbury Homes and Arethusa Training Ship* (2), are not applicable here. They deal with different wording and in those instances no partnership existed. Whatever may be the true view in the circumstances which existed in them, they do not touch the case where money is receivable by a partner out of partnership property.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Birkbeck, Julius, Edwards & Co.* (for the appellant) ; *Solicitors of Inland Revenue* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

OWNERS OF THE MOTOR-VESSEL LUBRAFOL v. OWNERS OF THE STEAMSHIP PAMIA. THE PAMIA.

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), January 11, 1943.]

Aliens Enemy aliens Company transferring business from enemy-occupied territory to neutral country—Whether company enemy alien—Proceedings commenced before enemy occupation—Continuation of proceedings.

The defendants, an Italian company, owners of the steamship Pamia, in November, 1939, admitted their liability in a collision action brought by the plaintiffs, a Belgian company, owners of the motor-vessel Lubrafol. The writ, which was issued in October, 1939, stated that the plaintiffs carried on business in Antwerp. In June, 1940, the plaintiffs transferred their head offices to Pittsburg, Pennsylvania, in accordance with the provisions of a decree of the Belgian Government issued in February, 1940, in order to protect the interests of the company in view of the German occupation of Belgium in May of that year. The defendants contended that proceedings in the action should be stayed on the ground that the plaintiffs had become enemy aliens at common law :—

HELD : the plaintiff company, by the action they took in June, 1940, had established their commercial domicile in the United States of America, and could continue this action although Belgium had become enemy-occupied territory.

V/O Soufracht v. van Udens Scheepvaart (1) distinguished.

[**EDITORIAL NOTE.** The principles affecting the position of a company said to be resident in enemy-occupied territory seeking to bring legal proceedings in England were fully considered in *Soufracht v. vans Udens Scheepvaart* (1), and it is clear that the burden is upon the company to show that it is domiciled outside enemy and enemy-occupied territory. The facts in that case were not clearly ascertained and there was little discussion as to what facts, if established, would be sufficient proof of commercial domicile outside enemy-occupied territory. Here that question is considered and it is held that the plaintiff company has done all that it could reasonably be expected to do to secure such commercial domicile.

AS TO ENEMY ALIEN, see HALSBURY, *Higham* Edn., Vol. 1, pp. 447, 448, para. 754; and FOR CASES, see DIGEST, Vol. 2, pp. 139-146, Nos. 144-199.]

Case referred to :

(1) *V/O Soufracht v. van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76; [1942] W.N. 223.

MOTION by the defendants to stay all further proceedings in an action by the plaintiffs to recover damages for injury to their ship.

Sir Robert Aske, K.C., and *Owen L. Bateson* for the applicants.

F. A. Sellers, K.C., and *E. W. Brightman* in opposition to the motion, for the respondents.

BUCKNILL, J. : This is a motion on behalf of the S.S. Pamia for an order that all further proceedings in the action and reference be stayed, on the ground that the above-named plaintiffs are enemy aliens at common law. The action arises out of a collision between the Lubrafol and the Pamia, on Oct. 10, 1939. The Lubrafol was owned by a Belgian company and the Pamia by an Italian company.

The action is brought by the owners of the motor-vessel Lubrafol; and the writ states that the plaintiffs carry on business in Antwerp. The writ was issued on Oct. 20, 1939; and on Nov. 14, 1939, there was an admission of liability by the defendants. On Feb. 2, 1940, the Belgian Government (at that time, of course, a neutral, but with some prevision as to what might be going to happen to Belgium) made an order in council in order to enable Belgian commercial companies to transfer their head offices to a foreign country. I need only read art. 1 of this order in council, which is dated Feb. 2, 1940, and has been translated in some printed document which seems to me to be accurate. Art. 1 reads thus :

Any Belgian commercial company may, without the company losing its Belgian nationality, be transferred provisionally to any place (other than that specified in its statutes and even abroad) by a simple decision of the administrative organ of the company or its directors, the manager or the management committee. The decision must be

notified to the commercial registry and published as soon as possible in the *Annexe au Moniteur Belge*.

There are various other articles ; but they do not seem to have any bearing on this case.

In May, 1940, as is universally known, Belgium was invaded by the Germans, who proceeded to overrun the country and are now in occupation of it. Various orders have been made by the Belgian Government, modifying that order of Feb. 2, 1940 ; in particular there is one made in March, 1942. Ch. 3, cl. 8 states this :

Removal of head office. The head office of any company may, without the company losing its nationality, be temporarily removed to any other place other than that fixed in the company's statutes and also abroad, simply by the decision of the agency in charge of the management of the company, the managing board, the managers or board of managers. In order that such a decision be valid it must comply with the following conditions : (1) That the head office be removed to unoccupied territory ; (2) That it may be taken over in unoccupied territory by persons residing there. The transfer of the head office of the company is not valid against third parties unless cl. 3 has been complied with.

Cl. 3 says :

The obligation of effecting the deposition of acts, extracts of acts or documents mentioned in arts. 2 and 5, concerns all the companies having properties or seats functioning outside occupied territories.

Then by sub-cl. 3 :

The deposition is to be placed with (a) the diplomatic agent within whose area the act was passed.

On June 20, 1940, the company owning the Lubrafol, which is called the Belgian Gulf Oil Co., and is a subsidiary company of the Gulf Oil Corpn., passed a resolution at Pittsburg in Pennsylvania. A copy of that resolution has been put in. I need not read it all ; but the minutes show that there were present at the meeting Newton, the managing director, who was acting as chairman, Drake a director, and Berryman, a director. Newton was also vice-president of the Gulf Oil Corpn. At that meeting, according to the minutes, Newton said :

This extraordinary meeting of the board has been called to consider what steps should be taken to protect the interests of the company in view of the events which have transpired in Belgium since May 10, 1940, as well as to consider all the possibilities looking towards the maintenance of a legal organisation which could officially take all necessary decisions and direct the activities of the company as far as possible during this emergency.

He then drew the attention of the meeting to the decree of Feb. 2, 1940, which I have referred to. Then the following resolution was passed :

Resolved that by reason of the fact that the ordinary general meeting of the shareholders of the company, owing to the circumstances, could not be held on the date fixed by the statutes, May 21, 1940, and under the authority granted by art. 4 of the government decree of Feb. 2, 1940, published in the *Moniteur Belge* on Feb. 7, 1940, the mandates of the directors, managers and commissaires, which would otherwise have expired, be and are hereby extended with full effect until such time as the aforementioned meeting of shareholders can be held.

Then another resolution was passed to the following effect :

In accordance with art. 1 of the government decree of Feb. 2, 1940, published in the *Moniteur Belge* on Feb. 7, 1940, the legal domicile of the Belgian Gulf Oil Co., Societe Anonyme, Antwerp, Belgium, be and is hereby transferred to Room 2615 Gulf Building, Pittsburg, Pennsylvania.

The resolution went on to say that :

In accordance with art. 7 of the government decree of Feb. 7, 1940, published in the *Moniteur Belge* on Feb. 7, 1940, the powers of the directors, managers and commissaires residing in territories other than the United States of America, and the powers of all others residing in territories other than the United States of America who, in any capacity, have the power to dispose of the assets, rights or privileges of the company, be and are hereby suspended.

Messrs. Newton and Berryman are directed :

... to send a copy of the minutes of this meeting to the register of commerce and a copy of the minutes of this meeting to the *Moniteur Belge* for publication in the annexe in conformity with the above-mentioned decree of Feb. 2, 1940.

After that various steps were taken by the plaintiffs to get the writ amended. They took out a summons on June 5, 1942, asking that the writ should be amended by putting the address of the plaintiffs at Gulf Building, Pittsburg,

Pennsylvania, U.S.A.; but the application was dismissed and there was no appeal.

On Feb. 20, 1942, shortly before that summons, the solicitors acting for the Lubrafol wrote to the solicitors acting for the Pamia, saying this :

In reply to the query raised in your last paragraph, the Belgian Gulf Oil Co., the owners of the Lubrafol, removed their head office and management to the U.S.A. They are now domiciled in New York. There is, therefore, no reason why any application should be made to or authority received from the Board of Trade.

A "New York" in that letter should be "Pittsburg." I refer to that summons and that letter because I am quite satisfied that every effort has been made by the Belgian company to transfer their place of business to the United States of America if Belgium were overrun, in order to avoid the legal difficulty which subsequently arose in *V/O Sovfracht v. van Udens Scheepvaart* (1).

B The only question is whether they have succeeded in taking themselves out of the decision of the House of Lords in *V/O Sovfracht v. van Udens Scheepvaart* (1). As to that, I need only refer to the opinion of VISCOUNT SIMON, L.C., in which he says, at p. 79 :

... the test [of enemy character] is an objective test, turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled : it is not a question of nationality or of patriotic sentiment.

C DICEY, CONFLICT OF LAWS, 5th Edn., r. 19, states as follows :

The domicile of a corporation is the place considered by law to be the centre of its affairs which, in the case of a trading corporation, is its principal place of business, i.e., the place where the administrative business of the corporation is carried on.

D Counsel for the defendants has argued that the judgment of the House of Lords in *V/O Sovfracht v. van Udens Scheepvaart* (1), has established that it is necessary for the corporation which has carried on business in Antwerp to prove that the business is no longer carried on there ; and it is not sufficient for the corporation merely to put forward this resolution to which I have referred. I think that is putting too high a burden on the company in this case. I do not think that the opinions of LORD WRIGHT and LORD PORTER establish that proposition. I do not myself see what more the Belgian company could reasonably have done than they have done. They were a shipping company, a subsidiary company of the American Gulf Oil Corpn. They have done their best to comply with the Belgian law. The Lubrafol, until she was lost, was transferred to Panama and flew the Panamanian flag. I think that the facts of this case distinguish it from the decision of the House of Lords in *V/O Sovfracht v. van Udens Scheepvaart* (1).

E Perhaps it is not a legal point ; but I must say it would be a little surprising if in this case the defendants, who are the real enemies of Great Britain, the Italians, and who before they became enemies admitted liability to the Belgian company in this action, should be able to come to this court and move this court to stay proceedings by the Belgian company to be paid a claim in respect of which the defendants admitted liability more than 3 years ago. I dismiss this motion.

Motion dismissed with costs.

F Solicitors : *Crawley & de Reya* (for the applicants) ; *Botterell & Roche* (for the respondents).

G [Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

ROBERTS v. LITTLEWOODS MAIL ORDER STORES, LTD.

H [KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Tucker, JJ.), January 25, 1943.]

Medicine—Poisons—Sale by retail—Sale by or under supervision of registered pharmacist—Sufficiency of supervision—Pharmacy and Poisons Act, 1933 (c. 25), s. 18 (1) (a) (iii).

The appellant, who was an inspector of the Pharmaceutical Society, bought a bottle of compound syrup of hypophosphites over the counter at a branch of Littlewoods Mail Order Stores, Ltd. As the preparation contained a quantity of strychnine, the sale came within the provisions of the Pharmacy and Poisons Act, 1933, which requires that the sale of any

poison included in Pt. I of the Poisons List must be effected by or under the supervision of a registered pharmacist. When this particular sale took place, the registered pharmacist in charge of the department was upstairs in the stockroom. It was contended by the respondents that as their registered pharmacist superintended the drug and medicine department and was on the premises and available for consultation if required, the sale was sufficiently effected under his supervision :—

HELD : the statute requires that the qualified person must be aware of each individual sale. In this case there is no evidence to show that the sale was effected either by a registered pharmacist or under his supervision. A

[EDITORIAL NOTE.] The decision here turns upon the construction of the words "sale is effected by, or under the supervision of, a registered pharmacist." It was urged that these words were sufficiently complied with by having a registered pharmacist in general control of the department selling the poisons, and, at any rate, this was sufficient in the case of innocuous proprietary medicines. This contention is rejected and the words are held to require the personal supervision by the registered pharmacist of every sale. B

AS TO THE SALE OF POISONS BY AUTHORISED SELLER, see HALSBURY, Hailsham Edn., Vol. 22, p. 385, para. 830; and FOR CASES, see DIGEST, Vol. 34, pp. 568, 569, Nos. 257, 258.

Cases referred to :

(1) *Pharmaceutical Society v. Wheeldon* (1890), 24 Q.B.D. 683; 34 Digest 569, 258; 59 L.J.Q.B. 400; 62 L.T. 727. C

(2) *Kingsbury v. Public Prosecutions Director* (1926), 96 L.J.K.B. 209; 34 Digest 567, 242; 136 L.T. 312.

APPEAL by an inspector of the Pharmaceutical Society by way of case stated by the magistrates for the county borough of Barnsley. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

G. R. Blanco White, K.C., and *H. R. Bramley* for the appellant. D

F. A. Sellers, K.C., and *A. M. Hamilton* for the respondents.

Blanco White, K.C. : This is a question of construction of the relevant sections. Sect. 9 (1) (b) provides for the personal control by a registered manager of the company's retail drug business, but sect. 18 (1) (a) (iii) goes further. The actual sale if not effected by the registered pharmacist must at least be directly supervised by him. He must know about the sale before it takes place. Supervising the sale is something more than managing the business. [Counsel referred to *Pharmaceutical Society v. Wheeldon* (1), and *Kingsbury v. Public Prosecutions Director* (2)]. E

Sellers, K.C. : The question before the justices was a matter of fact whether the sale was supervised by a qualified chemist. They have decided it in favour of the respondents. The preparations on sale were standard medicines. There is no indication that the assistant could have sold any articles containing poison other than these innocuous articles. Glover was on the premises and could have been referred to by the assistant if a customer asked as to the suitability of the preparation for any person or purpose. F

VISCOUNT CALDECOTE, L.C.J. : This is a case stated by the magistrates for the county borough of Barnsley with reference to a question of construction of the Pharmacy and Poisons Act, 1933.

I preface what I have to say on the point which has been discussed by repeating the words of HAWKINS, J., in *Pharmaceutical Society v. Wheeldon* (1), where speaking of the earlier Act of 1868, he said, at p. 688 : G

Nothing to our understandings can be clearer than that the object of the Act was beyond all other considerations to provide for the safety of the public, and to guard, as far as possible, all members of the community from the disastrous consequences, so frequent in occurrence, arising from the sale of poisons by persons inadequately acquainted with their baneful properties. H

I approach the question which has been raised in this case in precisely the same way as I should approach it if, instead of being a question relating to the sale of a vegetable laxative, it was a question relating to the sale of a bottle of neat strychnine or any other strong poison.

The offence which was said to have been committed was that the respondents, Littlewoods Mail Order Stores, Ltd. :

... did unlawfully sell by retail at 13-15, Cheapside, Barnsley, aforesaid, a certain poison contained in Pt. I of the Poisons List, 1935, namely, strychnine, such poison

being contained in a substance or preparation known as Compound Syrup of Hypophosphites B.P.C., such sale not being effected by or under the supervision of a registered pharmacist contrary to sect. 18 (1) (a) (iii) of the said Act.

The provisions of sect. 18 of the 1933 Act are an amendment of an existing statute. The law had required that the sale must be effected by a person described as a registered pharmacist. Sect. 18 (1) (a) is as follows :

A Subject to the provisions of this part of this Act, it shall not be lawful (a) for a person to sell any poison included in Pt. I of the Poisons List, unless (i) he is an authorised seller of poisons ; and (ii) the sale is effected on premises duly registered under Pt. I of this Act ; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist.

B The facts, as proved in this case, were that the respondents as a corporate body, and, therefore, coming under sect. 9, had become authorised sellers of poisons, and they had satisfied the provisions of sect. 9. The fact was also proved that the premises at Barnsley where this particular sale took place, were properly registered as required under sect. 12 of the Act. Therefore, I come to sect. 18 (1) (a) (iii), which provides that it shall not be lawful for a person to sell any poison unless the sale is effected by, or under the supervision of, a registered pharmacist.

C I approach this question, first of all, apart from any authority, if there is any, which will give any guidance to the construction of this sentence. This is not a provision which is dealing with the conduct of a business. That has been dealt with by sect. 9, which to contrast the words in that section with the words in sect. 18, provides that a body corporate shall be an authorised seller if certain conditions are complied with. One is that the business must be under the management of a superintendent of particular qualifications, and also in each set of premises the business, if not under the personal control of the superintendent, must be carried on under the personal control of a manager D or assistant who is a registered pharmacist. There is all the difference in the world, in my judgment, between saying that a business must be carried on under the management of or under the personal control of a manager, who must be a registered pharmacist, and saying that a sale must be effected by, or under the supervision of, a registered pharmacist.

E The contention which has been urged upon us in this case is that on the facts, to which I will come in a moment, there is no real distinction—I think I am not in any way misrepresenting the argument—between the words “personal control” and “supervision.” What are the facts in this particular case ? Littlewoods Mail Order Stores, Ltd., is one of those retail establishments where a large variety of articles are displayed on tables, which are attended to or served by girls, who sell the articles desired by the customer. I believe I am right in saying that the customer walks about the shop, picks up the article, and the sale is effected then and there by one of the young women who are in attendance. F In this particular case the inspector, who was the customer, went through that procedure. He asked the price of a bottle of poison. He was told that it was 1s. 10d. He paid the money and took the bottle. Then the case finds :

The said sales having been completed the appellant then asked the said Joyce Northern where the said P.S. Glover the registered pharmacist in charge of the department was to be found and was informed by her that he was then in the stockroom upstairs.

G It is quite possible, in my judgment, that the man who was upstairs might have been a person who was exercising personal control of a business, but I do not think that, while he was upstairs and therefore absent, he could be a person who was supervising a particular sale. It has been suggested that a man can supervise a sale without being bodily present. I do not accept that contention, unless some further facts are proved which are not present in this case. It is conceivable, with the mechanical assistance of a telephone, or something of that sort, that a person might be supervising something although he was not on the spot, but in H this particular case the only evidence is that the person who is vouched for as supervising this particular sale was a person who was then in the stockroom upstairs, and only appeared if and when he was asked for. Taking the language, and giving the interpretation to it which I think is the right one, I think there was a complete lack of evidence in the facts found in this case to show that this particular sale was effected under the supervision of a registered pharmacist.

I do not think it is necessary to refer to the authorities which have been cited to us. They turn on their particular facts, but, what is more important, they

relate to the interpretation of words which are quite different from these words. I think that no useful guidance can be obtained as to the construction of one set of words by the interpretation of quite different words on quite different facts. Counsel for the respondents, however, said that this is a question of fact which has been determined by the magistrates upon evidence which was sufficient to justify their finding. The conclusion at which the magistrates arrived was that they were of opinion on the facts that the sales, though not effected by, were sufficiently effected under the supervision of Glover as the duly registered pharmacist. The question is whether these two particular sales were effected under his supervision. Before it is possible to understand the finding of the magistrates, it is necessary to look at the contentions of the respondents, which are stated in para. 6:

On the part of the respondents it was contended that as their registered pharmacist supervised, that is, superintended the drug and medicine department carried on by them at their said premises, his actual presence at or personal knowledge of every such sale of poisons as was referred to in the said informations was not reasonably required upon a true construction of the said section.

That contention is obviously a submission on a point of law, because it relates to the construction of words in an Act of Parliament, and I think it is upon that contention that the magistrates formed the view that the sales, though not effected by, were sufficiently effected under the supervision of the registered pharmacist.

In my judgment, if the magistrates had not come to what I respectfully think was the wrong interpretation of the words of the section, they would not have arrived at their decision. I, therefore, think that this case cannot be treated as an appeal on a question of fact. I think the magistrates have come to a wrong decision on a question of interpretation. I think the subsection is reasonably plain, and the more plain when you contrast it with the words to which I have already referred, such as managing a business or controlling a business, and that each individual sale must be, not necessarily effected by the qualified person, but something which is shown by evidence to be under his supervision in the sense that he must be aware of what is going on at the counter, and in a position to supervise or superintend the activities of the young women by whom each individual sale is being effected. I think it is overstraining the words "under the supervision of a registered pharmacist" to say that they can be satisfied by the presence of a registered pharmacist in another part of the building unless, as I have already said, there is evidence to show that by some mechanical means, although in a different part of the building, he could effect supervision of what was going on at the tables.

In my judgment, this case should be decided by saying that we think the magistrates should have found the offence was proved, and the appeal, therefore, will be allowed.

HUMPHREYS, J. : I am of the same opinion. I do not think it is necessary or desirable that this court should attempt to state all the circumstances which would constitute, or might constitute, a sale effected by, or under the supervision of, a registered pharmacist. But in the case of a sale effected by some other person in a shop when the registered pharmacist was not present, in sight of or in hearing of the transaction, when the registered pharmacist had no idea that the sale was going to take place, was unaware that it was taking place, and would never have known that it had taken place but for the fact that the inspector of the Pharmaceutical Society sent for him to tell him so, I do not think that any court is entitled to hold as a matter of fact, because I think it is a matter of law, that that sale has been effected either by a registered pharmacist or under his supervision.

TUCKER, J. : I agree.

Appeal allowed with costs.

Solicitors : *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the appellant) ; *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re DE MARNEY, OFFICIAL RECEIVER v. SALAMAN.

[CHANCERY DIVISION (Farwell, J.), January 29, 1943.]

Bankruptcy—Property available for distribution—Future earnings—Future earnings charged by deed of arrangement before bankruptcy.

By a deed of arrangement made in 1940, and before his adjudication, the bankrupt agreed to pay the trustee of that deed half of all his earnings as an actor or otherwise less income tax at the current rate in force at the time of payment. In 1942, the bankrupt was adjudicated bankrupt. The question to be determined was whether the trustee in bankruptcy was entitled to the bankrupt's earnings after the date of the adjudication, having regard to the terms of the deed of arrangement:—

HELD: no distinction could be drawn between such future earnings and the future profits of a business, and, accordingly, the trustee in bankruptcy was entitled to receive the earnings.

[EDITORIAL NOTE.] In the ordinary course the trustee in bankruptcy is entitled to a bankrupt's earnings after adjudication and until discharge subject to such part of those earnings being paid to the bankrupt as is required for his maintenance and that of his family. In the present case, the bankrupt had, prior to his bankruptcy, charged one half of those earnings in favour of certain creditors under a deed of arrangement. If that charge had been a charge on the profits of a business, it would clearly on the authorities, have been invalid as against the trustee in bankruptcy. Future earnings, it was argued, have always been the subject of special treatment in bankruptcy and a charge upon them, it was contended, would be valid. The court, however, has found itself unable to distinguish between future earnings and the profits of a business and the charge is held to be void as against the trustee in bankruptcy.

AS TO BANKRUPT'S EARNINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 246, 247, para. 319; and FOR CASES, see DIGEST, Vol. 5, pp. 694-697, Nos. 6118-6129.]

Cases referred to:

- (1) *Re Jones, Ex p. Nichols* (1883), 22 Ch.D. 782; 5 Digest 640, 5754; 52 L.J.Ch. 635; 43 L.T. 492.
- (2) *Wilmot v. Alton*, [1897] 1 Q.B. 17; 5 Digest 696, 6126; 66 L.J.Q.B. 42; 75 L.T. 447.
- (3) *Re Collins*, [1925] 1 Ch. 556; 133 L.T. 479; *sub nom. Re Collins, Ex p. Salaman (Trustees)*, 95 L.J.Ch. 55.
- (4) *Re Davis & Co., Ex p. Rawlings* (1888), 22 Q.B.D. 193; 5 Digest 696, 6125.

MOTION by the trustee in bankruptcy asking for a declaration that the bankrupt was not entitled to pay his earnings to the trustee of a deed of arrangement pursuant to the terms of that deed; but that such earnings were payable to the trustee in bankruptcy pursuant to the Bankruptcy Act, 1914, s. 38. All the relevant facts are set out in the judgment.

V. R. Aronson for the applicant.

W. A. L. Raeburn for the respondent.

Aronson: The bankrupt's earnings between the date of his adjudication and his discharge belong to his trustee in bankruptcy except in so far as they are required for his maintenance and that of his family, and, therefore, the bankrupt could not be in a position to assign these earnings, which are property acquired after his adjudication and belong to the trustee. In the case of a business it is settled that the profits earned between these dates belong to the trustee, and no distinction can be drawn between professional earnings and profits from a business. [Counsel referred to *Re Jones, Ex p. Nichols* (1), *Wilmot v. Alton* (2), *Re Collins* (3), *Re Davis & Co.* (4).]

Raeburn: The decided cases only show that the after-acquired profits of a business belong to the trustee, which is admitted, as the business passes to the trustee; but a man's professional earnings are on a different footing and do not pass to the trustee, and a charge on those earnings is valid.

Aronson in reply.

FARWELL, J.: This is a motion by the trustee in bankruptcy of the bankrupt against Salaman who is the trustee under a deed of arrangement entered into by the bankrupt before the bankruptcy. The relief which the applicant seeks is a declaration:

... that the obligation undertaken by the bankrupt under a deed of arrangement

dated May 21, 1940, to pay one half of his earnings as an actor or otherwise, less income tax at the rate current at the time of payment, to the respondent as trustee under the said deed until such time as the claims of the creditors to whom he was legally liable had been paid in full, does not authorise the bankrupt to pay to the respondent, or the respondent to receive, any moneys earned by the bankrupt between the date of the adjudication herein and the date when his discharge shall have become effective . . . and further consequential relief.

The facts are in a very small compass. The receiving order in this case was made on May 12, 1942, on the debtor's own petition, the official receiver being the trustee. On Sept. 30, 1942, the bankrupt was granted his discharge, subject to a suspension of 18 months which will expire on Mar. 30, 1944. The bankrupt is an actor and has also been engaged from time to time in making gramophone recordings and in broadcasting performances. He is now employed on a salary basis by the British Broadcasting Corpn. In April, 1940, he was being pressed by various creditors, and on May 21, 1940, he entered into a deed of arrangement, of which the respondent was the trustee. By cl. 1 of that deed he covenanted to pay one half his earnings as an actor or otherwise, less income tax at the standard rate current at the time of payment, to the respondent until such time as the claims of the creditors to whom he was legally liable should have been paid in full. He further agreed to give a written authority to his theatrical agents, Myron Selznick (London), Ltd., to pay to the respondent one half of any part of his earnings which might be received by them. By cl. 14 of the deed the creditors granted the bankrupt a release subject to the proviso that if he should be adjudicated bankrupt before the creditors were paid in full, the release should be void and the creditors should have power to prove in such bankruptcy. Pursuant to cl. 1 of the deed the bankrupt, on May 21, 1940, gave a written authority to the said Myron Selznick (London), Ltd., to pay the respondent one half of his earnings received by them until such time as the claims of the creditors to whom he was legally liable should have been paid in full. Pursuant to the deed the bankrupt paid to the respondent £286, being the proportion due in respect of a contract to make recordings for a commercial undertaking, for which he received a fee of £1,000. That payment was made before the adjudication herein. Since the date of adjudication Myron Selznick (London), Ltd., paid to the respondent £60, representing half the amount received by Myron Selznick (London), Ltd., in respect of the bankrupt's earnings up to the date of adjudication, and the official receiver has been paid by the bankrupt's employers the sum of £57, being a proportion of the bankrupt's earnings since the adjudication. The official receiver has agreed to hold this sum pending the decision of this court as to who is entitled to it.

The question is whether the trustee in bankruptcy is entitled to be paid the moneys earned by the bankrupt since the date of the adjudication, having regard to the terms of the deed. If this was a charge of future profits of a business, there would, I think, be no doubt that the trustee in bankruptcy would be entitled to them. It is said, however, that this is not a case of the future profits of a business, but a charge upon the future proposed earnings of the bankrupt and that in this case different considerations arise. I have looked at the various cases which were cited to me and have considered them with care, and I am quite unable to find sufficient justification for saying that the principle applicable to future earnings of a business does not apply to the present case.

Accordingly, in my judgment, the applicant is entitled to the relief which he seeks in the first three paragraphs of the notice of motion.

Order accordingly.

Solicitors: *Solicitor to the Board of Trade* (for the applicant); *W. Wallace Harden* (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

MARRACHE v. ASHTON, MARRACHE v. ONOS.

[PRIVY COUNCIL (Lord Macmillan, Lord Romer, Sir George Rankin, Sir Madhaven Nair). **December 15, 16, 1942, January 22, 1943.**]

Privy Council—Gibraltar—Money—Loan in Gibraltar in pesetas—Repayment—Rate of exchange in sterling applicable in Gibraltar.

By a mortgage dated Oct. 28, 1931, on freehold property in Gibraltar, the appellant covenanted to pay to the respondent O. on Oct. 31, 1936, "the sum of 50,000 pesetas" in consideration of an advance of this amount. By a second mortgage on the same property, dated Nov. 22, 1933, the appellant covenanted in similar terms to repay to the respondent A. on Oct. 31, 1936, a loan of "the sum of 25,000 pesetas." By a third mortgage also on the same property, dated Mar. 28, 1934, the appellant covenanted to repay to the respondent A. on Oct. 31, 1936, "the sum of 35,000 pesetas" being the amount of a further loan. The respondents A. and O. brought actions against the appellant claiming repayment of the principal sums and interest thereon in sterling at the rate of 42.25 pesetas to the pound, which was the official rate of exchange current in London under the Clearing Office (Spain) Order, 1936. The appellant tendered payment at the rate of 132 pesetas to the pound, which was the market value of pesetas in Gibraltar where, although they were not currency, they circulated in considerable numbers. This tender was refused and the money was paid into court. In the course of proceedings the respondents departed from their claim to apply the rate of 42.25 to the pound and maintained that the rate of 53 pesetas should be applied, which was the rate at which persons entering Spain from Gibraltar could exchange pounds for pesetas at the Spanish custom house :—

HELD : the measure of damages in sterling, for the failure of the appellant to perform his contract to deliver in Gibraltar peseta notes to the respondents, was the sum in sterling which the respondents would have to pay in Gibraltar to obtain the pesetas, where they were commodities and not currency, at the market rate existing in Gibraltar of 132 to the pound.

[EDITORIAL NOTE.] This case, although it turns largely on its own facts, is of considerable importance. The natural desire of mortgagees is to receive back principal money of the same value as that which they advance. The law, however, is clear that a mortgagee who advances £5,000 can only demand repayment of £5,000 although at the time of repayment the pound has seriously depreciated in value. This case, incidentally, reaffirms that rule, but is really concerned with a case where two rates of exchange were available at the time and at the place where repayment had to be made. The loans were repayable at Gibraltar and were loans of 50,000 and 60,000 pesetas. Of course, such loans could have been satisfied by the payment in Gibraltar of 50,000 and 60,000 pesetas respectively, but, since they had to be sued for, a judgment had to be expressed in British currency. It being shown that there were two widely different rates of exchange, one in Gibraltar itself and one at the frontier between Gibraltar and Spain, the question arose which of these two rates were the proper ones. It is decided that the rate ruling in Gibraltar, the place where payment had to be made, was the one to be taken for the purpose of expressing the judgment in British currency.

AS TO RATE OF EXCHANGE AT WHICH DEBT MUST BE CONVERTED INTO ENGLISH MONEY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 173, 174, para. 251; and FOR CASES, see DIGEST, Vol. 35, pp. 172-176, Nos. 31-63.]

Cases referred to :

- (1) *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466; 35 Digest 169, 12; 93 L.J.Ch. 263; 130 L.T. 109.
- (2) *Pymont, Ltd. v. Schott*, [1939] A.C. 145; [1938] 4 All E.R. 713; Digest Supp.; 108 L.J.P.C. 30; 160 L.T. 118.

APPEAL by the defendant from a judgment of the Supreme Court of Gibraltar, dated April 4, 1940. The facts are fully set out in the judgment.

Stephen Clapman for the appellant.

Patrick Devlin for the respondents.

LORD MACMILLAN [delivering the judgment of the Board] : The question at issue between the parties to this appeal is as to the legal equivalent in sterling at Gibraltar on May 25, 1939, of certain amounts of Spanish pesetas.

By a mortgage dated Oct. 28, 1931, on freehold property in Gibraltar the appellant Marrache covenanted to pay to the respondent Onos, on Oct. 31, 1936, "the sum of 50,000 pesetas" in consideration of an advance of this amount. By a second mortgage on the same property, dated Nov. 22, 1933, the appellant Marrache covenanted in similar terms to repay to the respondent Ashton, on Oct. 31, 1936, a loan of "the sum of 25,000 pesetas." And by a third mortgage also on the same property, dated Mar. 28, 1934, the appellant Marrache covenanted to repay to the respondent Ashton, on Oct. 31, 1936, "the sum of 35,000 pesetas," being the amount of a further loan.

On May, 25, 1939, the respondent Ashton took out a writ of summons in the Supreme Court of Gibraltar against the appellant Marrache claiming payment of the sum of £1,433 10s. as the equivalent of 60,565.45 pesetas at 42.25 pesetas to the pound sterling, being the amount of the principal sums with interest then due under the second and third of the before-mentioned mortgages. On the same date the respondent Onos took out a writ of summons against the appellant Marrache claiming payment of the sum of £1,200 as the equivalent of 50,712.50 pesetas at 42.25 pesetas to the pound sterling, being the amount of the principal sum with interest then due under the first of the before-mentioned mortgages. The actions were not preceded by any demand for payment. They were consolidated on June 13, 1939.

The appellant Marrache in his defences alleged that at the date of the raising of the actions the market value of pesetas in Gibraltar was 132 to the pound sterling and on July 3, 1939, he tendered payment to the respondent Ashton of £458 16s. 8d., and to the respondent Onos of £384 3s. 9d., being the equivalents of the sums of pesetas due by him at the rate of 132 pesetas to the pound sterling. On the tenders being refused he paid these sums into court on July 3, 1939.

The rate of 42.25 pesetas to the pound sterling adopted by the respondents in their original claims was admitted to be the official rate of exchange current in London under the Clearing Office (Spain) Order, 1936, but in the course of the proceedings the respondents departed from their claim to apply this rate and maintained that the rate of 53 pesetas to the pound, which they justified as will appear in the sequel, should be applied.

To this contention the learned Chief Justice gave effect and on April 4, 1940, he pronounced judgment in favour of the respondent Ashton for £1,181 14s., and in favour of the respondent Onos for £992 8s. 11d. It is against this judgment that the present appeal is brought.

All three parties were resident in Gibraltar and their rights and obligations under the mortgages in question were admittedly governed by the law of Gibraltar, which was the place of payment of the sums in pesetas due by the appellant. The amount of these sums was admitted to be correctly stated in the writs of summons, as at May 25, 1939, when the writs were issued, and this date, it was agreed, was the date at which the appellant's liability should be ascertained. The contest was thus narrowed to the question whether for the purposes of the cases pesetas should be reckoned at 53 or at 132 to the pound.

Evidence of legal and financial experts was adduced on both sides. From this it appeared that in Oct., 1936, and until Jan. 20, 1939, gold and silver coins were legal tender in Spain but that from Jan. 20, 1939, and consequently on May 25, 1939, Bank of Spain peseta notes, popularly known as "Franco" notes, were, apart from gold, the only legal tender and currency in Spain. By a decree of the Spanish Government of Nov. 24, 1938, it was declared to be "an offence of monetary contraband" to export from or import into Spain *inter alia* Bank of Spain peseta notes, except under conditions immaterial for the present purpose. Nevertheless there was, as the learned Chief Justice found, "a market for these notes both in Gibraltar and London and elsewhere." A partner in Galliano's Bank, Gibraltar, stated that there was a regular market for them in Gibraltar and London and that his bank bought and sold such notes in May, 1939, the rate being about 132 pesetas to the pound. He instanced a sale on May 6, 1939, to a London house of 15,000 pesetas at 145 to the pound and produced a cable from the Midland Bank London reporting the market rate ruling in London for "Franco" Bank of Spain peseta notes on May 25, 1939, to be 127 to 131 pesetas to the pound for denominations of 500 and 1,000.

The respondents led evidence to the effect that at the Spanish frontier the official rate fixed in Spain at which tourists and labourers entering Spain from Gibraltar could exchange pounds for peseta notes at the Spanish custom house was 53 pesetas to the pound. This was the rate which the respondents, as above stated, claimed to apply, as being the rate legally recognised in Spain.

In their printed case laid before the Board the respondents stated as a fact not in dispute that "at the material time there were dealings in Bank of Spain notes in Gibraltar and London, these notes being bought and sold at ptas. 132 to the pound," but added that "these notes would have to be smuggled into Spain."

It was common ground before their Lordships that while Bank of Spain

peseta notes were legal tender in Spain they were not currency in Gibraltar, though they circulated there in considerable numbers. Consequently these notes must be regarded in Gibraltar as commodities. It was also agreed that the appellant would have specifically performed his covenants if he had tendered to the respondents the appropriate amounts of Bank of Spain peseta notes. This was clearly so in view of the law as laid down in *Re Chesterman's Trusts, Mott v. Browning* (1). There LORD STERNDALÉ, M.R., said at p. 478 :

A I think that a mortgage to secure a given number of reichsmarks is a mortgage to secure the repayment of whatever may be legal tender at the time of repayment in the country where the reichsmark circulates.

The law so stated was approved by this Board in *Pymont, Ltd. v. Schott* (2). In that case, as here, there was an obligation to repay in Gibraltar a sum of borrowed pesetas, but at the material time peseta notes were not legal tender

B in Spain. The appellant not having specifically performed his contracts by delivering peseta notes to the respondents became liable to them in damages for his failure to deliver to them the stipulated quantity of the commodity which he had contracted to deliver. The measure of damages for his failure is the sum in sterling which it would cost the respondents to obtain for themselves in the market the amount of the commodity which the appellant was bound but had failed to deliver to them. This assumes the existence of a recognised and accessible market for the commodity.

C On the evidence and admissions above set out it is clear that there was a recognised and accessible market in Gibraltar for Bank of Spain peseta notes and that the respondents on May 25, 1939, could have bought in that market 132 pesetas for a pound sterling. They could thus have provided themselves at this rate with the equivalent of specific performance of the contract. Their Lordships see no reason why, in preference to the rate obtaining in the Gibraltar market, the rate at which sterling was convertible into pesetas at the Spanish custom house at the frontier should be adopted. This was not a market rate of exchange and it apparently worked only one way. The respondents did not need to resort to the Spanish custom house in order to get pesetas for pounds. It was in Gibraltar not in Spain that the appellant had covenanted to deliver

E pesetas to the respondents. The learned Chief Justice, however, discarded the Gibraltar market rate. The passage in his judgment dealing with the matter is as follows :—

Whatever the liability of the Bank of Spain may be to eventually redeem these notes [i.e. peseta notes out of Spain] it appears to be clear that under the municipal law of Spain they are not regarded while abroad as part of the legal currency of the country and that they are liable to confiscation if identifiable by the Spanish authorities. I am of opinion that, while the prohibition against the repatriation remains, these notes cannot be regarded under Spanish law as legal currency in Spain.

F With all respect, their Lordships are unable to accept this argument. The only necessary reference to Spanish law was for the purpose of ascertaining what in Spain was legal tender for the payment of so many Spanish units of account. This having been ascertained the court at Gibraltar was not concerned with the domestic currency regulations and restrictions imposed by the Spanish Government. There had been no Spanish decree demonetizing Spanish peseta notes abroad or declaring transactions in these notes by foreigners abroad to be illegal, if indeed the Spanish Government could have effectually so decreed with regard to transactions by foreigners abroad. For the purposes of the present suits the Spanish prohibition on the import to or export from Spain of Bank of Spain peseta notes was in their Lordships' opinion irrelevant. A

G contract between foreigners abroad involving the introduction of peseta notes into Spain in contravention of Spanish law would have raised quite a different question. No such question arose here. The parties were not governed by Spanish law. All that the court had to do was to ascertain what was legal tender in Spain for so many pesetas and then to inquire whether there was a market in Gibraltar for the sale and purchase of such Spanish currency and if so what was the market rate. Bank of Spain peseta notes were legal tender in Spain, there was a market for such notes in Gibraltar and the rate there prevailing was 132 pesetas to the pound sterling.

H

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, that the judgment of the Chief Justice of the Supreme Court of Gibraltar of April 4, 1940, be recalled and that the case be remitted to the Supreme Court at Gibraltar to give judgment against the appellant Marrache in favour of the respondent Ashton for the sum of £458 16s. 8d., and in favour of the respondent Onos for the sum of £384 3s. 9d. The respondents will pay to the appellant his costs of the present appeal and of the proceedings in the Supreme Court of Gibraltar subsequent to July 3, 1939, when the appellant paid into court the sums for which he is now found to be liable. As the writs in the actions were issued without any previous demand for payment the parties will each bear their own costs of the proceedings prior to July 3, 1939.

Appeal allowed with costs.

Solicitors: *Docker, Andrews & Co.* (for the appellant); *William A. Crump & Son* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

TILLEY v. WALES (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter), **December 10, 11, 14, 1942, February 11, 1943.**]

Income Tax—Sched. E—Compensation for salary and pension rights for sum payable in two instalments—Income Tax Act, 1918 (c. 40) Sched. E.

By an agreement made in June, 1937, a company, of which the appellant was managing director, agreed to pay him £6,000 per annum and a pension of £4,000 per annum for 10 years after he ceased to be managing director. By a subsequent agreement, made in April, 1938, the appellant agreed to release the company from the obligation to pay the pension and to serve as managing director for £2,000 per annum, and in consideration of these stipulations the company agreed to pay him £40,000 in two equal instalments. The Revenue contended that this sum was assessable under Sched. E, as being profits arising from the office of managing director of the company. The appellant contended that the sum was paid in commutation of the company's obligation under the agreement of June, 1937, and was in the nature of a capital receipt:—

HELD: the payment must be apportioned as between the sum paid in substitution for the reduction in salary, which should be assessed for tax under Sched. E, and that paid in commutation of the pension rights of the appellant under the agreement, which was not subject to income tax.

Decision of the Court of Appeal ([1942] 2 All E.R. 22) *varied*.

[EDITORIAL NOTE.] It is the usual practice when a person accepts a lump sum in settlement of a number of periodic payments to view that lump sum as a capitalisation of those payments and thus to speak of it as a capital payment. Income tax is primarily a tax on income and it is a common argument that a payment sought to be taxed is a capital payment and not income. This argument, however, has been said to be inapplicable to the taxation of remuneration under Sched. E. The House of Lords herein refuse to go as far as that and it is said that there may be remuneration which is a capital payment. Generally speaking, however, all remuneration whether it be a weekly payment or a sum in respect of employment extending over a number of years falls within the words of charge in Sched. E, which are that the tax is charged on every person having or exercising an office or employment of profit in respect of all salaries, fees, wages, perquisites or profits whatsoever. Having regard to these words and the decided cases, both periodic payments and lump sums fall to be charged with

tax under this Schedule. The same schedule also charges tax on all pensions; but it is held that a sum received in commutation of a pension is a capital sum and not chargeable with tax. In this connection it has to be noted that the schedule only uses the word pension and omits any all-embracing term which might apply to sums paid in place of or in commutation of a pension. The House, however, has treated a sum paid in commutation of a pension as a sum paid for a release from a contingent liability and, therefore, a capital sum not liable to tax. In the present case one lump sum was paid as compensation for reduction in salary and loss of pension rights and the question arose as to whether this sum was apportionable. The Court of Appeal had decided that apportionment was impracticable but the argument that it was impracticable was not pressed in the House of Lords and it seems clear that the House was against any such suggestion.

AS TO PAYMENTS ASSESSABLE UNDER SCHED. E., see HALSBURY, Hailsham Edn., Vol. 17, pp. 212-217, paras. 431-438; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to:

- (1) *Short Bros., Ltd. v. Inland Revenue Comrs., Sunderland Shipbuilding Co., Ltd. v. Inland Revenue Comrs.* (1927), 136 L.T. 689; Digest Supp.; 12 Tax Cas. 955.
- (2) *Hunter v. Dewhurst* (1932), 16 Tax Cas. 605; Digest Supp.; 146 L.T. 510.
- (3) *Cameron v. Prendergast*, [1940] A.C. 549; [1940] 2 All E.R. 35; Digest Supp.; 109 L.J.K.B. 486; 162 L.T. 348; 23 Tax Cas. 122.

APPEAL by the taxpayer from the decision of the Court of Appeal given on May 18, 1942, and reported [1942] 2 All E.R. 22, affirming the decision of LAWRENCE, J., given on February 18, 1942, and reported [1942] 1 All E.R. 455. *Raymond Needham, K.C.*, and *Terence Donovan* for the appellant.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and Reginald P. Hills for the Crown.

VISCOUNT SIMON, L.C.: My Lords, the question in this case is whether two sums of £20,000 each which were paid to the appellant by a company named *Stevenson & Howell, Ltd.*, carrying on the business of manufacturing chemists, of which he was managing director, fall to be assessed for income tax under Sched. E, as being profits from his employment as such director. The circumstances in which this question arises are very special, and before a correct solution can be reached, it is necessary to refer to three agreements made at different dates between the company and the appellant.

The first of these agreements is dated Dec. 19, 1921. It recites that the appellant was the inventor of a secret process for the manufacture of a product to be used by the company in connection with their business. Under this agreement, the appellant, who was already a director of the company, divulged to the then managing director, his secret process, and the company contracted to pay to the appellant a royalty of 1s. upon every pound weight of the new product manufactured under the secret process and used by the company. The next agreement to be referred to is dated June 28, 1937. By that time the appellant had become managing director and was receiving a salary as such of £2,000 per annum. The agreement cancelled the arrangement of 1921 for the payment of the royalty and in consideration of this provided that the appellant's salary as managing director should be raised to £6,000 per annum, and that, in the event of the appellant ceasing from any cause whatsoever to be managing director of the company, the company would pay to him from the date of cessation a pension of £4,000 per annum for 10 years from such date. As long as matters stood on the basis of the 1937 agreement, there can be no doubt that the appellant's salary of £6,000 per annum was subject to income tax under Sched. E, and that, when his service as managing director ceased, the pension of £4,000 per annum was equally liable to tax under the second limb of that schedule. The agreement of 1937 ended with a paragraph providing that the expression "Mr. Tilley" includes, where the context so permits, his personal representatives. As the Court of Appeal has pointed out, this makes the construction of the agreement, so far as it provides for "pension," somewhat difficult, and in view of the nature of the conclusion at which I would invite the House to arrive, it is desirable to indicate whether under the agreement the pension would in any case cease with the appellant's death or whether it would be payable, in the event of his death, to his personal representatives until the period of 10 years had elapsed. I think the second of these constructions is the correct one.

Lastly, there comes the agreement dated Apr. 6, 1938. It recites the provisions made the year before for a salary of £6,000 per annum as managing director and for a pension of £4,000 per annum for 10 years on the appellant ceasing to be managing director. The agreement then goes on to record that the company has requested the appellant (1) to release it from the prospective obligation to pay the pension, and (2) to serve the company in future at a salary of £2,000 per annum. The agreement witnesses the appellant's acceptance of these requests, and in consideration of this :

... the company will pay to Tilley the sum of £40,000 by two equal instalments, the first of which shall be paid on Apr. 6, 1938, and the second on Apr. 6, 1939.

It is evident, therefore, that the £40,000 on which the Crown seeks to levy income tax is paid in part as the price of compounding the pension, and in part in consideration of the reduction of the appellant's annual salary from £6,000 to £2,000. I will postpone the consideration of any difficulty which might arise from the fact that the total of £40,000 is stated as a single sum and is not divided by the terms of the agreement into two parts allocated respectively to the compounding of the pension and the reduction of salary, and will first consider how far Sched. E would be applicable if the two matters were dealt with separately, £x being stated in the agreement as representing the value of the pension rights, and £y as being paid in return for the reduction of salary, so that the two sums added together, £x plus £y, amounted to the total of £40,000.

If it is legitimate to separate out the consideration in this way, it appears to me that there are two decisions of your Lordships' House which guide us to the conclusion at which we must arrive, one in connection with the pension problem and the other in connection with the payment in respect of the reduction of salary. As regards the commutation of pension, I cannot agree with the view of LAWRENCE, J., that, as the pension would have been assessable under Sched. E, therefore, a sum payable in commutation of it would also be assessable under the same schedule. I think that LORD GREENE, M.R., is right when he says that the decision in *Short Bros., Ltd. v. Commissioners of Inland Revenue* (1), to which LAWRENCE, J., referred in this connection, does not support the judge's proposition, and neither can I accept the contention contained in the case for the respondent (but not, as I understood, persisted in by the Attorney-General) that the pension under the agreement of 1937 was deferred remuneration and that the acceptance by the appellant during his service of a sum in commutation of the pension amounted to the acceptance of a present remuneration instead. Neither the pension nor the sum paid to commute it constituted, in my opinion, profit from the office. If pension was paid after ceasing to hold the office, it would have been assessable under the head of "pension" in Sched. E, r. 1. I agree with the unanimous view of the members of the Court of Appeal that a pension is in itself a taxable subject-matter distinct from the profit of an office, and, if an individual agrees to exchange his right to a pension for a lump sum, that sum is not taxable under Sched. E. This conclusion is in accordance with the views of the majority of the Law Lords when this House decided *Hunter v. Dewhurst* (2). There an article of association of the company which had employed Commander Dewhurst provided that when a director died or resigned or ceased to hold his office for a cause not reflecting upon his conduct or competence, the company should pay to him or his representatives "by way of compensation for the loss of office" a sum equal to the total amount of his remuneration in the preceding 5 years. Commander Dewhurst subsequently agreed with the company, at a time when he was ceasing to be chairman but was remaining a director, that in lieu of his rights under this article he should be paid £10,000, while his remuneration as director was at the same time reduced to £250 per annum. LORD WARRINGTON, LORD ATKIN, and LORD THANKERTON held that the £10,000 was not a profit from his employment as director and did not represent salary, but was a sum of money paid down by the company to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment. LORD THANKERTON emphasised the further point that the payment was not in the nature of income at all. It is true that the decision in *Dewhurst's* case (2) was regarded and described as arising under very special circumstances, but I think the *ratio decidendi* is as I have described. Moreover, apart from previous authority, I should myself take the view that a lump sum paid to commute a pension is

in the nature of a capital payment which is substituted for a series of recurrent and periodic sums which partake of the nature of income.

A But can the same view be taken of an arrangement made between an employer and his servant under which, instead of the whole or part of a periodic salary, a single amount is paid and received in respect of the employment? Generally speaking, I think not. An "office or employment of profit"—to use the actual phrase in Sched. E—necessarily involves service over a period of time during which the office is held or the employment continues. The ordinary way of remunerating the holder or the person employed is to make payments to him periodically, but I cannot think that such payments can escape the quality of income which is necessary to attract income tax because an arrangement is made to reduce for the future the annual payments while paying a lump sum down to represent the difference. My view seems to me to be supported by the decision of this House in *Cameron v. Prendergast* (3). In that case the respondent was a director of a company and was minded to resign his position and so obtain greater ease. His fellow directors, in the interests of the company's success, urged him not to do so and an agreement was made between the company and himself under which his salary was reduced from £1,500 to £400 per annum, but he also received £45,000. This House decided that the £45,000 was a profit from the respondent's directorship and was, therefore, assessable under Sched. E. I am not myself prepared to go so far as to say, as was said by LORD GREENE, M.R., and GODDARD, L.J., in the present case, that remuneration for service can never be capital in the sense which would put it outside income tax. It is worth pointing out that the word "remuneration" does not occur in Sched. E at all and it is safer to use the words of the statute. I prefer to limit myself to the case now under consideration, and to say that whatever part of the £40,000 should be regarded as the equivalent of a drop in salary amounting to £4,000 per annum is within the charge on profits from the office of director.

There remains the question, which might otherwise have raised some difficulty, whether, when capitalisation of pension is not taxable and a sum paid in compromise of a reduction in salary is taxable, the £40,000 which is agreed between the parties to be the value of the two things together can be split up. We are relieved in the present case from deciding the point, for the Attorney-General agreed that the two sums of £20,000 each should be treated as apportionable if the House took the view that tax was due under one head but not under the other. Accordingly I move that these two assessments should be referred back to the commissioners in order that they may determine, according to the best of their judgment, what would be a reasonable apportionment. So much of the two sums as should be taken as paid in substitution for the reduction of salary should be assessed, in the appropriate years, for tax under Sched. E. The balance of the two sums which should be regarded as representing the purchase price of the annuity should escape taxation. I move accordingly.

F The appellant should have his costs of the appeal to this House, and there should be no costs in the Court of Appeal on either side.

My Lords, I am authorised by my noble and learned friends, LORD ATKIN and LORD RUSSELL OF KILLOWEN, to say that they concur in the opinion which I have just delivered.

G LORD THANKERTON: My Lords, the Crown claims that the sum of £40,000 paid to the appellant in two instalments at a year's interval under the agreement of Apr. 6, 1938, is chargeable to income tax under the Income Tax Act, 1918, Sched. E, as paid to him in respect of his office of director and coming within the words of Sched. E, r. 1, namely, "all salaries, fees, wages, perquisites or profits whatsoever therefrom."

H Sufficient reference to the various agreements has been made by VISCOUNT SIMON, L.C., and I agree that in order to appreciate the two-fold consideration in return for which the £40,000 was agreed to be paid, it is necessary to refer to the agreement of June 28, 1937, the terms of which equally necessitate a reference to the earlier agreement of Dec. 19, 1921.

The Crown failed before the Special Commissioners, on the ground that the payment of £40,000 was not made to the present appellant as remuneration for services rendered or to be rendered by him in his office as a managing director of the company. On appeal, by stated case, LAWRENCE, J., decided in favour of the Crown, holding that both in form and substance the payment was made in

consideration both of the release from the company's obligation to pay the pension and the present appellant's agreement to serve at a reduced salary of £2,000 per annum. As regards the latter element, LAWRENCE, J., held that it was clearly a profit from the office, and, as regards the 10 year pension, he held that, as the pension would have been assessable under Sched. E by virtue of the Finance Act, 1932, s. 17, the sum payable in commutation thereof was assessable under Sched. E, and he based this finding on the decision in *Short Bros., Ltd. v. Commissioners of Inland Revenue* (1).

An appeal by the present appellant to the Court of Appeal was dismissed, partly on grounds materially different from those of LAWRENCE, J. All the judges differed from his statement as to the assessability of a sum paid in commutation of a pension and LORD GREENE, M.R., pointed out that *Short Bros.*' case (1) did not support the view of LAWRENCE, J.; further, all the judges of the Court of Appeal were of opinion that, if the agreement of 1938 had expressly apportioned the consideration of £40,000 between cls. 1 and 2, the portion referable to cl. 1, which released the pension obligation, would not have been chargeable to tax, but that the portion referable to cl. 2, which contained the agreement to serve as managing director at a reduced salary, was chargeable to tax, as it fell directly within the decision of this House in *Cameron v. Prendergast* (3). But the Lords Justices—MACKINNON, L.J., *dub.*—held that, as the parties themselves had refrained from apportionment, an apportionment by the court was not permissible. GODDARD, L.J., appears to have further held that, in view of the conditions attached to the payment of the pension, it would be impracticable to make such apportionment.

My Lords, in common with all the judges below, I have no doubt that in so far as the payment of the £40,000 may be referable to the agreement to serve as managing director at a reduced salary, there is liability to tax, the decision in *Prendergast's* case (3) being directly in point. It satisfies, in my opinion, the two tests, namely, (i) whether it arose from the office of director within the meaning of r. 1, and (ii) whether it is in the nature of income. I may add that I doubt whether the word "capital" is the exact antonym to the latter test. While I would agree that according to common experience, any consideration given in return for services in the office of director is likely to be in the nature of income, I am not prepared to state dogmatically that it must in every conceivable case be so, whatever form it takes, as LORD GREENE, M.R., and GODDARD, L.J., appear to think. It is enough that there is no difficulty in the present case.

In so far as the payment of the £40,000 may be referable to the agreement to accept a sum in commutation of the liability to pay a pension, I have nothing to add to the view expressed by VISCOUNT SIMON, L.C. As in *Dewhurst's* case (2), such payment did not arise from the office of director, but in spite of it. I also agree with the view expressed by VISCOUNT SIMON, L.C., on the question of apportionment. I would desire to note, on the question of practicability, referred to by GODDARD, L.J., that the present appellant's accountants appear to have provided the basis for the agreed sum of £40,000, as stated in para. 8 of the stated case. I concur in the motion proposed by VISCOUNT SIMON, L.C.

LORD PORTER: My Lords, as MACKINNON, L.J., has pointed out, your Lordships are not without assistance when considering the problem which this matter presents. In *Hunter v. Dewhurst* (2), and *Cameron v. Prendergast* (3), this House has at least discussed the question and in my view has decided it.

By the so-called "1938" agreement the appellant received two sums of £20,000 each and in return gave two separate considerations: (i) he released the company from an obligation to pay a pension of £4,000 per annum for 10 years from his ceasing to be managing director; and (ii) he agreed to serve the company at a reduced salary of £2,000 (instead of as theretofore at £6,000 granted him by the 1937 agreement).

It was claimed for the Crown that both these two sums of £20,000 were taxable as a profit from the directorship, but that even if the former was not so taxable the commutating sums paid for each were so inextricably interwoven that it was not possible to ascertain how much was paid for the one and how much for the other, and that consequently the subject must pay on the whole. This was, as I understand it, the view of the majority of the Court of Appeal. MACKINNON, L.J., however, though he would himself have taken the view that each item would be severally taxable, held himself bound by the principles

evolved in the two cases referred to above and, therefore, considered that any sum paid in commutation of the pension was not taxable, whereas the sum paid as a consideration for the agreement to serve on as managing director at a reduced salary was taxable.

My Lords, I agree that this result follows if the remuneration can be apportioned between salary and pension. As I see it, your Lordships have so decided in the cases referred to above and are bound by authority so to hold.

A The Attorney-General argued that this present case differed from *Hunter v. Dewhurst* (2) in that the sum paid in commutation of the pension rights was paid whilst the appellant was still serving as a director and that the sum paid in commutation of a pension to a person so serving differed from that paid in respect of a pension already due to a director whose service had come to an end. I do not feel able to accede to this argument. In my view a sum received upon the sale or surrender of pension rights is not taxable under Sched. E because B it is neither pension nor annuity and comes under no other heading of that section. It is in the headnote to *Dewhurst's* case (2) said to be exempt as being capital and not income.

It is not, as I think, a pension or annuity; and, therefore, not income taxable under Sched. E, but I doubt if much assistance is to be obtained by making use of the antinomy between capital and income. The Attorney-General sought to distinguish *Hunter v. Dewhurst* (2) on the ground that in that C case the pension was not deferred pay whereas in this case it was, and admitted that, if it were not, the Crown would have no claim to tax. Such a contention makes it necessary to determine the grounds upon which the pension was granted in the 1937 agreement. No special consideration is stated in that document: the granting of the pension apparently forms one of the general terms of the agreement under which the appellant promises to give up his right to receive D 1s. in respect of each pound of material manufactured under his secret process. Moreover, the pension is payable at any moment at which he may cease to be employed as managing director whatever the cause, and it is apparently payable to his personal representatives. I cannot think that such a provision represents deferred pay. It looks much more like a payment in lieu of the stipulated reward for revealing the secret process. But it is unnecessary to speculate. E It is a sum paid for the release of an obligation to provide a pension. It is a pension and not shown to be given instead of, or as deferred, pay. If so, it is admittedly not subject to tax.

Just as in my opinion it follows, from the reasoning in *Dewhurst's* case (2), that any part of the two sums of £20,000 which was paid in respect of the surrender of the pension rights is not subject to tax under Sched. E, so, in consequence of the decision in *Prendergast's* case (3), the remaining part of that sum which was given in lieu of the surrendered payment of £4,000 as managing F director is, I think, taxable as a profit from a public office.

It only remains, therefore, to see whether the sum attributable to the release of the pension can be separated from that payable for the reduction of salary. It was only faintly argued on behalf of the Crown that such a division was not possible; but it was said that there were no materials upon which such a calculation could be made inasmuch as the cessation of the salary and the G commencement of the pension were dependent on many unascertainable matters, amongst others on the appellant's choice of the time of his retirement. No doubt there are difficulties but the resultant figure seems no more incalculable than, say, the length of time during which an injured workman would have continued to earn wages had he not received his injury, a period difficult no doubt to ascertain, but one which has constantly to be estimated in dealing with cases of personal injury.

H My Lords, I agree that this appeal should be allowed in part and in part dismissed, and concur in the order suggested by VISCOUNT SIMON, L.C.

Appeal allowed as to pension payment and dismissed as to remuneration. Assessment referred back to Commissioners for apportionment.

Solicitors: R. G. Percival (for the appellant); Solicitor of Inland Revenue (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

SMITH v. DAVEY PAXMAN & CO. (COLCHESTER), LTD.
 [COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **January, 27, 28, February 10, 1943.**]

Workmen's Compensation—Arising out of employment—Workmen at place of employment in time of danger—Fellow employee tampering with shell from enemy aeroplane—Employees forbidden to do anything but employers' work—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

Emergency Legislation—Compensation—Shell from enemy aeroplane passing through various hands—Injury to worker by fellow-workman sawing it about 3 weeks after shell found—"War injury"—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), s. 8 (1) (b).

During the last week of July, 1942, a German aeroplane crashed at Wivenhoe, Essex, and boys looking for souvenirs found an aeroplane cannon-shell, which, after passing through various hands, came into the possession of a workman named Marriott, a toolmaker in the works, where the applicant was employed as a crane driver. On Aug. 12, 1942, Marriott was sawing the shell at his bench, when the appellant came to ask for some special oil for his crane and when he was two or three feet away the shell exploded and Marriott was killed and the applicant seriously injured. Marriott's act in sawing the shell was in defiance of his employers' prohibition forbidding workmen to do anything but the employers' work and warning them against tampering with unexploded bombs, and was also a criminal offence under the Defence (General) Regulations, reg. 92. The appellants contended (a) that the injury came within the provisions of the Personal Injuries (Emergency Provisions) Act, 1939, conferring the right to compensation on persons injured *inter alia* by the impact of anything dropped from enemy aircraft and (b) that the accident did not arise out of the applicant's employment within the Workmen's Compensation Act, 1925, s. 1 (1):—

HELD: (i) there was no causal nexus between the enemy act and the injury resulting from the explosion. The case did not, therefore, come within the Personal Injuries (Emergency Provisions) Act, 1939.

(ii) there was evidence of a tendency for engineering workmen to do a little illicit, but tolerated experimenting on their own and the risk of such conduct by other workmen was an incident of the applicant's employment; but the mere presence of the applicant, for the purpose of his work, at the place and time of danger was enough to show that the accident arose out of his employment.

[EDITORIAL NOTE.] So far as this case deals with the point under the Personal Injuries (Emergency Provisions) Act, 1939, it is purely one of construction, but none the less important for that reason. The adventures of the shell prior to reaching the unfortunate experimenter are reminiscent of the famous squib case, but there is quite a clear distinction on the facts which breaks the chain of causation. As to the claim under the Workmen's Compensation Act, 1925, the injury was clearly related to the employment although the risk of such injury was very remote. It was his employment which took the workman to the place where the danger existed and at the time when it existed, and, although the risk arose out of an act totally unconnected with the employment, and an act which appears to have been a criminal offence, the authorities seem to establish the right of the workman to compensation.

AS TO ACCIDENTS ARISING OUT OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 822, 858, paras. 1160-1180; and FOR CASES, see DIGEST, Vol. 34, pp. 320, 321, Nos. 2619-2626.]

Cases referred to:

- (1) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 43 Digest 433, 597; 3 Wils. 403.
- (2) *Gedge v. Royal Exchange Assurance Corpn.*, [1900] 2 Q.B. 214; 12 Digest 303, 2495; 69 L.J.Q.B. 506; 82 L.T. 463.
- (3) *Thom (or Simpson) v. Sinclair*, [1917] A.C. 127; 34 Digest 320, 2619; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220.
- (4) *Clayton v. Hardwick Colliery Co., Ltd.* (1915), 85 L.J.K.B. 292; 34 Digest 297, 2466; 114 L.T. 241; 9 B.W.C.C. 136.
- (5) *Dover Navigation Co., Ltd. v. Craig*, [1940] A.C. 190; [1939] 4 All E.R. 558; Digest Supp.; 109 L.J.K.B. 158; 162 L.T. 223; *sub nom. Craig v. Dover Navigation Co., Ltd.*, 32 B.W.C.C. 300.
- (6) *Lawrence v. George Matthews* (1924), Ltd., [1929] 1 K.B. 1; Digest Supp.; 97 L.J.K.B. 768; 140 L.T. 25; 21 B.W.C.C. 345.

- (7) *Lancashire & Yorkshire Ry. Co. v. Highley*, [1917] A.C. 352; 34 Digest 290, 2425; 86 L.J.K.B. 715; 116 L.T. 767; 10 B.W.C.C. 241; *revsq* S.C. *sub nom. Highley v. Lancashire & Yorkshire Ry. Co.* (1916), 85 L.J.K.B. 1513.
- (8) *Powell v. Great Western Ry. Co.*, [1940] 1 All E.R. 87; Digest Supp.; 162 L.T. 35; 32 B.W.C.C. 293.
- (9) *Armitage v. Lancashire & Yorkshire Ry. Co.*, [1902] 2 K.B. 178; 34 Digest 297, 2465; 71 L.J.K.B. 778; 86 L.T. 883.

A APPEAL by the employers from an award of His Honour JUDGE HILDESLEY, dated Nov. 18, 1942, given at Colchester County Court. The facts are fully set out in the judgment of SCOTT, L.J.

J. A. Pugh for the appellants.

F. A. Sellers, K.C., and G. H. Oliver for the respondents.

B SCOTT, L.J.: This is an appeal from His Honour JUDGE HILDESLEY, sitting at Colchester, by the respondent employers to a claim for compensation under the Act. The applicant's injuries were caused by the explosion of a small shell, picked up from where a German aeroplane had fallen in the neighbourhood some 3 weeks before, which a fellow workman, named Marriott, was sawing with a hack-saw at his bench in the respondents' works where the applicant was employed. Two defences were raised below: (1) that the injury by accident caused to the applicant was taken altogether out of the scope of proceedings under the Workmen's Compensation Act by the express language of a scheme made under the Personal Injuries (Emergency Provisions) Act, 1939; and, alternatively, (2) that the accident did not arise out of the applicant's employment within the Workmen's Compensation Act, 1925, s. 1 (1). The judgment contains findings of fact in favour of the workman on both points.

C On the first issue the facts are not in dispute, and the only question is whether they come within the 1939 Act. On the second issue a further question has been raised before us as to whether a particular finding is justified by the evidence; otherwise it is the protean question of the words "out of" which has appeared in the courts in so many shapes.

D During the last week of July a German aeroplane crashed at Wivenhoe, Essex. Two or three days later a tool room boy, employed at the respondents' works, went with other boys to the site of the crash to look for souvenirs. They found some, including a small object—in fact a gun shell—some 3ins. long and 1in. or so thick, made mostly of aluminium but painted black. It had a pointed nose, which was loose; this the tool room boy threw away. He then gave the object to another boy who in turn gave it to a fitter, and he in turn, on Aug. 1 or 2, gave it to a tool maker at the works named Reader, who thought it looked like a shell, but said he had no idea that it was explosive. Reader handed it on to his workmate Simons, who kept it till about a week before the accident, when he gave it to a maintenance fitter named Howard, who said he would hand it in, that is, to the foreman or manager. He, however, did not do so. Howard worked on the same bench with Marriott. Their tools, which they had in common, were kept in a locked drawer of which each had a key. Howard put the object in the drawer. A week later, at 5.30 p.m., on Aug. 12, when Howard left off work, the object was still in the drawer, since he had forgotten to hand it in, a fact which he did not remember till questioned by the police on Aug. 17. About 6.35 p.m., on Aug. 12, the applicant, a crane driver in the works, went up to Marriott, at his bench, and spoke to him. Marriott, who was greasing his tools up, went to the joint drawer, took out a tin and emptied the contents on the bench, including the object—now of the colour of aluminium, the black paint having, apparently, been cleaned off. The applicant then went back to his crane, but about 7.30 p.m. returned to ask Marriott if he was staying late as he wanted to get from him some special oil preparation for the wheels of his crane (to prevent oil dropping on the men working below), which it was part of Marriott's duty to prepare. As Smith came through the shop he noticed Marriott using a hack-saw on something in his bench vice, and when he was 2 or 3 ft. away the object, which was being sawn, exploded. Marriott ran shouting for help—and in fact died soon after. Smith was seriously injured and lost consciousness. There was no doubt as to the identity of the thing which exploded.

H The above are all the facts which are relevant to the first issue. I will now state shortly the material provisions of the Personal Injuries (Emergency

Provisions) Act, 1939, which, we were told, was carried into effect by a scheme under sect. 1 (1) conferring on persons injured within its provisions the right to compensation through the Minister of Pensions. The provisions are as follows :

3 (1). In respect of a war injury sustained during the period of the present emergency, by any person no such compensation . . . shall be payable . . . as apart from the provisions of this subsect. (a) would be payable under the Workmen's Compensation Acts, 1925-1938 . . .

8 (1) "War injuries" means physical injuries (a) caused by (i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or noxious thing; or (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or (b) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.

In my opinion the injury in question is not within the Act. Had I thought otherwise I should have felt bound to have notice given to the Minister in case he thought fit to ask the court to hear one of the law officers as *amicus curiae*. Sub-para. (a) (iii) shows clearly that the "causes" contemplated by paras. (i) and (ii) are acts done by the enemy or by British or allied forces in combating the enemy or repelling imagined attacks. One or other of the combatant sides must do the things mentioned. The only injuries within para. (a) are the results of which such action is the cause in a legal sense. A similar interpretation applies to para. (b). The "impact" primarily contemplated is that caused by an aircraft or other thing in motion striking a person—whatever be the force which has produced the motion; whether of gravity or an explosive. A delayed time-fuse bomb might come within the language used—or even a deliberately conceived "booby trap" dropped from an aeroplane; but there must be some definite causal nexus between the enemy act and the final effect of an injury resulting from the explosion. Where intention can be inferred, as in the two illustrations I have just mentioned, there might be such a continuing chain of causation as would bring the injury within the definition; but where, as here, the effect is not only remote from the cause but the chain of causation is definitely severed by a series of fortuitous interventions by curious boys or men acting for their own purposes, the injury is outside the Act altogether. Each boy or man who received the shell was a *novus actor interveniens* producing no such continuation of an original cause, as characterised the intervening persons in *Scott v. Shepherd* (1) or a wrong act of a navigating officer in the agony of a collision at sea. The shell in question was manufactured for discharge out of a gun as a projectile and for no ulterior purpose.

There is a further consideration which affects the application of the statute to the present case. The whole series of acts which began with the picking up of the German shell and ended with the exploding of it by Marriott's saw were illegal, and criminal offences under the Defence (General) Regulations, reg. 92. This point was not taken either below, or before us, but it is the duty of the court to take cognizance of it—see *Gedge v. Royal Exchange Corpn. Co.* (2), at p. 220. Each intervening person who "removed", or received, or kept possession of, or tampered with the shell, or handed it on to another person instead of at once "causing it to be delivered to a member of His Majesty's Forces on duty or to the officer in charge of a police station," as required by the Defence (General) Regulations, reg. 79 (1), *prima facie* committed a criminal offence against that regulation under reg. 92; for apparently all knew that it was from an enemy aeroplane. A claim under the statute could hardly succeed. That ground of appeal, therefore, fails.

The other ground of appeal is more arguable—that the accident cannot be said to have arisen "out of" the injured man's employment. Had it been the widow's application she might conceivably have claimed under the Workmen's Compensation Act, 1925, s. 1 (2)—though I express no opinion on her chance of success, especially on the point of illegality; but that subsection is of no use to the applicant. He has to show that he suffered from a risk arising out of his employment under subsect. (1). He was beyond question acting for the purpose of his employers' trade or business within subsect. (2); and it

was not he who was going outside the scope of his employment by transgressing the employers' prohibition; it was Marriott and not the applicant who was both transgressing the employers' prohibition and doing something for his own purposes and not for their purposes; and finally was guilty of doing a criminal act when he did the very thing which produced the explosion and so caused the applicant's injury.

A Apart from the aspect of illegality, there was certain evidence, to which I have not yet referred, which is material. The evidence at the inquest was admitted by consent. The superintendent of the section of the company's undertaking in which the applicant and Marriott were both employed gave the following evidence before the coroner:

B Marriott was particularly interested in his work, especially investigation; he always wanted to find out things, and was willing to learn anything. On Tuesday, Aug. 12, 1941, the deceased was working at his bench as usual, I saw the work he was doing, which was making a gauge for engine work. In all his work there would be nothing he would use which would cause an explosion, and there should be nothing in the boiler shop in the way of an explosive.

In the county court he gave evidence as follows:

C At inquest I said Marriott particularly interested in work—most inquisitive in the right manner . . . I should have wanted to know all about it, but should not have seen it—the very shape suggested something explosive. Further cross-examined: Skilled craftsmen do odd jobs for themselves. I am afraid it is only too true. They don't always ask leave. They get consideration when they do ask.

D The divisional organiser for the Amalgamated Engineering Union gave evidence below, based on his long experience—40 years—of engineers "naturally tending to experiment" and becoming thereby more efficient workers. A copy of a warning hung up at various places in the works was in evidence: it spoke of six men having lost their lives in a neighbouring shop by a small unexploded bomb being brought inside. It added:

Take warning, therefore, if you see an unexploded bomb or any suspicious looking object—don't touch it—get away from it—warn others in the vicinity—and immediately report its location.

The finding of the county court judge on this part of the evidence was this:

E There is also in force at the respondents' works a general (verbal) prohibition forbidding workmen without permission to occupy themselves with work other than that which they are actually employed to do. Both these prohibitions are habitually disregarded. I accept the evidence of the witness Rogers that engineers, in disregard to prohibitions, naturally tend to make experiments and that they habitually do so even at the risk of being dismissed. In his experience workmen examining objects of this kind do so under the influence of a natural curiosity impelling them to find out things for themselves. This is to some extent confirmed by the evidence of the works superintendent, Downey, who was called on behalf of the respondents.

F I should hardly have thought the evidence justified the words "habitually disregarded"; but I think there was evidence to support a finding that it was a characteristic of this engineering shop for the men to do a good deal of experimenting on their own for the sake of acquiring knowledge, and sufficiently often without leave from the management to justify a conclusion that it was to some extent tolerated. It may also, I think, be inferred from the evidence that Marriott did not at all realise that the small object he was sawing contained an explosive.

G If then a workman such as Marriott, a toolmaker, might quite possibly be experimenting in the above way, innocent of any realisation that the object was likely to explode, it must follow that the risk of such conduct by other workmen was an incident of the applicant's employment, which might, though unexpectedly, bring him in the course of his employment into a zone of danger, as when he approached Marriott for the necessary purpose of getting the special oil for his crane: if so, the accident arose out of his employment. H This was one of the grounds on which the county court judge thought the case within the principle of the opinion of LORD SHAW OF DUNFERMLINE, in *Thom (or Simpson) v. Sinclair* (3), at p. 142; when LORD SHAW OF DUNFERMLINE was referring to "the nature, the conditions, the obligations and the incidents" of the workman's employment. There is some resemblance of principle in the propensity of skilled engineering workmen to seek after a still greater skill by a little illicit but tolerated experimenting on their own, to the propensity of boys

to "lark" mischievously, which was the risk present in *Clayton v. Hardwick Colliery Co., Ltd.* (4). There the House of Lords, recognising that "boys will be boys," thought that the stone throwing on the picking belt at the pit head was a natural incident of the employment which exposed the applicant to his accident. If it be necessary, in order that the accident should have arisen out of the employment, to show a nature, or a characteristic, or such an incidental tendency to do things as may give rise to the risk of accident, there was evidence sufficient to dispose of the contention of counsel for the appellants of no evidence on this aspect of the employment. A

Even without evidence of the above propensity of workmen like Marriott, I should have been prepared to hold that the mere presence of the applicant for the purpose of his work at the precise spot and time of danger was enough to show, that the accident did arise out of his employment, within the principles laid down in the House of Lords and also in this court. The decision in *Dover Navigation Co., Ltd. v. Craig* (5), is very much in point, because the decision of the county court judge was reversed. The opinion of LORD WRIGHT contains a review of the authorities, and I think justifies the language of RUSSELL, L.J., in *Lawrence v. Matthews* (6), at p. 19, which is quoted by the county court judge in the present case : B

... sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot. C

It follows from the above that I agree with the conclusions of His Honour JUDGE HILDESLEY in the present case—apart from the fact that Marriott's very act which produced the accident was itself an offence against Defence (General) Regulations, reg. 79. On the whole, though with doubt, I think, that that fact is irrelevant to the question of whether the accident arose out of the employment. To decide otherwise would mean that accidents in mines and factories would cease to arise out of the employment, if the act of somebody else which produced the accident happened to be not merely common law negligence but also an offence against, for example, the Coal Mines Acts, or the Factory Act. I think such a question is outside the purview of the Workmen's Compensation Acts. D

The appeal must be dismissed with costs. E

GODDARD, L.J. : On the question whether this injury was a war injury, so as to fall within the provisions of the Personal Injuries (Emergency Provisions) Act, 1939, s. 3, I have nothing to add to the judgments of the county court judge, and of SCOTT, L.J. It is indeed, in my opinion, too clear for argument. F

Whether this accident arose out of the applicant's employment is not, in my opinion, a mere question of fact, and on several occasions not only this court but the House of Lords have come to a different conclusion to that reached by the arbitrator. It has to be determined whether on the facts found it is possible to say that the accident arose out of the employment. In *Lancashire & Yorkshire Ry. v. Highley* (7), LORD SUMNER said at p. 372 : F

There is, however, in my opinion, one test which is always . . . applicable because it arises upon the very words of the statute and is generally of some real assistance. It is this : Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury ? If yea, the accident arose out of his employment. G

He then showed that various expressions which had been used were all ways of asking whether it was part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby, in the course of that employment, he sustained injury. It is, I think, important to remember that we are not dealing with the case of Marriott, who caused the explosion. The present applicant was where he was and doing what he was at the moment that he was injured because it was his duty to be there and to be acting as he was. Moreover, every workman is exposed, as one of the inevitable features of his employment, to the risk of a fellow workman doing an unauthorised, negligent or dangerous act. If an injured man was taking part in the act which caused the injury, it may well be that, unless the case falls within the provisions of sect. 1 (2), he would be disentitled to compensation ; but, if he was not, in my opinion, he ought not to be affected because the negligent act of his fellow workman was of one nature rather than another. H

The applicant here was injured because he was doing his work at a place and time when a fellow workman was doing a negligent and unauthorised act. I do not base my decision on quite the same grounds as did the county court judge. He dealt with it as a case of a special exposure to risk. As I understand the special exposure cases, they depend on the fact that the workman has been required to work in a place where he is exposed to a greater degree of risk than would ordinarily be the case, for instance, on a scaffold during a thunder-storm, or on a fishing vessel in the last war. I prefer to regard the accident as being caused by an ordinary risk of the employment, namely, the negligent act of a fellow workman, and as it was part of the employment of the applicant that he should act as he was acting, and should be in the position in which he was when he was injured, I think the test of LORD SUMNER is satisfied and consequently the accident arose out of his employment. While I do not want to burden this judgment with the citation of cases, I think I may refer to *Powell v. Great Western Ry.* (8). There a boy aimed with an air-gun at a locomotive and shot the fireman. The boy was doing an unlawful act, but the injured workman was held entitled to compensation, because his service and duty required him to be where he was, and unless he had been there he would not have been injured. I do not think in principle that case can be distinguished from the present.

DU PARCQ, L.J. : In this case the county court judge held that the accident to the workman arose out of his employment. That it arose in the course of his employment is not disputed. The county court judge further held, contrary to a submission made on behalf of the employers, that the Personal Injuries (Emergency Provisions) Act, 1939, had no application to the present case. Both these findings were challenged before this court. I will deal with them in the order in which I have stated them.

The workman was injured by reason of an explosion. The explosion was caused by work which was being done in a part of the works to which the workman's employment took him by a fellow workman, Marriott, who was unfortunately killed by it. Marriott was a skilled craftsman. He was engaged in sawing with a hack-saw a metal object which was fixed in a vice before him. In so doing Marriott was disobeying his employers' orders in that he was engaged for his own purposes on work which they had neither required nor authorised him to do. The motive which prompted him seems to have been curiosity as to the nature and construction of a "small cylindrical object" which had been brought to this country in an enemy aeroplane, and, after passing through many hands, had come into his possession. There was evidence that in these boiler works skilled craftsmen sometimes "do odd jobs for themselves" without permission, though in so doing they are breaking a rule.

In these circumstances, I am of opinion that the county court judge made no error in law in coming to the conclusion that the accident arose out of the applicant's employment. The question in all cases is, in the words of LORD SUMNER, at p. 372 :

Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury ? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment.

For present purposes, the words "to do" may be omitted from the question. The applicant did nothing but his duty. His was the passive part of a sufferer, and, if he hazarded a risk, he did so involuntarily. It is beside the point to inquire whether what Marriott did arose out of Marriott's employment. Clearly it did not. But where workman A, by gross negligence or misconduct, causes injuries to workman B, the question for the judge is not whether what A did arose out of A's employment, but whether B's injuries arose out of B's employment. What A does may be entirely outside the sphere of his duties, and a tortious or even a criminal act, but it by no means necessarily follows that the injury which B suffers as a result of it does not arise out of the employment of B.

In my opinion the real question here is whether the risk that a fellow workman might disregard his employers' orders and do work for his own purposes, with injurious consequences to his workmates, was a risk incidental to the employ-

ment of the applicant. Even without evidence as to the particular works in question, I think that a judge, using his knowledge of fallible human nature, might be justified in giving an affirmative answer to the question and in replying that this was no less a risk of a man's employment than the universally recognised risk that a fellow workman may do negligently that which he is engaged to do. Further, the very fact that Marriott did so act, with consequences injurious to the applicant, may well be regarded as evidence that the risk existed, whether or not its existence was previously apprehended by workmen or employers, the question in these cases being, not whether the risk was foreseen or predictable, but whether it was there. For the decision of this case, however, it is enough to say that the existence of the risk which I have defined was proved by evidence which the judge accepted. Since that risk existed, it seems to me to be immaterial to consider for what particular purpose of his own Marriott was doing the work on which he was engaged, or what motive prompted him to do it. Nor is it material, in my opinion, that the work which he was doing was in fact, though presumably not to his knowledge, highly dangerous to himself and others, and that the metal object which he was investigating turned out to contain an explosive. The same principles would apply if, for instance, he had been improperly engaged in making a toy for a child in his employers' time and in the course of his work a splinter from the material which he was using had flown off and hit a fellow workman. Whether the risk be great or small, it is an incident of the fellow workman's employment. I am accordingly of opinion that, on the facts found by the county court judge, he rightly held that the accident arose out of that employment.

Our attention was directed to that line of cases of which *Armitage v. Lancashire & Yorkshire Ry.* (9) is, if not the first, at any rate a very early example. These are cases in which it was held that, apart from special circumstances, injuries occasioned by horseplay or skylarking on the part of fellow workmen are not within the Act. Special circumstances may exist, as in *Clayton v. Hardwick Colliery Co., Ltd.* (4), which will support a finding of fact that the risk of injury from such a cause was incidental to the employment. If in the present case Marriott had deliberately and maliciously exploded a live shell in the works and so caused the applicant's injuries, these skylarking cases would no doubt have been much in point. They seem to me to have little relevance to the facts found. They affirm the principle that, in order to show that an accident arose out of a man's employment, it is not enough to prove that it occurred at the place where the man was engaged in his work, or in the course of his employment. The decision of the county court judge does not depart from that elementary principle, and for the reasons which I have given I think that in the present case the risk is clearly related to the employment. The contrast between the present case and such cases as *Armitage v. Lancashire & Yorkshire Ry.* (9) may be put in this way. No reasonable man would be surprised at the proposition that a workman by accepting employment in a factory, subjected himself to the risk that a fellow workman in that factory might do something negligent, or reckless, or contrary to orders, or even something which was a statutory offence. If it were asserted that, when the workman accepted such employment, he was by so doing subjecting himself to the further risk that he might be assaulted by a fellow workman in the factory, most reasonable men would say, not merely that it was, generally speaking, a most remote risk, but also that, in so far as such a risk existed, it was not as a general rule attributable to the employment, but to causes wholly unconnected therewith. The reasonable man would, however, no doubt concede, what *Clayton's* case (4) demonstrates, that there are exceptions to the general rule, and that the risk of assault, whether or not it results from horseplay, may be an incident of the employment in special circumstances.

The question raised under the Personal Injuries (Emergency Provisions) Act, 1939, does not seem to me to be either difficult or doubtful. The Act provides that where what it describes as "war injuries" are sustained, compensation is to be recoverable by the injured person under a scheme to be made by the Minister of Pensions. In respect of such injuries persons who would otherwise be liable in damages are freed from their liability, and no compensation is to be payable which apart from these statutory provisions "would be payable under the Workmen's Compensation Acts, 1925, 1938." It seems

unlikely that the legislature intended to free from liability persons who use parts of enemy aeroplanes for the purpose of assaulting their fellow subjects, or who so mishandle weapons which were once used by the enemy as to cause damage to the person or property of others. I think that when the definition of "war injuries" is read with these considerations in mind, and in its context, it cannot be held to cover the present case. I do not think that the applicant's injuries can reasonably be said to have been caused by "the discharge of a missile by the enemy" or "the use of a weapon, explosive, or other noxious thing by the enemy." It may be said that, if the enemy had never used the shell in question, it would never have reached England, or Marriott's possession, just as it may be said that, if the Germans had never invaded Poland and there had been no war, this accident would never have happened. But this "cause" is too remote, and to adopt the construction ingeniously urged by counsel for the appellants would be to go out of one's way to make nonsense of the Act. The alternative contention, that the applicant's injuries were caused by the "impact" on him of a "part of, or of something dropped from", an enemy aircraft, presents no greater attraction to my mind.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors: *Carpenters* (for the appellants); *Pattinson & Brewer* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Re GREGORY & CO. (BRUTON STREET), LTD.

[CHANCERY DIVISION (Bennett, J.), **February 8, 1943.**]

Emergency Legislation—Application for leave to enforce a remedy—Remedy not available to applicant—Power of court to refuse leave—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (a) (v).

A managing director applied for leave to serve a demand as a creditor on a company under the Companies Act, 1929, s. 169, in respect of salary payable under a written agreement with the company. Before the salary became due his appointment as managing director to the company had been terminated on the appointment of a receiver. It was contended that, on an application for leave to enforce a remedy under the Courts (Emergency Powers) Act, 1939, the court had no power to inquire whether or not the remedy sought to be enforced was available to the applicant:—

HELD: the Courts (Emergency Powers) Act, 1939, did not preclude the court from inquiring whether a remedy was available to the person seeking leave to enforce it and, as it was clearly shown that no such remedy was available, leave to enforce it would be refused.

Re Fraser Taylor's Application (1) distinguished.

[**EDITORIAL NOTE.** As a matter of convenience the practice has been to deal with an application for leave to proceed under the Courts (Emergency Powers) Acts quite separately from any question whether the creditor was in a position to enforce the rights which he proposed to enforce. It was, therefore, held in *Re Fraser Taylor's Application (1)* that a mortgagee on an application under that Act had not to show a *prima facie* case that he was entitled to enforce the powers which he sought leave to exercise. This, however, is only a matter of convenient practice. It is here held that, if there is clear evidence that no such remedy exists, such evidence can properly be adduced on an application for leave to proceed. The matter is purely one of practice and convenience and the saving of the costs of unnecessary applications.]

FOR THE COURTS (EMERGENCY POWERS) ACT, 1939, s. 1 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 947.]

Case referred to:

(1) *Re Fraser Taylor's Application*, [1941] 3 All E.R. 141; Digest Supp.; 165 L.T. 405.

MOTION to discharge an order made by the registrar under the Courts (Emergency Powers) Act, 1939, giving leave to serve a notice under the Companies Act, 1929, s. 169. All the facts are set out in the judgment.

J. Wolfe for the applicants, the company.

Wilfrid M. Hunt for the respondent, G. W. March.

BENNETT, J.: The Companies Act, 1929, s. 169, provides that:

A company shall be deemed to be unable to pay its debts (1) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £50 then due, has served on the company, by leaving it at the registered office of the company, a

demand under his hand requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

The Courts (Emergency Powers) Act, 1939, s. 1 (2), provides as follows :

Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (a) to proceed to exercise any remedy which is available to him by way of . . . (v) the serving of a demand under the Companies Act, 1929, s. 169 (1).

Subsect. 4 of the same section provides :

If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

On Jan. 5, 1943, George William March applied under the provisions of the Courts (Emergency Powers) Acts for leave to serve a demand, under the Companies Act, 1929, s. 169, on a company called Gregory & Co. (Bruton Street), Ltd., for payment to him of the sum of £250, being the amount due and payable by the company for 3 months' salary and expenses from Oct. 1, 1942, to Dec. 31, 1942, pursuant to an agreement in writing made between the company and George William March and dated Dec. 4, 1936.

On Jan. 21, 1943, the registrar made an order giving the respondent leave to serve notice, the intention being, no doubt, to follow the notice up, if it was not complied with, with a petition to wind up Gregory & Co. (Bruton Street), Ltd.

The present motion is to discharge the order made by the registrar. The grounds upon which it is sought to discharge the order is, first, that the respondent is not a creditor of the company and, therefore, not a person entitled to serve a notice under the Companies Act, 1929, s. 169. The second ground is that the applicant, the company, has proved that its inability to pay is attributable to circumstances directly or indirectly due to the war. It is said by the respondent that the court is not entitled to inquire into the question of whether he is a creditor. Counsel for the applicants, on the other hand, says that the court is entitled to inquire into that question ; that he has filed evidence which shows that the respondent is not a creditor, and that he is entitled to have this order which the registrar has made, discharged and the application dismissed.

The practice undoubtedly is, in the first instance, not to require a person, who applies for leave to exercise his remedies under the Courts (Emergency Powers) Act, 1939, to prove anything. The practice directions in the Chancery Division provide that in applications under sect. 1 (1), (2) and (3) of the Courts (Emergency Powers) Act, 1939, it shall not be necessary in the first instance to support the application by any affidavit. In applications under sect. 1 (2) (a), the mortgage deed, debenture or other document under which the applicant seeks to exercise his powers shall be produced to the master and be entered in his note and be read in the order. That practice I do not think necessarily settled that in no circumstances can the court inquire into the question whether or not the person who is asking leave to exercise his powers is a person who has any powers which he is entitled to exercise. It seems to me there is nothing in the Act which says that the court is under no circumstances to inquire into the question whether the person applying for leave to exercise powers is a person who has the right to exercise powers. It seems to me that in a case where it is clearly proved that the applicant has no rights of any kind, the court ought not to give that applicant leave to exercise his rights. I do not think there is anything in the Act which disentitles the court to inquire into the question. There are circumstances in which the court may inquire into the question. I think each case must depend upon its own facts ; but where you have it clearly proved that the applicant is not a person who can have any rights, then I think the court is entitled to look into those facts and act upon the view that the applicant has no rights at all.

The position here is that the respondent was engaged as managing director of the applicant company upon the terms of a written agreement of Dec. 4, 1936, for a term of 7 years from Dec. 4, 1936, in accordance with cl. 68 of Table A

incorporated in the company's articles of association, with the provision that his appointment should determine *ipso facto* if he ceased from any cause to be a director or if the company in general meeting resolved that his tenure of office be determined. His salary was fixed at £900 per annum, to be paid monthly on the first day of every month, and he also had an allowance for expenses at the rate of £100 per annum payable in like manner, so that his remuneration was £1,000 per annum payable monthly.

A The applicant company issued debentures, and some time in September, 1941, the debenture holders applied under the Courts (Emergency Powers) Act for leave to exercise their powers under the debentures of appointing a receiver. According to an affidavit made on behalf of the company, on Dec. 17, 1941, leave was obtained by the debenture holders under the Courts (Emergency Powers) Acts to exercise any remedy available to them by way of the appointment of a receiver. The debenture provided, by cl. 12 thereof, that the holder or holders of the debenture might at any time, after the principal moneys thereby secured should become payable, by writing under his or her hand or hands appoint any person to be a receiver of the undertaking property and assets thereby charged with power to take possession of such undertaking, property and assets, to manage and carry on the business of the company, and to sell the said undertaking in all or any such property and assets and execute any assurance thereof in the name of and on behalf of the company. The same clause provided that the receiver so appointed should be deemed for all purposes to be an agent of the company. Under that power and in pursuance of the leave which they obtained on Dec. 17, 1941, the debenture holders, on Sept. 22, 1942, appointed a receiver and manager, who, on the evidence, the day after his appointment, informed the respondent that, so far as he was concerned, the respondent was a free agent; he could not look to him for employment, nor for any remuneration. That statement of what he did on the day after he was appointed was set out in a letter which the receiver addressed to the respondent on Nov. 11, 1942, and was never controverted. There were discussions between the respondent and the receiver for employment upon terms differing from those which were set out in the agreement of Dec. 4, 1936.

On the correspondence and the facts which are deposed to in an affidavit, I have no doubt whatever that the receiver purported to put an end, in September, 1942, to the respondent's contract of Dec. 4, 1936. In those circumstances, if he put an end to that contract in September, 1942, it is not possible for the respondent to have been a creditor of the company for salary as a director for the period between Oct. 1, 1942, and Dec. 31, 1942. The respondent has never filed any evidence in any way controverting the case which is now put forward on behalf of the company. In those circumstances it seems to me that, if I am satisfied that he is not a creditor, I ought not, on clear proof and no contradiction of those facts, to give him leave under the provisions of the Courts (Emergency Powers) Act, 1939, to take a step which is preliminary to presenting a petition to wind up this company.

It is suggested that I am not in a position to consider the question because of a decision of MORTON, J., in *Re Fraser Taylor's Application* (1). I do not think the decision in that case affects the point which is raised here. All the court decided was that it was not incumbent upon a mortgagee, who applied for leave to exercise his remedies under the Courts (Emergency Powers) Act, 1939, to show a *prima facie* case that the powers which he sought leave to exercise had arisen. That is all the court there decided, and it is a wholly different case. This is a case as to whether the person who seeks leave of the court to exercise a particular remedy has the qualities which entitle him to exercise that remedy. If it is clearly proved (and, in my judgment, it has been in this case) that he does not possess those qualities, I think the court is entitled to look into the matter and act upon that footing.

For these reasons, in my judgment, the motion succeeds; the order made by the registrar must be discharged, and the respondent must pay the costs of the motion.

Order of registrar discharged.

Solicitors: *Kenneth Brown, Baker, Baker* (for the applicants); *M. L. Moss & Son* (for the respondents).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

RUSSELL AND ANOTHER *v.* WEINREB.[CHANCERY DIVISION (Uthwatt, J.), **February 5, 1943.**]*Emergency Legislation—Mortgage—Meaning of “mortgage money”—Possession of Mortgaged Land (Emergency Provisions) Act, 1939 (c. 108).*

The meaning of the term “mortgage money” in any act must depend on the construction of that Act, and the meaning in the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, of the term “mortgage money” was principal money not including interest. A

[EDITORIAL NOTE.] This is purely a question of the meaning of the words “mortgage money” in the Act of 1939. As the judgment states the question is one of the construction of the words as they are in the particular Act and thus is to be decided on the context in which they are there found.

FOR THE POSSESSION OF MORTGAGED LAND (EMERGENCY PROVISIONS) ACT, 1939, see HALSBURY'S STATUTES OF ENGLAND, Vol. 32, p. 1179.] B

APPLICATION by a mortgagee under the Possession of Mortgaged Land (Emergency Provisions) Act, 1939. The summons was taken out by the mortgagees against the mortgagor, asking for possession of property which had been mortgaged to them by a legal charge dated Nov. 5, 1935. The court was asked to determine, *inter alia*, whether the words “mortgage money” in the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, s. 1, included interest as well as principal. It was admitted that the interest was in arrear but not that any payment of the principal money was in arrear. C

I. J. Lindner for the applicant.

H. J. Astell Burt for the respondent.

UTHWATT, J. : The question which I have to decide in this case is whether in the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, the expression “mortgage money” includes interest due on the mortgage. D

“Mortgage money” has been defined from time to time in various Acts of Parliament. In the Conveyancing Act, 1881, it is defined as including interest; the same definition is found in the Law of Property Act, 1925, and the same definition may, I think, be found in other Acts. That, of course, is of some assistance as showing the general way in which the phrase is used; and I know of no example where “mortgage money” is treated as relating only to the principal secured by the mortgage. E

The question is always one of construction of the particular Act, and the point which I have to determine is whether, on the construction of this Act, “mortgage money” is used in a sense which includes interest. I am clearly of opinion that it is not used in that sense. It is quite clear from the phrasing employed in sect. 1 (1) that interest on the “mortgage money” is treated as a different thing from the “mortgage money” itself. Under the terms of the subsection, there must be the breach of an obligation “to pay the mortgage money or interest thereon” before a mortgagee becomes entitled to obtain possession. “Interest” is there clearly differentiated from “mortgage money.” F

When one comes to subsect. (2) the provision is :

For the purposes of this section default shall not be deemed to have been made in payment of any mortgage money, unless a written demand for payment has been served on the person liable, and a period of 3 months has elapsed since the service of the demand : Provided that this subsection shall not apply where the mortgage money is repayable by instalments. G

It is, I think, obvious that in the proviso the expression “mortgage money” can relate only to principal, because interest in common experience is not payable by instalments, whereas principal is. Having regard to that, and to the differentiation in subsect. (1) made between “mortgage money” and “interest thereon,” as a matter of terminology it appears to me that the right construction is that in subsect. (2) “mortgage money” means principal, and does not include interest. H

The result, therefore, is that the mortgagee is not precluded by the absence of any written demand for payment from obtaining an order under this section, because it is agreed that interest is in arrear.

Order accordingly.

Solicitors : *Fisher, Dowson & Wasbrough* (for the applicant) ; *Phoenix, Levinson, Walters & Shane* (for the respondent).

[Reported by *IRENE G. R. MOSES, Barrister-at-Law.*]

Re SUBURBAN AND PROVINCIAL STORES, LTD.

[CHANCERY DIVISION (Bennett, J.), February 8, 1943.]

Companies—Shares—Variation of rights—Objection by holder of 15 per cent. of issued shares—Unfair prejudice of shareholders—Right to bring petition to annual variation—Dismissal of petition where petitioner not the holder of sufficient shares—Companies Act, 1929 (c. 23), s. 61.

A By a resolution, passed at a meeting of ordinary stockholders, the rights thereof were varied by converting the £3,000,000 7 per cent. ordinary stock into 3 per cent. cumulative preference stock. A stockholder, who had not voted for the variation, presented a petition under the Companies Act, 1929, s. 61, asking that the variation should be cancelled as being prejudicial to the ordinary stockholders. It was admitted that he did not own 15 per cent. of the ordinary stock or represent 15 per cent. of the ordinary stockholders as required by sect. 61, but it was stated on his behalf that he would obtain that representation:—

B HELD: (i) since the petitioner had not fulfilled the requirements of the section the petition could never succeed.

(ii) to allow such a petition to remain on the file must hamper the legitimate business of the company and was, therefore, an abuse of the process of the court, and the petition must be struck out and removed from the file.

C [EDITORIAL NOTE. The importance of this case lies in the fact that it arises upon a section which has seldom been acted upon and from the fact that the court has, in the circumstances, seen its way to remove the petition from the file as an abuse of the process of the court.

AS TO RESTRAINT ON VARIATION OF RIGHTS ATTACHED TO CLASSES OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 156, 157, para. 281; and FOR CASES, see D DIGEST, Vol. 10, pp. 776-780, Nos. 4857-4882.]

MOTION for an order that a petition presented under the Companies Act, 1929, s. 61, should be dismissed. All the facts are set out in the judgment.

C. Harman, K.C., and Cecil Turner for the applicants.

Valentine Holmes for the respondent.

E BENNETT, J.: This is a motion, notice of which was given on Feb. 2, on behalf of Suburban & Provincial Stores, Ltd.,

... for an order that the petition presented in the above matter by Peter Lind on Jan. 20, 1943, in which the company is named as a respondent, and which was presented pursuant to sect. 61 of the above-mentioned Act, do stand dismissed ... on the grounds: (a) that the said petitioner was and is not the holder of 15 per cent. of the 3 per cent. cumulative preference stock (formerly ordinary stock) of the said company, and was not appointed in writing for the purpose of presenting the said petition by holders of 15 per cent. of the said stock; (b) that the said petitioner has not served the said petition on the said company or taken out a summons for directions in regard thereto as required by R.S.C., Ord. 53 B, r. 10 (1); (c) that in the circumstances of the case the presentation of the petition and the delay in proceeding therewith, ought to be regarded as vexatious and an abuse of the process of the court and that the petitioner may be ordered to pay the costs of this application.

G The matter is a somewhat unusual one. On Jan. 20, Lind presented a petition to the court under the Companies Act, 1929, s. 61. It is a section which is not often used. I have been sitting here since Nov., 1929, and this is the first occasion upon which I have had to consider a petition presented to the court under that section. The section provides as follows:

H (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than 15 per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the court to have the variation cancelled, and, where any such application is made, the variation shall not have effect unless and until it is confirmed by the court. (2) An application under this section must be made within 7 days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the

shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose. (3) On any such application the court, after hearing the applicant and any other persons who apply to the court to be heard and appear to the court to be interested in the application, may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall if not so satisfied, confirm the variation. (4) The decision of the court on any such application shall be final.

This company, the Suburban & Provincial Stores, Ltd., was incorporated in 1926 and its authorised capital is £3,600,000. Prior to Jan. 13, 1943, that capital was divided into £3,000,000 ordinary stock, 3,000,000 deferred shares of 2s. each, and 300,000 5 per cent. cumulative preference shares. The whole of that capital had been issued with the exception of some of the 5 per cent. cumulative preference shares. Of that class of share only 61,153 had been issued out of a nominal capital of that class of £300,000. A

The rights attached, before Jan. 13, to the £3,000,000 ordinary stock, were rights which entitled them to receive a dividend at the rate of 7 per cent. per annum, on the amount paid or credited as paid up on the stock. On Dec. 21, 1942, the company convened meetings of the ordinary stockholders, of the deferred shareholders and of the company, for the purpose of passing resolutions under the articles of association, for varying the rights attached to the ordinary stock, and converting, amongst other things, the ordinary stock into 3 per cent. cumulative preference stock. The meetings were convened to be held on Jan. 13, 1943, and on that day meetings were held of the ordinary stockholders, of the deferred shareholders and of the company, and those meetings, by very large majorities, passed resolutions which altered the rights attached to the ordinary stock. B C

The petitioner, Lind, is the holder of £400 of ordinary stock, and on Jan. 20 (that is to say, within 7 days of the meetings at which the resolutions were passed altering the rights attached to the ordinary stock) he presented a petition to the court, and para. 14 of his petition is as follows : D

Your petitioner did not consent to or vote in favour of the resolution for the variation of the rights of the ordinary stock holders. He is the holder of ordinary stock to the amount of £400. It has not been possible to obtain the appointment in writing by holders of 15 per cent. of the issued ordinary stock who did not consent to or vote in favour of the resolution to make this application on their behalf, but this appointment will be obtained without delay. Your petitioner makes this application on behalf of the shareholders entitled to make it. The application is to have the variation of the rights aforesaid cancelled. The variation of rights will unfairly prejudice the class of ordinary stock holders. E

and the prayer of the petitioner is that the variation of rights attached to the ordinary stock of the company be cancelled.

That petition, as I say, was presented on Jan. 20, last. It has not been served upon the company nor has the petitioner taken any step under R.S.C., Ord. 53 B, r. 10, to get directions as to proceeding with the petition. The petition simply remains on the file. But it came to the knowledge of the company, because, having presented it, the petitioner proceeded to circularise the ordinary stockholders of the company with a view to getting from them, or from a sufficient number of them, authority to act on their behalf in making the application which he has made to the court; and the petition, having in that way come to the knowledge of the company, and the company having obtained a copy of the petition, and having read the allegations contained in it, and having come to the conclusion that the petition is demurrable and cannot in any circumstances succeed, has made the application on motion to the court which I read at the outset of my judgment. F G

There are two questions, I think, which have to be considered and determined. The first is upon the construction of the Companies Act, 1929, s. 61. Whether, upon the true construction of that section and on the admitted facts, the petition can possibly succeed, the admitted facts being that the petitioner holds no more than £400 stock, and that, at the time when the petition was presented, the petitioner did not have the authority in writing or otherwise of other shareholders whose holdings combined with his own amounted to 15 per cent. of the issued shares to make the application. H

In my judgment, the provisions of the section are quite plain. The right

to apply is given to the holder or holders of 15 per cent. of the issued shares of the class whose rights are to be varied. Such holders must not have consented to the proposed variation or voted in favour of a resolution for the proposed variation. That is made quite plain by sect. 61 (1). Sect. 61 (2) is imperative and requires that the application under the section must be made within 7 days after the date on which the consent was given or the resolution was passed, and in this case that is within 7 days of Jan. 13, 1943. The subsection enables the application to be made either by a qualified shareholder—

A that is to say a shareholder who has not consented to the variation or voted in favour of the resolution for variation—who holds or by qualified shareholders who hold the prescribed percentage of shares or by a qualified shareholder who, when he makes the application, has the written authority of other qualified shareholders whose holdings together with his own amount in the aggregate to 15 per cent. of the issued shares of the class of shares the rights of which

B are to be varied. The subsection does not enable an application to be made by a shareholder who, when he makes the application, does not himself hold a prescribed percentage, and has not then the written authority to act as agent for other shareholders whose holdings, aggregated with his own, amount to the prescribed percentage.

Any other view of the requirements of the section would not comply with the provisions of subsect. (1) which gives the right to make the application to the

C holders of not less, in the aggregate, than 15 per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, because, when Lind made the application, he had no authority from any holder of ordinary stock to make it. In my judgment, upon the language of sect. 61 and the admitted facts, this petition never can succeed.

D Then the question is whether it can be stayed *in limine*, or whether it should remain on the file while the petitioner tries to whip up a sufficient number of qualified stockholders to support him, and when he has succeeded in doing that, issues his summons for directions and brings the petition on for hearing before the court.

I should here say that counsel on behalf of the petitioner, who is the respondent to this motion, has this morning offered forthwith to issue a summons for directions under R.S.C., Ord. 53 B, r. 10, and I have no reason for supposing, and

E I am not acting upon the view, that the petitioner is moving otherwise than in good faith. The question, as it presents itself to my mind, is whether, when proceedings must fail, as I think these proceedings must fail, and at the same time they hamper, as this petition must hamper, the legitimate business activities of the respondent to the petition, those proceedings are not an abuse of the process of the court whatever the motive which prompts the petitioner to present

F it may be. In my judgment, when you have a proceeding which must fail and which, at the same time, hampers the activities of the person against whom it is presented, that petition is an abuse of the process of the court and should, at the earliest possible moment, be removed from the file of the court.

For these reasons in my judgment this motion succeeds. I think the right order to make is to order the petition to be struck out and removed from the file of the court; the respondent to this motion to pay the costs of it.

G *Application granted with costs.*

Solicitors: *Clifford-Turner & Co.* (for the applicants); *Swann Hardman & Co.* (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

BANK VIEW MILL, LTD. AND OTHERS *v.* NELSON CORPORATION AND FRYER & CO. (NELSON), LTD.

H [COURT OF APPEAL (Lord Greene, M.R., du Parcq, L.J. and Birkett, J.),
January 13, 14, 15, 18, 19, February 5, 1943.]

Nuisance—Occupier—Local authority using stream for drainage—Statutory power to remove obstructions—Flooding due to weir erected and maintained by riparian owner—Nelson Local Board Act, 1879 (c.lxxxix), ss. 20, 21, 22.

The Nelson Local Board, predecessors of the Nelson Corporation, in 1866 constructed a reservoir which had an outlet known as the *Walverden Stream*

which flowed through the town of Nelson. In course of time this stream was enclosed in a culvert and in 1939 the flow of water through this culvert was alleged to be impeded by a bridge which had been taken over by the local authority in 1884, and a number of weirs erected by manufacturers who obtained water from the stream. To some extent the corporation drained surface water into the stream and they had also laid a 21in. sewer along part of the culverted bed of the stream. In a local Act of 1879, which was an Act primarily enabling the local authority to extend its waterworks, the local authority was given a permissive power to cleanse this stream and to remove banks, shelves or other impediments and obstructions to the free flow of the water, and all dams and weirs placed in the bed of the stream subject to a provision for compensation to the owners of any dam or weir lawfully placed therein. From time to time flooding had occurred due to the overflowing of the stream. On Nov. 25, 1939, there was a heavy rainfall in Nelson and serious flooding followed, causing considerable damage to the plaintiffs' property. It was contended that the flooding was due to a bridge owned by the corporation and to a weir owned by the other defendants. It was also contended that the stream, the flow of water through which was impeded by a number of obstructions, was a nuisance and that the corporation was the occupier of the stream and was thus responsible for the nuisance :—

HELD : (i) the corporation was not in occupation of the stream and was not responsible for the nuisance.

(ii) liberty to apply for an injunction cannot be given where the right to an injunction is not established.

Decision of STABLE, J. ([1942] 2 All E.R. 477) reversed.

[EDITORIAL NOTE.] It is settled that the liability for nuisance rests upon the occupier of property. The question here is whether the corporation were in law occupiers. It was held by STABLE, J., that the use of the stream for drainage purposes was sufficient to show that they were occupiers, but the Court of Appeal have rejected this view. They have pointed out that the acts relied upon as proving occupation amounted to no more than the exercise of statutory powers or duties vested in the corporation. If these acts had amounted to occupation, the corporation would have been obliged to remove the obstructions irrespective of any statutory power to do so and it was not suggested that any duty to remove them arose otherwise than under the permissive power given by the local Act.

AS TO LIABILITY OF OCCUPIER, see HALSBURY, Hailsham Edn., Vol. 24, pp. 84-88, paras. 148-153; and FOR CASES, see DIGEST, Supp., Nuisance, Nos. 566a-575a.]

Cases referred to :

- (1) *Heap v. Ind Coope & Allsopp, Ltd.*, [1940] 2 K.B. 476; [1940] 3 All E.R. 634; Digest Supp.; 109 L.J.K.B. 724; 163 L.T. 169.
- (2) *East Suffolk Rivers Catchment Board v. Kent*, [1941] A.C. 74; [1940] 4 All E.R. 527; Digest Supp.; 110 L.J.K.B. 252; 165 L.T. 65.
- (3) *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880; [1940] 3 All E.R. 349; Digest Supp.; *sub nom. Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893.
- (4) *Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K.B. 112; [1936] 2 All E.R. 50; Digest Supp.; 106 L.J.K.B. 41; 154 L.T. 700.
- (5) *Wilchick v. Marks and Silverstone*, [1934] 2 K.B. 56; Digest Supp.; 103 L.J.K.B. 372; 151 L.T. 60.
- (6) *Newsome v. Darton Urban District Council*, [1938] 3 All E.R. 93; Digest Supp.; 159 L.T. 153.
- (7) *Simon v. Islington Borough Council*, [1943] 1 All E.R. 41; Digest Supp.; 168 L.T. 65.
- (8) *Fletcher v. Bealey* (1885), 28 Ch.D. 688; 44 Digest 52, 369; 54 L.J.Ch. 424; 52 L.T. 541.
- (9) *A.-G. v. Manchester Corpn.*, [1893] 2 Ch. 87; 36 Digest 227, 681; 62 L.J.Ch. 459; 68 L.T. 608.
- (10) *A.-G. v. Nottingham Corpn.*, [1904] 1 Ch. 673; 36 Digest 175, 212; 73 L.J.Ch. 512; 90 L.T. 308.

APPEAL by each of the defendants from a judgment of STABLE, J., at Manchester Assizes, dated July 29, 1942, reported [1942] 2 All E.R. 477, where the facts are fully set out. There was also a cross-appeal by the plaintiffs. The case is only reported on two questions, (a) that the corporation was in occupation of the stream, and (b) whether liberty to apply for an injunction should be given.

C. R. Havers, K.C., Erskine Simes and B. Ormerod for the appellant corporation.
Neville J. Laski, K.C. and R. A. Forrester for the appellant company.

Wilfrid Clothier, K.C. and A. E. Baucher for the respondent plaintiffs and cross-appellants.

A *Havers, K.C.* : The corporation had certain statutory powers conferred upon it by the local Act of 1879. The plaintiffs in the action said that the corporation had been guilty of a breach of duty in not exercising their powers whereby the council could have prevented the weirs from holding up water. The council was not under a legal obligation. The land is vested in the landowners. The corporation does not own the soil of the stream. The sewer and the storm-water overflows were constructed under statutory powers. The facts upon which the judgment is founded are not pleaded. It is not alleged that the corporation were in occupation of the Netherfield Shed weir or of the Victory V. weir, and that by reason of that the corporation were liable at common law for a nuisance.

B It is not pleaded anywhere that the corporation were in occupation of the culvert. A mere exercise of a statutory power does not create occupation.

C *Clothier, K.C.* : The corporation were in rightful occupation of the whole of the bed of the stream and the owners of the bed could not have ejected them as trespassers. In order to establish liability for nuisance, it is not necessary that there should be exclusive occupation. There are certain matters which show that the corporation had occupation and possession. The corporation laid a 21in. sewer on the bed of the stream. Secondly, they have laid at least 10 overflow pipes which discharge water into the stream. Also, the corporation has drained surface water into the stream. Further, the corporation directed the overflow water from the reservoir into the stream. In that connection the corporation was under an obligation to maintain a certain flow of water. Also, the corporation cleansed the Victory V weir under powers contained in the local Act. As regards control over the stream, that is shown by the obligation with regard to overflow water. If a person uses something over which he has control, he must see that it does not cause a nuisance. In *Sedleigh-Denfield v. O'Callaghan* (3), the ground of responsibility was the possession and control of the land. The duty of the corporation arises not only from the statute, but also from other circumstances. The underlying principle in *Sedleigh-Denfield v. O'Callaghan* (3), is essentially the same as in *Heap v. Ind Coope & Allsopp, Ltd.* (1).

E The underlying principle of nuisance is control and failure to exercise the power of control. The corporation cannot stand by and say that they have only a mere power which they need not exercise unless they choose to do so. A corporation, as such, enjoys no immunity from liability for nuisance. *East Suffolk Rivers Catchment Board v. Kent* (2), is distinguishable and is not a fetter upon the judgment of the court in the present case. *Skilton v. Epsom & Ewell Urban District Council* (4), is authority for saying that immunity from liability for non-feasance must be restricted to a local authority in its capacity as a highway authority. It is not said that the track across the bridge was out of repair. The complaint is about the buttress of the bridge. [Counsel referred to *Wilchick v. Marks and Silverstone* (5), *Newsome v. Darton Urban District Council* (6), and *Simon v. Islington Borough Council* (7).]

F

G *Havers, K.C.* : The five matters relied upon by counsel for the plaintiffs were merely an exercise by the corporation of one or more of the permissive powers given them by statute. If the argument for the plaintiffs is correct, a local authority, notwithstanding that it is given permissive powers, would have to consider carefully whether or not to exercise them, if by such exercise the local authority would become liable in the event of a nuisance arising. It does not follow that the power to abate a nuisance involves liability for failure to exercise the power. No authority has been cited to support the proposition that where

H permissive powers are given to a local authority and those powers are exercised, the local authority becomes under a duty to others and liable in respect of nuisance. The basis for liability rests upon rights over property. In *Sedleigh-Denfield v. O'Callaghan* (3), emphasis was laid upon the duty to abate a nuisance which duty arises from the occupation of property. The right and duty to abate a nuisance springs from the occupation of property. In the present case, the corporation has no right to extract water from the stream or to exclude the owners. Without their having the usual benefit of occupation, they are being called upon to bear the burden of an occupier. In *Sedleigh-Denfield v. O'Callaghan*

(3), the defendants were in occupation. In the present case the corporation was not.

Laski, K.C. : *Quia timet* was not pleaded. On the findings of the judge, the Victory V weir is not a potential danger so long as the Netherfield weir exists. The apprehension of danger must be well-founded before an injunction will be granted in a *quia timet* action. Apprehension of a nuisance must also be well-founded. It does not exist in the present case. [Counsel referred to *Fletcher v. Bealey* (8), *A.-G. v. Manchester Corpn.* (9), and *A.-G. v. Nottingham Corpn.* (10).] A

LORD GREENE, M.R. : The first of these appeals is by the Nelson Corporation against whom damages were awarded in respect of the whole of the loss suffered by the respondents, the plaintiffs in the action, such damages to be assessed or agreed.

The second appeal is by the second defendants, Fryer & Co. (Nelson), Ltd., whom I will call "the appellant company." They were held liable for the loss to the extent of £5, and they also complain of the provision in the judgment giving liberty to the respondents to apply for an injunction. By a notice of cross-appeal the respondents seek to make the appellant company liable jointly with the corporation (or, in the alternative, severally) for the whole of the loss. B

The general history of the events leading up to the litigation and the matters of fact upon which no controversy arises are fully set out in the judgment of STABLE, J. I shall, accordingly, confine myself to such observations as are necessary to explain the questions which fall for our decision. C

Under the Nelson Local Board Act, 1879, ss. 20 to 26, certain powers were conferred upon the Nelson Local Board, the predecessors of the corporation, for the improvement of the Walverden Stream, including in particular power to remove weirs and other obstructions to the free flow of water in the stream. The weirs whose combined operation was found by STABLE, J., to have been responsible for the flood, namely, Robert's weir and more particularly the Netherfield Shed weir, and (as to a particular area of flooding) the Walverden Shed weir, are admittedly weirs which could be removed under these powers. The same applies to the Victory V weir which, if the Netherfield Shed weir were alone to be removed, would then combine with Robert's weir to produce the same disastrous results. Upon the facts as found by STABLE, J., the danger of flooding could be averted by the removal of both the Netherfield Shed weir and the Victory V weir, and if these two weirs were removed (and the corporation has power to remove them), all would be well without any necessity to remove Robert's weir. D

It was not argued that the existence of the statutory power to remove these weirs taken by itself imposed any duty on the corporation to remove them. If the matter had stood there, it could not have been suggested that this Act of Parliament, which in terms does no more than confer a power, must be construed as having also imposed a duty to exercise that power. Reference was indeed made to the decision of this court in *Heap v. Ind Coope & Allsopp, Ltd.* (1), where a lessor who had reserved power to repair the demised premises was held liable for injury suffered by a passer-by by reason of a defective light shaft cover. The liability was, it is true, based on the existence of a power to repair. But the decision can have no application to the case of powers conferred by statute which are powers and nothing more. To hold otherwise would be to treat a statutory power to remove as being the same thing as a statutory duty to remove and this is for obvious reasons illegitimate. As I understood the argument of counsel for the respondents, he did not dispute the correctness of this view, but he put his argument in two ways. First, he said that the rule that no action will lie for failure to exercise a statutory power is confined to cases where the power is what he described as a "mere" power : that in the present case the corporation had what he described as "a power coupled with an interest," that interest being derived from the five matters to which I will refer in a moment : and that the existence of that interest imposed upon the corporation an obligation to exercise its powers of removal. Secondly, he said (and this is the argument which was accepted by STABLE, J.), that, by reason of those five matters the corporation was in possession or occupation of the bed of the stream (including, as I understand, the weirs) ; and that being thus in possession or occupation and having in addition the power of removing the weirs, the corporation comes under a duty to exercise the power of removal. E F G H

The five matters to which I have referred are as follows: (a) the laying by the corporation of a 21in. sewer along part of the culverted bed of the stream; (b) the construction by the corporation of a number of storm overflow pipes which discharge into the stream; (c) the drainage of surface water into the stream by means of gratings and pipes constructed by the corporation; (d) the direction of overflow water from the corporation's reservoir into the stream; (e) the occasional cleansing of the Victory V weir by the corporation.

I will give a word of explanation with regard to each of these matters. But before I do so I must make it clear that in view of the findings of fact of STABLE, J., not one of them had anything to do with the flooding of which complaint is made in the sense that the corporation could be held liable by reason of their actions in these respects. But for the obstructions caused by Robert's weir, the Netherfield Shed weir and the Walverden Shed weir which STABLE, J., found to be responsible, there was ample capacity in the culvert carrying the stream to deal with the water turned into it by these works of the corporation, even allowing for the presence of the sewer.

Of these five matters, the works referred to in (a), (b) and (c) were merely works constructed by the corporation in exercise of its powers under the Public Health Act, 1875. The operation referred to in (d) is carried out in pursuance of the statutory obligations imposed by the Nelson Local Board Act, 1879, s. 8, and apparently also those imposed by the Nelson Water and Gas Act, 1866. These obligations to direct water from the corporation's reservoir into the stream were clearly imposed for the protection of persons interested in the water flowing in the stream in order to prevent the right conferred on the local board to impound the water of the stream for the purposes of its waterworks being exercised in such a way as unduly to deprive such persons of the benefit of the natural flow of the stream. The acts of the corporation mentioned in (e) were performed by the corporation in exercise of its statutory power of cleansing under sect. 21 of the 1879 Act.

The case as so presented by counsel for the respondents is one for which he was unable to cite any authority. If either of the two ways in which he formulated it were correct in law, startling results would follow and corporations possessing statutory powers would be placed in a position of great difficulty and danger. Speaking generally, I fail to see how a local authority which possesses and exercises a number of statutory powers conferred upon it for different purposes can thereby come under an obligation to exercise another statutory power which, again for a different purpose, it happens to possess. Counsel for the respondents endeavoured to make his argument more presentable by pointing out that all the five matters upon which he relied had reference to the Walverden Stream and he said that by their exercise the corporation had acquired an "interest" in or obtained "possession or occupation" of the stream including apparently the offending weirs. But this argument is, in my opinion, fallacious. The acts of the corporation in the five matters relied upon were in each case limited to the particular scope of the statutory power or duty under which they were performed. By turning the storm, surface and reservoir water into the stream and cleansing the Victory V weir, the corporation was not acquiring an "interest" in the stream in any relevant sense, nor did it thereby come into "possession or occupation" of any part of the bed of the stream or the culvert, much less of the offending weirs. In the case of the sewer, it may very well be that the corporation can be regarded as being in occupation or possession of so much of the bed of the stream as is necessary for the purpose of maintaining the sewer; but beyond this, its occupation or possession cannot possibly go. If each of these operations of the corporation, when regarded separately, is insufficient to convert its statutory powers of removing obstructions into duties, the fact that it performed all five cannot place it in a worse position in that respect. It would be a serious deterrent to a local authority against using statutory powers if it were told that it could only do so on pain of coming under an obligation to do something else in respect of which the legislature had deliberately refrained from imposing any duty upon it.

The fallacy underlying this attempt to combine the corporation's statutory power to remove obstructions with the alleged possession or occupation in order to impose upon the corporation a duty to exercise its statutory power can, I think, be exposed in another way. If the corporation were in fact in possession

or occupation of the bed of the stream including the offending weirs (e.g., if it had acquired those rights by purchase), its liability in respect of flooding caused by the artificial damming of the water would have arisen from the fact of its possession or occupation. It would have been in precisely the same position as any other person in possession or occupation of a watercourse who artificially accumulates the water and then allows it to escape on to his neighbour's land. The obligation to remove the obstructions would not have arisen in any way from the existence of the statutory powers, nor would the obligation have been an obligation to exercise those powers. The obligation to remove the obstructions would have existed if the statutory powers had never been granted.

I have said that no authority was cited in support of these novel propositions. Reference was indeed made to an expression used by LORD ROMER in *East Suffolk Rivers Catchment Board v. Kent* (2), where he says, at p. 102:

Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power.

Counsel for the respondents said that in the present case the corporation, by reason of the five matters to which I have referred, had more than a "mere power" and, therefore, that the general rule did not apply. But the phrase "mere power" as used by LORD ROMER cannot, in my opinion, be used to support such an argument. It clearly means a bare power or, in other words, something which upon the true construction of the relevant statute does not impose a duty. In my opinion, therefore, that part of the judgment of STABLE, J., in which he held the corporation liable cannot be supported either by the reasons which he gives or by the arguments presented in support of it by counsel for the respondents, and the appeal of the corporation must be allowed.

It remains to deal with that part of the judgment of STABLE, J., which gives liberty to apply for an injunction. So far as concerns the corporation, this part of the judgment must go with the rest. So far as regards the appellant company, counsel for the respondents endeavoured to support it on the ground that there is a potential danger in the existence of the Victory V weir because, if and when the Netherfield Shed weir is removed, the Victory V weir will take its place as a contributory cause of flooding. This argument will not, in my opinion, bear examination and is based on a misconception of the principles upon which an injunction or liberty to apply for an injunction *quia timet* is granted. It is obvious that no injunction can be granted at the present time. Things being as they are, there is no damage to be apprehended from the existence of the Victory V weir. What the appellant company may do, if and when the Netherfield Shed weir is removed, is at present quite uncertain. They may be able to remove any risk by altering the construction of their weir, by installing an efficient sluice-gate or in some other manner. At present, they cannot be said to be threatening or intending to do anything which will imperil the respondents and an injunction could not be granted to restrain them from doing something which in assumed different circumstances they may or may not do in the future. STABLE, J., evidently took this view, but, in my opinion, he ought not to have given liberty to apply for an injunction at some future date. The device of giving liberty to apply for an injunction is adopted in cases where, apart from some special circumstances, an injunction would have been granted. For example, the plaintiff may not ask for an injunction at the trial, being satisfied with the responsibility and credit of the defendant; or the defendant may desire an opportunity of making experiments with a view to remedying the mischief complained of so as to make the grant of an injunction at the hearing premature. But in all cases the right to an injunction is established before liberty to apply for an injunction is granted and the judgment giving liberty to apply for an injunction is commonly based on a declaration of the plaintiff's rights. I have never heard of a case where liberty to apply for an injunction has been given to a plaintiff who has failed to establish the facts necessary to entitle him to an injunction but has merely shown that, if at some future date and in altered circumstances the defendant does or fails to do some act, a case for an injunction will be established. This part of the judgment against the appellant company cannot stand.

In the result, both appeals must be allowed and the cross-appeal must be dismissed. Counsel for the respondents argued that this result would place

him in a position of great hardship as he would now be compelled to proceed against the proprietors of the Netherfield Shed weir and he might not succeed in establishing the responsibility of that weir which has been established in the present case. This is no doubt unfortunate, but it is the common risk which affects plaintiffs who have been unlucky enough to sue the wrong person. In any event, it cannot affect our decision.

A In conclusion, I would like to say this. It is manifest that, unless something is done to put matters right, flooding will continue to take place and great damage will be suffered by the plaintiffs and possibly by others. Those in control of the companies concerned are presumably reasonable and responsible persons, and the corporation has ample statutory powers in reserve. It would be deplorable if, for lack of co-operation and goodwill between these bodies, the existing state of affairs should be allowed to continue, particularly at the present time when special care ought to be taken to prevent damage to valuable goods.

B DU PARCQ, L.J. : I have had an opportunity of reading and carefully considering the judgment which has just been delivered, and I have only to express my complete concurrence with it. I cannot usefully add anything. I should like to say that in concurring I agree not only with the main body of the judgment, but with the concluding observations of LORD GREENE, M.R.

C LORD GREENE, M.R. : I am authorised by BIRKETT, J., to say that he has read the judgment which I have just delivered and agrees with it.

Appeals allowed. Cross-appeal dismissed.

Solicitors : *Torr & Co.*, agents for *F. W. Roberts*, Town Clerk, Nelson (for the appellant corporation); *Littledale & Lefroy*, agents for *Southern, Ritchie & Southern*, Burnley (for the appellant company); *Robinson & Bradley*, agents for *Oddie & Roebuck*, Blackburn (for the respondents).

D [Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

R. v. DAVIS.

E [COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Tucker, JJ.), **January 14, 1943.**]

Criminal Law—Practice—Taking other offences into consideration—Accused must himself admit offences and apply for them to be taken into consideration.

F The appellant was sentenced to 3 years' penal servitude for obtaining money by false pretences to which he had pleaded guilty and in respect of 33 similar offences which were also taken into consideration against him. At the time of the trial the police officer stated that a copy of the 33 offences had been served on the appellant, and his counsel stated that he had seen the appellant about these other offences and he wished them to be taken into consideration at the same time. The accused had written under the list of offences : " I admit the above offences," and added his signature :—

G HELD : this was not the correct procedure. The appellant himself must admit any further offences and request that they be taken into consideration at the same time. The court would not interfere with the sentence in this case where this course was not strictly followed since the man had seen the list of offences, had admitted them, and desired them to be taken into consideration at the same time.

H [EDITORIAL NOTE. The practice on this point is peculiar in that it does not allow counsel to admit the other offences on behalf of the accused, but requires that the accused himself admit them and apply that they be taken into consideration.

AS TO TAKING OTHER OFFENCES INTO CONSIDERATION, see HALSBURY, Halsham Edn., Vol. 9, pp. 256-259, para. 365 ; and FOR CASES, see DIGEST, Vol. 14, pp. 472, 473, Nos. 5070-5103.]

APPLICATION for leave to appeal against a sentence of 3 years' penal servitude passed upon the applicant at the Hertfordshire Quarter Sessions. All the facts are set out in the judgment.

No counsel appeared.

TUCKER, J. [delivering the judgment of the court]: This is an application for leave to appeal against sentence of 3 years' penal servitude which was passed upon the applicant at the Hertfordshire Quarter Sessions in respect of the offence of obtaining money by false pretences to which he had pleaded guilty, and in respect of 33 other similar offences which were taken into consideration against him. The kind of pretence made was that he went round to people and pretended that he came from an eye hospital and that he had some skill as an oculist. By this means he obtained money for glasses, which he promised to deliver to the people and never did deliver. He obtained £60 from one man by pretending that he had a brother who was a solicitor who would obtain substantial damages for the man if he paid certain costs in advance. That was the type of story which he was telling by means of which he was obtaining comparatively small sums of money from various people. The 33 other offences which were taken into consideration were all committed in the months of August and September and involved a total amount of about £70.

The appellant is a man of 47 years of age and has six previous convictions. He was bound over in 1926 for stealing, he was sentenced to 6 months in 1931 for false pretences, he was bound over in 1937 for larceny by a trick, he was sentenced to 6 months in 1938 for false pretences, he was sentenced to 9 months for false pretences in 1939, and to 6 months for false pretences in 1941. The burden of his application is first of all that he never, in fact, did consent or ask for the 33 other cases to be taken into consideration, and, furthermore, he emphasises that the offences in respect of which he pleaded guilty were caused by his unfortunate domestic circumstances and the serious illness of his wife. In subsequent applications he has emphasised that point and has also said that unfortunately since his conviction his wife has died.

With regard to taking the 33 other cases into consideration, what happened at the trial was this. The police officer was asked by counsel for the prosecution :

First of all, are there 33 other offences which this man desires to have taken into consideration?—Yes.

Has he been served with a list of offences?—A copy of this form, which I now hand into the court, has been served upon the accused.

The form was thereupon handed in. At that stage counsel for the applicant said to the chairman :

I have seen the defendant about these outstanding offences. He has shown me the copy of the form containing those offences which has been served upon him, and he instructs me to say that he admits them all. He has read the list, and he desires them to be taken into consideration by the court to-day.

The chairman then said :

Will that satisfy the Court of Criminal Appeal?—Yes, in my submission it will. Very well.

This court desires to say that the proper practice is for the man himself to admit and ask for the offences to be taken into consideration if he so desires, and in that respect we think the doubts of the chairman were correct and the assurance of counsel was wrong. None the less, it does not follow, because a strict and accurate course was not taken, that, in the circumstances of a particular case, where the court is satisfied that the man did admit and desire the cases to be taken into consideration, the court should interfere with the sentence. In this case not only did the man hear his counsel say in open court what I have read, but he in fact signed the list of outstanding charges adding these words in his own handwriting: "I admit the above offences."

In all these circumstances, the court sees no reason or ground for interfering with this sentence of 3 years' penal servitude, and the application for leave to appeal against his sentence is refused.

Application dismissed.

Solicitor: Registrar of Court of Criminal Appeal (for the appellant).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

**Re ROTHERMERE, MELLORS BASDEN & CO. v. COUTTS & CO.
AND ANOTHER.**

[CHANCERY DIVISION (Uthwatt, J.), January 22, 1943.]

*Executors—Payment of debts—Agreement for debt to be first charge on estate—
Effect of agreement—Inoperative where estate insolvent.*

The testator, in order to compensate the applicant for abandoning his journalistic career on entering his service, entered into an agreement on May 9, 1940, whereby the testator agreed to pay the applicant the sum of £12,000 in addition to any salary, such sum to be paid within 10 years of the agreement, and by cl. 4 thereof the testator agreed that in the event of his dying before such payment, that sum should become immediately due and "constitute a first charge on the estate" of the testator. The question to be determined on this summons was the construction of cl. 4 :—

HELD : (i) where a phrase in an instrument is capable of two constructions but one of such constructions would involve capricious action by a party to the instrument, that construction which avoids such anomalies should be adopted by the court. It was not conceivable that the testator wished to charge every asset of his estate with such payment, and, therefore, the clause meant only that payment was to be made in priority to all other debts.

(ii) such a direction was inoperative as the law provided in what order debts should be paid. Therefore, upon the proper construction of the deed, the applicant was only entitled to be admitted as an unsecured creditor to the testator's estate for the sum of £12,000 and such interest as the law allowed.

[EDITORIAL NOTE.] In the administration of an estate the first essential is that the executor or administrator shall be able to convert the assets into money in order that he may pay debts, duties and the like. His position would, therefore, become impossible if a considerable debt was charged on every asset in the estate, since he could not give a title to the purchaser without first discharging the debt. It is with this impossible situation in view the the court has rejected the view that the clause here in question upon its proper construction, created such a charge. Further in the case of an insolvent estate, the law has provided for the order in which debts shall be discharged, and, therefore, on the only possible construction of this clause—that is, that the debt in question shall be paid in priority to all other debts—the clause is inoperative and has no effect.

AS TO PAYMENT OF DEBTS WHERE ESTATE INSOLVENT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 461, 462, para. 883; and FOR CASES, see DIGEST, Vol. 23, p. 818, Nos. 8505-8514.]

Cases referred to :

- (1) *Locke v. Dunlop* (1888), 39 Ch.D.; 44 Digest 560, 3762; 57 L.J.Ch. 1010; 59 L.T. 683.
- (2) *Abbott v. Middleton*; *Ricketts v. Carpenter* (1858) 7 H.L.Cas. 68; 44 Digest 557, 3735; 28 L.J.Ch. 110; 33 L.T.O.S. 66; *affg.* (1855), 21 Beav. 143.
- (3) *Bathurst v. Errington* (1877), 2 App. Cas. 698; 44 Digest 559, 3758; *sub nom.* *Craven v. Errington*, *Bathurst v. Errington*, 46 L.J.Ch. 748; 37 L.T. 338.

SUMMONS taken out in an administration action to determine the construction an agreement. The facts are fully stated in the judgment.

Charles E. Harman, K.C., and *C. V. Rawlence* for the applicant.

Wilfrid M. Hunt for the plaintiffs.

R. F. Roxburgh, K.C., and *E. M. Winterbotham* for the defendants.

UTHWATT, J. : This summons raises a question in the administration of the estate of the late Lord Rothermere. Lord Rothermere died on Nov. 26, 1940, and the particular transaction which I have to consider is embodied in an agreement dated May 9, 1940, made between Lord Rothermere of the one part and Harry Morison of the other part.

That agreement recited that Morison had been for some years in the service of Lord Rothermere and in assuming such service had abandoned a journalistic career; that Lord Rothermere wished to compensate him for any prejudice that he might have suffered in that connection; and that Morison had agreed to continue in the service of Lord Rothermere for a further minimum period of 5 years. In cl. 2 Lord Rothermere covenanted and agreed to pay Morison within a period of 10 years, as from May 1, 1940, that is to say, at the latest on or before May 1, 1950, a sum of £12,000 without interest. Cl. 3 provided

that the sum of £12,000 was to be in addition to any salary. Cl. 4 provided as follows :

In the event of the party of the first part—that is, Lord Rothermere—dying before May 1, 1950, without having effected the said payment the said sum of £12,000 shall immediately become due and shall constitute a first charge on the estate of the party of the first part. The said sum shall be paid free of duty of any kind whatsoever and shall bear interest at the rate of 5 per cent. as from the date of death.

Then there was a provision that the agreement shall remain in force notwithstanding the death of Morison or his ceasing to be employed by Lord Rothermere, and then last of all, it was provided that the agreement should be construed in accordance with English law.

The first point which I have to decide is the meaning of the provision that in the event of Lord Rothermere dying before May 1, 1950, without having paid the said sum of £12,000, it should constitute a first charge on the estate of Lord Rothermere. That clause, it was argued, was intended to create, and, apart from any considerations arising under the Bills of Sales Acts, it would create, what is known as an equitable charge on Lord Rothermere's estate. Lord Rothermere, it may be presumed, was a person of considerable means, or at least he was treated so to be. If this clause in fact charged his estate then it would operate as a charge on every asset comprised in that estate whatever its nature and wherever it was situate. I have no doubt that as a matter of law it was competent to a person to create such a charge. The whole of the assets are defined. They are all the assets that the person possesses at a particular point of time. It is the assets as they then existed which are charged and the charge would come into operation and into existence at the date of the death.

The next question is whether, upon the construction of the deed, such a charge was created. It appears to me that the phrase itself is ambiguous. It certainly is capable of meaning that the whole of the assets of Lord Rothermere are to be charged with the payment of this sum of £12,000. It is also capable of meaning that the payment of the £12,000 shall be a first charge in the administration of the estate, that is, that the debt is to be paid in the administration of the estate and is to be paid before any other debts. As I say, the phrase is ambiguous.

In considering the proper construction to be given to an ambiguous phrase, I think that I am entitled to rely upon a general rule of old standing, which is applicable to the construction of wills. The rule is stated by STIRLING, J., in *Locke v. Dunlop* (1), at p. 393. It is stated in reference to a will. STIRLING, J., is there repeating what was laid down in *Abbott v. Middleton* (2) and repeated by LORD CAIRNS in *Bathurst v. Errington* (3). The statement is this :

Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious or even harsh and unreasonable.

In this particular case it appears to me to be ridiculous to assume that any person would set out to create a charge which was going to attach to every asset which was going to be in the hands of his legal personal representatives. The existence of such a charge would render it improper for the executors in any way to alienate or dispose of those assets unless they had first of all paid off the creditor in question. Could that have been intended ? In my opinion, no. The other construction is quite a reasonable one. The clause is dealing with payment of the £12,000 in the event there referred to, namely, in the event of Lord Rothermere dying before the payment has in fact been made. Payment is the thing to be provided for and not the creation of a charge. It starts off by saying that in the event of Lord Rothermere dying before May 1, 1950, without having effected the said payment, the said sum of £12,000 shall immediately become due, and that then it is to be paid in a particular way. It is to be paid first. The expression used is that it shall constitute a first charge on the estate of Lord Rothermere.

The net result is that no charge is created upon any asset. There is a direction contained in the estate that it is to be paid first. In this administration action

it must be assumed that the estate is insolvent. That direction is, therefore, inoperative, because the law provides for the order in which a person's debts are to be paid and no agreement by the debtor with his creditor as to the order in which they are to be paid is of any use whatever.

Upon that footing the effect of this deed is that no objection can be taken under the Bills of Sale Acts to any of the provisions of the deed. Morison is as respects this sum of £12,000 entitled to be admitted as a creditor of the estate and also, subject to the rule which applies in the administration of an insolvent estate, as a creditor of the estate for interest at 5 per cent. per annum from the date of the death.

Declaration accordingly.

Solicitors: *Claremont, Haynes & Co.* (for the applicant); *Roney & Co.* (for the plaintiffs); *Radcliffes & Co.* (for the defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

Observations of SCOTT & MACKINNON,
L.J.J., at pp. 311, 312, considered.
INSALL v. NOTTINGHAM CORPN.
[1948] 2 All E.R. 232.

Applied. MITCHELL v. BARNES.
[1949] 2 All E.R. 719.

DAVIES v. WARWICK

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.). January 29, 1943].

Landlord and Tenant—Rent restriction—Standard rent—Cottage formerly decontrolled—Not let on Sept. 1, 1939—Recontrolled by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71).

A cottage was let by R. to T. in 1916, at a weekly rent of 3s. 9d., which was later raised to 4s. 3d. by an increase permitted by the Rent Restrictions Acts. In 1931 T. gave up possession of the premises and R. went into possession and eventually sold it to the respondent, who went into possession in May, 1939. In October, 1939, the respondent let it to the appellant who agreed to pay a rent of 12s. 6d. per week. He occupied the cottage and paid the rent without complaint for 97 weeks until the respondent sold the reversion. The appellant contended that, although the cottage had been decontrolled since 1931, it had become recontrolled by the 1939 Act, and that the standard rent of the cottage, which was not let on Sept. 1, 1939, was, by the 1939 Act, the rent at which it was last let, namely, 4s. 3d. He claimed repayment of £28 9s. 3d., being the difference between 4s. 3d. and 12s. 6d. for the 2 years prior to the commencement of the action. The appellant contended that the rent paid at an earlier date should not be the criterion of a future standard rent because the legislation should not be construed so as to give it retrospective effect:—

HELD: all houses within the pecuniary limits of the 1939 Act, whether they were or were not let at the commencement of the Act, were within its scope and the standard rent imposed by it was to be measured by the rent payable on the date when the house was last let, however long ago. The appellant was, therefore, entitled to recover the excess over the standard rent of 4s. 3d. paid by him during 2 years prior to the commencement of the action.

[EDITORIAL NOTE. The decision in this case, though it throws considerable hardship on the landlord, follows from the plain wording of the Act. Where a house is brought within the Rent Restrictions Acts by the 1939 Act, the standard rent is the rent at which it was let on Sept. 1, 1939, or, if first let after that date, the rent at which it was first let, or if let at any time before that date, the rent at which it was last let. Here the house had been last let as long ago as 1916 at a rent which seems to be about one-third of the rent it would command at the present time. The fact that such rent is absurdly low and is a great hardship upon the landlord is immaterial, and the standard rent is that of 1916.

AS TO PREMISES WITHIN THE ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-321, paras. 369-380; and FOR CASES, see DIGEST, Vol. 31, pp. 555-562, Nos. 7019-7091.]

Cases referred to:

- (1) *Brooks v. Brimecome*, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 106 L.J.K.B. 801; 157 L.T. 417.
- (2) *Smith v. Baker & Sons*, [1891] A.C. 325; 13 Digest 527, 789; 60 L.J.Q.B. 683; 65 L.T. 467.

APPEAL by the plaintiff from a judgment of His Honour JUDGE CAVE given at Andover County Court on Aug. 12, 1942. The facts are fully set out in the judgments of SCOTT and GODDARD, L.J.J.

Stephen Murray and *S. N. Bernstein* for the appellant.

W. R. Rees-Davies for the respondent.

SCOTT, L.J. [read by GODDARD, L.J.] : This is an appeal from the Andover county court. On Oct. 18, 1939, the respondent let 105, New Street, Andover, a house of which he was then the freehold owner, to the appellant at 12s. 6d. per week. He had bought the house in the previous May from Rolfe, who had owned it from some date in or before 1916. When the respondent bought it, he himself went into occupation; and the house remained in his possession until he let it in October to the appellant. From that time till September, 1941, a period of 97 weeks, the appellant duly paid his rent of 12s. 6d. per week to the respondent; but in the latter month the respondent sold the house to Butler, the appellant still being in occupation as tenant. On May 15, 1942, the appellant delivered particulars of a claim for a repayment by the respondent of "overpaid rent" during the whole of the 97 weeks to the extent of the difference between 12s. 6d. and the standard rent of the house, which he alleged to be 4s. 3d. per week; and prayed the court to fix the standard rent. That claim works out at some £40. The rent of the house had been 4s. 3d. in 1916 when one Tallent had been in occupation as tenant to Rolfe, and apparently had continued to be the rent until 1931, when Tallent's tenancy came to an end, and Rolfe himself went into occupation of the house. From that time until May, 1939, when Rolfe sold it to the respondent, the house was never let. Thus, at the time when the respondent let the house to the appellant in October, 1939, the house had been continuously for 8 years in the actual possession of the freeholder.

The appellant contended below, as appears from the county court judge's addition to his note, that the house had become recontrolled by the operation either of the 1933 Act, or of the 1938 Act, on the ground that the house had not been registered as decontrolled, as required under those Acts. The county court judge goes so far as to say in his addition that that was the only argument advanced for the respondent, and that no contention was made on his behalf that the 1939 Act was material. On this basis the dismissal of the claim would have been right; since the house had become decontrolled by the operation of sect. 2 (1), (3) of the 1923 Act in 1931, when it came into the "actual possession" of the landlord Rolfe; and the registration provisions of the 1933 and 1938 Acts, did not apply unless the house was a "let house" on the date when those Acts came into operation: see *Brooks v. Brimecome* (1). There was nothing in the respondent's point below based on an assumed obligation of Rolfe to register. The real difficulty for the respondent lies in counsel's concise and clear argument before us, that the house became a controlled house by reason of sect. 3 of the 1939 Act. A preliminary objection to this argument was taken by counsel for the respondent, on the ground that the point of counsel for the appellant had not been taken below; and he relied on the wording of the record of the arguments of the county court judge. On consideration, however, we overruled the objection as the note by him actually taken at the hearing shows that the appellant's solicitor referred to sect. 12 of the 1920 Act, obviously in relation to the appellant's prayer at the end of his particulars of claim, in which he asked the court to fix the standard rent. This inference is borne out by the note of the county court judge of a reference having been made to sect. 3 of the 1939 Act; for it is that section which brings in all houses other than those to which the existing Acts were already in operative application immediately before the commencement of that Act, i.e., Sept. 1, 1939. In addition, it may be assumed that everyone concerned—judge and counsel—had RENT AND MORTGAGE INTEREST RESTRICTIONS, 18th Edn., by the Editors of LAW NOTES, open before them, and particularly p. 79, where sect. 12 (1) is set out both in its 1920 wording and its 1939 wording. For these reasons, we felt justified in overruling the objection.

We have, therefore, to consider the argument on its merits. Counsel for the appellant says, and rightly says, that *prima facie* the language of sect. 12 (1) (a) of the 1920 Act, as amended by the 1939 Act, Sched. I, construed according to the natural meaning of the English language, is free from ambiguity: i.e., that, as the house in question "was not let on Sept. 1, 1939," "the rent at which it was last let before that date," namely, 4s. 3d. in 1931, was constituted the standard rent of the house. If the 1939 Act applied, as from the moment of its com-

mencement, to houses already decontrolled and not then let, that conclusion is irresistible. If so, sect. 14 of the 1920 Act entitled the appellant to recover over-payments, although as voluntary payments made in mistake of law, not of fact, they might have been irrecoverable but for that section. We can see no answer to this argument. The house was undoubtedly within pre-1920 Acts when it was let by Rolfe to Tallent. It also undoubtedly came within the 1920 Act, because it was still subject to the tenancy of Tallent on July 2, 1920, when that Act came into force, and was within the pecuniary limits of the Act. Had the 1939 Act applied only to houses already let at the date of its commencement, like the Acts of 1933 and 1938, the house would not have been brought into control; but the 1939 Act was not so restricted. On the contrary, by sect. 3, it brought within the net of control, broadly speaking, every house which fell within its pecuniary limits on Sept. 1, 1939; and, further, the amendment of sect. 12 of the Act of 1920, contained in the Act of 1939, Sched. I, imposed on every house within the Act's pecuniary limits the status of a house with a standard rent to be measured by the rent which had been payable on the date when the house had last been let—however long ago, even if it had only once been let, and that perhaps a century ago. I can see no ambiguity in the material words of sect. 12 of the 1920 Act; and it is not irrelevant to note that those very words had appeared in sect. 2 (1) (a) of the 1915 Act, and were again treated by Parliament as appropriate in 1939. Counsel for the respondent urged that to refer back to rents paid at earlier dates as the criterion of a future standard rent, is to pass retrospective legislation; and that legislation should not be construed so as to give it retrospective effect. But that canon of construction only applies to equivocal language; and the words now in question are, in my opinion, quite clear.

So far as I know, the reference back to an earlier letting has never been the subject of litigation in the courts up to now; and yet there are possibilities in the cast-iron wording of the provision of considerable hardships. It is easy to imagine such a case—for instance, a small house owned for several generations in the same family. The statutory reference back to some almost pre-historic letting might take one to a time when economic conditions and the value of money were totally different from what they are to-day. A purchaser in 1938 of a decontrolled house might have bought it for investment, intending to get a market rent, such as 12s. 6d. for 105, New Street; and, anyhow, would probably have had to pay a capital value based on some such annual yield. The Act would then step in retrospectively and halve the value of his investment. Or, again, a landlord might, as an act of kindness, have let a cottage to some deserving person for a short time at a nominal rent; the retainer dies, and the landlord wants either to let at a market rent or to sell. In either choice he is penalised by the retrospective provision in the Act.

That Parliament was not intending to penalise landlords is shown by sect. 6 of the 1933 Act, which, in certain circumstances, made the average rent of comparable houses in the neighbourhood the test for the standard rent. In the present case there is no evidence that either landlord or tenant had any knowledge that the house had ever before been let: neither plaintiff nor defendant was called as a witness; so that the allegations in the pleadings were never tested. I cannot doubt that if the hardships of the kind I indicate had been foreseen by Parliament, discretion might well have been given, and might by an amending Act still be given, to the court to have regard to circumstances which make the rigid application of the past-rent rule work unfairly; and in such case to fix a rent with due regard to the fair value of other houses in the neighbourhood and so temper the rigour of the Act.

Our judgment must be that the appeal is allowed, on the basis of 4s. 3d. being the standard rent; the number of weeks, however, for which repayment is recoverable will be limited to 2 years from the filing of the claim. We understand that that figure is £28 9s. 3d. In regard to costs, we think the claimant ought to have put his claim in the county court much more clearly than his solicitor succeeded in doing. Had he done so, the appeal might have been wholly avoided. The appeal will be allowed, but without costs in this court. In the county court the appellant should have his costs, as he has succeeded in the long run. Those costs will be on Scale B.

MACKINNON, L.J. [read by DU PARCQ, L.J.]: The plaintiff, in October,

1939, agreed to pay the defendant 12s. 6d. per week rent for this house. He fulfilled his promise for 97 weeks, until the defendant sold the reversion in September, 1941. In this action the plaintiff claims to recover back from the defendant 97 times 8s. 3d. upon the ground that the defendant's predecessor in title in 1916 let the house for a time to another man for 4s. 3d. per week.

I agree that the effect of the 1939 Act is that the plaintiff is entitled to recover back 8s. 3d. of such payments of 12s. 6d. as he made within 2 years of making his claim.

I have no means of knowing whether this result works an injustice to the defendant. But it is manifest that in such a case the hasty and ill-considered language of this statute may work very great injustice. If a house was not let on Sept. 1, 1939, the Act fixes the standard rent at the sum at which it was last let before that date. If reliance be placed on a previous letting 50 or 500 years ago, the judge is given no discretion to take into account the altered value of money. If the landlord proves that the rent the tenant agreed to pay is perfectly fair, and is in fact lower than the rent being paid by every other tenant of identical houses, the judge is not allowed to consider that. If the landlord proves that the previous letting years ago was an act of charity at a nominal rent by the owner to his aged relative, or at a low or nominal rent to a servant, the judge cannot take either of these facts into account. If the landlord proves that, under the old letting the tenant agreed to do all the repairs whereas in the agreement with the recalcitrant tenant the landlord had to do the repairs—apparently that is not a matter the judge is allowed to consider. Indeed, if it were proved that at the old letting relied on the landlord agreed to a very low rent in consideration of a lump sum paid down by the tenant, or in consideration of the tenant putting the house in repair and enlarging it, I find it difficult to see how the judge could take either of those circumstances into account. The standard rent under this section is to be "the rent" at which the house was last "let" before September, 1939, with no qualification whatever, and with no discretion given to the judge to consider the terms and circumstances of that last letting, or even its date.

That is why I am constrained to say that this hasty and ill-considered language may work injustice. And I am reminded of some words of the late SIR FREDERICK POLLOCK, in *THE GENIUS OF THE COMMON LAW*, 1912, at p. 48 :

It is certain, in any case, that far more class grievances have been raised by legislation than by the purely judicial development of the common law.

GODDARD, L.J. : The action out of which this appeal arises was brought to recover a sum paid in respect of rent which it was said was an over-payment, in that the rent charged was higher than the standard rent. The right of action is given by sect. 14 of the 1920 Act, as amended by the 1939 Act, and is limited to rent paid during the past 2 years. It was really a very simple case, and the confusion and any difficulty that has arisen were caused in the first place by the plaintiff concluding his particulars with a prayer for the court to determine the standard rent, which is a proceeding authorised by sect. 11 of the 1923 Act. This was wrong. The action was in no sense a proceeding under that section ; it was for the plaintiff to prove the standard rent as part of his cause of action. Of course, had this been in dispute, the court would have had to decide what the standard rent was ; but it was not a proceeding under sect. 11, though from the extract from the court books before us it looks as though everyone thought that it was. These entirely wrong arguments which were submitted to the court appear to have effectually diverted the attention of the county court judge from the real question ; and finally, he seems to have based his decision in favour of the defendant by reference to sect. 2 of the 1933 Act, which in fact has been repealed. I say this as in the note of his judgment he has quoted words which appear to have reference to or to be taken from that section.

The simple question was whether there was a standard rent attached to this cottage, and, if so, was it less than 12s. 6d. per week, the rent actually paid. The cottage was first let by Rolfe to Tallent in 1916 at 3s. 9d., which was raised by an increase permitted by the Acts to 4s. 3d. In 1931 Tallent quitted and Rolfe went into possession. He afterwards sold to the defendant, who went into possession in May, 1939. Apart from any question of registration, which has not been argued before us, the cottage was, and had been since 1931, decontrolled. On Sept. 1, 1939, by the Act of that date, it again became subject

A to the Acts. In October, 1939, the defendant let it to the plaintiff, who agreed to pay 12s. 6d. and was, no doubt, glad to get it at that rent. He lived in the cottage and paid his rent without complaining for 97 weeks till September, 1941, when the defendant sold the reversion. He now sues to recover the difference between 12s. 6d. and 4s. 3d., and it is agreed that in any event he cannot recover more than the overpayment during 2 years before action, which is £28 9s. 3d. Now the standard rent, in the case of a house which was not let on Sept. 1, 1939, is, by the 1939 Act, the rent at which it was last let before that date; or, in the case of a house first let after Sept. 1, 1939, the rent at which it was first let. This house was let to the plaintiff after Sept. 1, but it had been let before that date; and the last date at which it was let was some day in 1916, when it was let to Tallent at 3s. 9d., afterwards lawfully raised to 4s. 3d. The defendant admitted in his answer that no statutory notice of increase has been served which would raise the rent above 4s. 3d. Clearly, then, the standard rent was 4s. 3d. The words of the Act are plain and unambiguous and permit of only one construction. It is said that to give the plain meaning to the words will work hardship on the defendant. Of course it will; but that does not entitle the court to read into the Act words which are not there, or to give to the words that are clear a meaning other than that which they bear. These Acts were, in their origin, war-time Acts, and the recontrol in 1939 of houses which were outside or had escaped from their meshes was essentially a war-time measure. It is a commonplace of war-time that legislation which Parliament intends for the protection of the public or a class often works hardship on individuals. But this is no reason for refusing to the plaintiff a right of action which the statute gives him, any more than the court can refuse the defaulting gamester a plea of the Gaming Act, or a spirit drinker, who has obtained credit from a trusting publican, the benefit of the Tippling Act, as it is commonly called. To expect the average owner of house and cottage property to remember the provisions of the Rent Restrictions Acts, is to look for the impossible: I think there have been 12 altogether, and it is always necessary to consult more than one, as the amendments by subsequent Acts have been endless. It is too much to expect that he would understand, or be able to solve problems which have puzzled the judges again and again and often led to marked difference of judicial opinion. So, as Warwick now finds to his cost, house property is a dangerous form of investment, particularly so when it is remembered that in 1915 the Acts only applied, outside London, to property let at a rent not exceeding £26 per year, and now houses up to £75 per year are included, irrespective of when they were built, or bought or let. I confess I am not much impressed by the argument that, on the construction we have placed on the section it might perhaps happen that one would have to go back 200 or 300 years to find the standard rent in the case of a house that had at that remote period first been let. The class of house most likely to be affected in such improbable circumstances are farm-houses; and they are, for all practical purposes, outside the Act: see sect. 12 (2) (iii) of the 1920 Act, and also sect. 3 (3) of the 1939 Act. Sect. 12 (7) of the 1920 Act is also a protection. Moreover, if such a case ever did happen, it would probably be very difficult to prove what the rent was unless, perchance, an old lease had been preserved; and the standard rent would then be ascertained by reference to the rent of comparable property. One other matter I should like to mention. It was said in the course of the argument that, as the proper question was not raised at the trial, it could not be taken on appeal. In answer to that it was said that the rule that a point of law not taken in the county court cannot be raised on appeal, as laid down in *Smith v. Baker* (2), does not apply to appeals under these Acts. I think the proposition which is to be found in RENT AND MORTGAGE INTEREST RESTRICTIONS, 18th Edn., by the Editors of Law Notes, p. 183, is too widely stated. The cases cited show that the effect of sect. 3 of the 1920 Act, which restricts the power of the court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the court. If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it. But that, in my opinion, is all that the cases quoted establish. In cases in which possession is not sought there may well be points which must be taken in the court below, if it is desired

to base an appeal upon them. Here the point on which we have decided the case necessarily arose in the court below, because it was apparent on the pleadings; the fact that wrong arguments were adduced in support of the case does not disentitle the plaintiff from availing himself of the right arguments in this court. No one could have argued better than counsel for the plaintiff and counsel for the defendant.

The result is that the appeal is allowed and judgment must be entered for the plaintiff for £28 9s. 3d., with costs on Scale B. I would give no costs of the appeal; for if the short and simple point had been properly presented to the county court judge, and he had not been confused by reference to sections and matters which had nothing to do with the case, I feel sure no appeal would have been necessary.

Appeal allowed without costs.

Solicitors: *Barnett Janner*, agent for *Lloyd Overstone*, Birkenhead (for the appellant); *Taylor, Jelf & Co.*, agents for *Trethowan & Vincent & Fultons*, Salisbury (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

STEVENS & STEEDS, LTD. AND EVANS v. KING.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J. and Tucker, J.),
January 27, 1943.]

Emergency Legislation—Food control—Rationing restrictions—Returns understating number of registered customers—Returns false in a material particular and made recklessly—Rationing Order, 1939 (S.R. & O., 1939 No. 1856), art. 42.

A firm of retail grocers were charged under the Rationing Order, 1939, art. 42, with making returns which, in that they understated the number of registered customers, were false in a material particular, and were made recklessly. It was contended that no offence was committed because the effect of the inaccuracy was that they received less of the rationed foods than they were entitled to receive:—

HELD: the returns were made for the purpose of obtaining rationed food, were false in a material particular and were made recklessly. It was immaterial that they were not calculated to secure for the retailer a greater supply than would have been obtained if they were filled in correctly.

[**EDITORIAL NOTE.** This is a very short point. It is obviously against the interest of the retailer to understate the number of his registered customers and for this reason it was suggested that no offence had been committed. On the other hand, it is obviously in the interest of the authorities that a correct return shall be made, since they have not only to provide for present requirements, but to estimate future requirements. For this reason it has been held that such a statement which is clearly false in a material particular is also made recklessly within the meaning of the Order.

AS TO THE RATIONING ORDER, see BUTTERWORTH'S EMERGENCY LEGISLATION [38] 1755].

APPEAL by way of case stated against a conviction for an offence under the Defence (General) Regulations, 1939, reg. 55.

H. Lester for the appellants.

Valentine Holmes and *D. Tolstoy* for the respondent.

VISCOUNT CALDECOTE, L.C.J.: The Rationing Order, 1939, art. 42 (a) provides as follows:

A person shall not: for the purpose of obtaining any rationed food make any statement which he knows to be false in a material particular or recklessly make any statement which he knows to be false in a material particular . . .

The case stated finds that the appellant company, on each of a number of returns, entered the number of its registered customers incorrectly. It appears that in every case except that of cheese the number of registered customers is understated by the appellants. The case goes on to find:

. . . that the true number of registered customers for the various rationed foods was at all times known to the respondent.

So far as the cheese is concerned, the number of registered customers was overstated. Counsel for the appellants points out that it was only overstated by something like 1 per cent., but the fact remains that it was overstated and it was for the magistrates to form their own opinion about the value of the evidence. That a false statement was made must be conceded, but the magistrates had also to find that it was recklessly made and false in a material particular.

They have so found. So far as the two returns as to cheese are concerned, I think it is clear beyond any possible doubt that the magistrates were justified in finding the charge proved.

With regard to the three other articles of food, cooking fats, margarine and butter, a question has been raised as to whether they could be said to be falsely made for the purpose of obtaining any rationed food because in fact the returns understated the number of customers, and that was obviously against the interests of the parties making the return. The article makes it an offence to make a statement which is false in a material particular recklessly for the purpose of obtaining any rationed food. It also makes it an offence to attempt to obtain any rationed food by means of such false and reckless statement, and I think, especially having regard to the printed notes on the back of these two returns, viewing the paragraph as a whole, it could be properly found by the magistrates that these documents were made for the purpose of obtaining rationed food. One thing is quite certain, that if returns had not been made these appellants would not have obtained any rationed food, their licence would have been withdrawn and they would not have had any supplies. Therefore, in the ordinary sense of the words, it seems to me that these documents were made for the purpose of obtaining rationed food, although it is possible that the evidence would not have justified a finding that they attempted to obtain any rationed food by means of such reckless statement. It is of obvious importance to the food department to have accurate returns for the purpose of distributing available supplies and of estimating the supplies which will be required in the future. I have come to the conclusion, therefore, that in respect of those three articles of food, as well as in the case of the cheese, there was evidence upon which the magistrates could come to the conclusion that an offence had been committed under art. 42.

I would only add this. There are a number of these prosecutions which have taken place under orders and regulations which are not always easy to follow, but in this particular case to-day these are two quite plain paragraphs. The appellants seem, even on the argument presented to us, carelessly, and I think, recklessly, to have made these false statements.

I am satisfied that on the facts before the magistrates the magistrates could find that all nine offences had been committed and, therefore, I think this appeal must be dismissed.

TUCKER, J. : I agree.

I think there was ample evidence in this case that the statements made were false and were false in a material particular and were recklessly made. A point of law, however, does arise, as to whether, if the statement which has been made and which is false is one which would not be calculated to secure for the person who makes it a larger supply of rationed food than he would have obtained if he had correctly filled in the form, an offence has been committed. I think that does raise a question of law, and with regard to that point I am in entire agreement with the interpretation which has been put upon this article by VISCOUNT CALDECOTE, L.C.J., and I desire to add nothing to that.

Appeal dismissed with costs.

Solicitors : *Ernest W. Long & Co.* (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Distinguished. PHILLIPS v. DALZIEL.
[1948] 2 All E.R. 810.

WILES v. MADDISON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Tucker, J.),
January 27, 1943.]

H *Emergency Legislation—Food control—Rationing restrictions—Charge of offering an excessive quantity of meat at an excessive price—Meat priced and marked with customer's name but not offered to customer—Whether offer within meaning of the Order—Rationing Order, 1939 (S.R. & O., 1939, No. 1856), art. 2—Meat (Maximum Retail Prices) Order, 1940 (S.R. & O., 1940, No. 37), art. 4.*

A butcher, who carried on his business in a town, supplied customers some miles away, and it was his custom each Friday to drive out in his cart and supply them with meat. On the Thursday in question he set aside certain pieces of meat for three customers and attached to the packages invoices

bearing the customer's names and stating the price of the meat. The respondent, accompanied by meat agents appointed by the Ministry of Food, entered the shop and weighed and priced the meat and found that, so far as the invoice for each of the three customers was concerned, the meat was priced in excess of the permitted maximum price and consisted of a larger quantity than was allowed under the Rationing Orders, which prohibit the offer of or attempt to supply rationed food except as therein provided. The butcher contended that he had not made any offer within the meaning of the Order and that he had not received from the customers any specific order, and had not communicated any offer to them of any particular quantity or kind of meat, nor informed them of his intention of delivering any meat in that week :—

HELD : there could be no offer within the meaning of the Order unless it was communicated to the offeree. The intention to commit the offence the next day was insufficient to show that an offence had been committed on the day in question, and, on the facts of the case, there had been no offer made within the meaning of the Order.

[**EDITORIAL NOTE.** This case, though it impinges upon the law relating to offers as part of the formation of a contract, is really a decision confined to its own facts. There can be in law an offer which is not communicated to the intended offeree, but the difficulty here was not that there had been no communication, but that there was intended to be a communication of the offer on the following day. In the circumstances nothing more than an intention to commit an offence was proved and that is not enough. Although this result is reached upon a consideration of the facts only, the judgments are of importance both to those called upon to advise sellers of rationed articles and still more as a warning to officers whose duty it is to prevent such offences that there is a danger of acting at too early a stage.

AS TO RATIONING RESTRICTIONS, see BUTTERWORTH'S EMERGENCY LEGISLATION [38] 1017.

APPEAL by way of case stated against a conviction by justices sitting as a court of summary jurisdiction at Long Sutton, Lincolnshire, for an offence under the Defence (General) Regulations, reg. 55. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

R. S. Shove for the appellant.

Valentine Holmes for the respondent.

VISCOUNT CALDECOTE, L.C.J. : By Orders which have been made under the Defence (General) Regulations, certain restrictions have been put upon the freedom of butchers both with regard to the price at which they may sell their meat and the quantity in each week which they may supply to registered customers. By the Meat (Maximum Retail Prices) Order, 1940, art. 4, it is provided that :

No person shall sell or offer or expose for sale or buy or offer to buy any meat at a price exceeding the price applicable under this Order, or in connection with a sale or disposition of any meat, enter or offer to enter into any artificial or fictitious transaction or make or demand any reasonable charge.

By the Rationing Order, 1939, art. 2, it is provided :

Except under the authority of the Minister or under and in accordance with the provisions of this Order or any directions or licence issued thereunder, a person shall not obtain or attempt to obtain, or supply or offer or attempt to supply any rationed food for household consumption or any rationed food for the purposes of any establishment.

He is prohibited by a later provision from supplying more than a particular quantity measured by the price of the meat supplied to the registered customer.

In this case the butcher, against whom the informations were laid, supplied customers some miles away from the town or village of Long Sutton, where he carried on his business. On Friday he was going to deliver the weekly ration, and on Thursday in preparation for what he was proposing to do on Friday, he set aside certain pieces of meat for the customer, and, as showing what his intention was, he attached to the pieces or the package of meat something which counsel for the respondent says is really an invoice bearing the customer's name and stating a price, without items being given, of 6s. 6d.

Before the intention, which seems to have been formed and in accordance with which that ticket or invoice was prepared, could be carried out, the respondent, together with some gentlemen who are called meat agents employed by the Ministry of Food, visited the appellant's shop at Long Sutton. They

weighed the meat and they priced it out, and they found that so far as the ticket for each of those three customers was concerned, there was more meat than could properly be delivered under the Rationing Orders, and the meat was priced in excess of the price which was permitted.

The short question is whether on Thursday afternoon there was an offer of that meat to the customers. In my judgment, the facts were not such as to justify or permit a finding by the magistrates that there had been an offer. The facts found in para. 17 of the case are that the appellant had not received from the customers :

... any specific order or orders for any particular quantity or kind of meat or any meat to be delivered in the week in question and had not communicated with any of them with regard to the delivery in the said week of any particular quantity or kind or informed any of them of or intimated to any of them any intention on his part of delivering in the said week any particular quantity or kind of or any meat.

In my opinion, before it can be said that anybody has made an offer, some evidence must be available to show that the offer was communicated or put on its way. I do not say that it must be proved that the offer has reached the person to whom the offer is made. A person might, for instance, be convicted of making an offer of an article of food at too high a price by putting it in his shop window to be sold at an excessive price, although there would be no evidence of anybody having passed the shop window or having seen the offer or the exposure of the article for sale at that price. But in this case it seems to me that these officers of the Ministry of Food stepped in too early from their point of view. It may very likely be that, if they had attended the following day when the butcher was calling on the customers, they would have found that he was committing the offence of offering the meat by saying : "Will this suit you, and, if so, this is the price." But the facts do not go nearly as far as that. They go no more than to show that an intention had been formed, if the magistrates so understood the evidence, to commit an offence the following day. That, in my judgment, is not enough to justify a finding that the offence had been committed.

For these reasons I think the magistrates arrived at a wrong decision, and the appeal must be allowed.

TUCKER, J. : I agree. I think it is quite clear on the facts found in this particular case that there was no offer of this meat on the Thursday in question, but only a course of conduct preparatory to making an offer on the Friday. I agree with the submission made by counsel for the respondent that there can be an offer without it having been communicated to the intended offeree. For myself, I think, that the position might be different if the course of conduct between the butcher and the customers in this case had been different, that is to say, if the evidence had been that the custom was for the butcher to put in a particular place, perhaps in his shop, certain quantities of meat allocated to certain customers at certain prices, and if the practice had been for the customers to call on a particular day and take away the meat which had been prepared and put ready for them, that might be different, because in that case the butcher, pursuant to the customary dealing between the parties, would then have done everything on his part necessary to bring to the mind of the offeree the offer which he was desiring to make to him ; he would have done everything necessary on his part, and he would have been merely awaiting their arrival to apply their minds to the offer which they would expect to find waiting for them on the counter. The course of dealing here was not that. Before the offer was brought to the notice of the offeree, the practice was for the butcher to drive out in his cart and take the meat to the customers and then offer it to them. The evidence is that that was done on Fridays. What happened in this case was merely that the butcher had put on one side on the Thursday the meat which he was intending to offer to the customers on the Friday. I agree that that cannot amount to an offer within the meaning of these regulations.

Appeal allowed.

Solicitors : *Waterhouse & Co.*, agents for *Few & Kester*, Cambridge (for the appellant) ; *Treasury Solicitor* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

COMMISSIONERS OF INLAND REVENUE v. EXECUTORS OF WILLIAMS, EXECUTORS OF WILLIAMS v. COMMISSIONERS OF INLAND REVENUE.

[COURT OF APPEAL (Lord GREENE, M.R., Scott and MacKinnon, L.JJ.),
February 15, 16, 17, 1943.]

Income Tax—Sur-tax—Proceeds of policy insuring member for the benefit of the company—Whether capital or income receipt. A

A member of a private company had valuable connections in India and special knowledge of bloodstock and for those reasons his services were particularly valuable to the company. The company insured that member in respect of death by accident in the sum of £15,000. The member was killed in an accident on Feb. 1, 1938, and the policy moneys were duly paid to the company and treated by the company as an income receipt. B These policy moneys were subsequently distributed among the members including the member of whom the appellants were the executors and the appellants were charged with sur-tax upon the sum received as that member's share. It was contended for the appellants that the policy moneys were a capital sum and not a receipt on revenue account:—

Held: the receipt of the policy moneys was an income receipt of the company and the share thereof received by the member in question was rightly assessed to sur-tax. C

Decision of MACNAGHTEN, J. ([1942] 2 All E.R. 266) affirmed.

[**EDITORIAL NOTE.** The Court of Appeal have regarded the general nature of the sum received by the company under this policy of insurance. The loss covered was a loss of profit and, since the profits themselves, if made, would have appeared in the revenue account of the company, the sum received from the insurance should similarly appear in that account. The fact that under the policy a lump sum was received is held to be immaterial. D

AS TO SUMS RECEIVED UNDER INSURANCE POLICIES, see HALSBURY, Hailsham Edn., Vol. 17, p. 128, para. 238; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 204b, 204c.]

Cases referred to:

- (1) *Murphy v. Gray (Thomas E.) & Co., Ltd.*, [1940] 2 K.B. 175; [1940] 3 All E.R. 214; Digest Supp.; 109 L.J.K.B. 711; 163 L.T. 180; *sub nom. Gray & Co., Ltd. v. Murphy*, 23 Tax Cas. 225. E
- (2) *Mitchell v. Noble (B.W.), Ltd.* [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; *sub nom. Noble (B.W.), Ltd. v. Mitchell, Mitchell v. Noble (B.W.), Ltd.*, 11 Tax Cas. 372.
- (3) *R. v. British Columbia Fir and Cedar Lumber Co., Ltd.*, [1932] A.C. 441; Digest Supp.; 101 L.J.R.C. 113; 147 L.T. 1.
- (4) *Chibbet v. Robinson (J.) & Sons* (1924) 132 L.T. 26; 28 Digest 19, 98; 9 Tax Cas. 48. F
- (5) *Du Cros v. Ryall* (1935), 19 Tax Cas. 444; Digest Supp.

APPEAL by the executors of the taxpayer from an order of MACNAGHTEN, J., dated May 22, 1942, reported [1942] 2 All E.R. 266, where the facts are fully set out.

J. Norman Daynes, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Reginald P. Hills* for the Commissioners of Inland Revenue. G

LORD GREENE, M.R.: It is conceded in this appeal that, if the sum in question was not of a nature to attract income tax in the hands of the company, it cannot be taxed in the hands of the shareholder, whose executors are the appellants, either for income tax or for sur-tax. The sole question, therefore, which we have to consider is whether or not this sum was in the hands of the company a receipt on capital account or a receipt on revenue account. The fact that the company has agreed to have it treated as between itself and the Revenue as a receipt on revenue account cannot bind the present appellants, who are not affected by the view which the company may have taken. H

The difficulty lies, as it does so often, in the application of principles to the facts of an individual case; and in this class of case different minds may well take different views. I have come to the conclusion that the decision of MACNAGHTEN, J., was right.

The first thing to do is to examine the nature of the payment which the com-

pany received. It was a sum of £15,000 received under a policy taken out for the benefit of the company covering injury or death by accident of Crawford, one of the directors of the company. It was a very small company. There were three principal shareholders and directors, and Crawford was a gentleman who had very special experience and knowledge of bloodstock, with the sale and purchase of which the company's business was mainly concerned.

A The company adopted the policy of effecting insurances of a similar character in respect of Crawford and also in respect of the other two directors, who, in different ways, appear to have had qualifications and experience of special value to the company; but Crawford obviously stood in a category by himself. The object of the insurance was not to cover any temporary loss. That is stated in the case, although when one comes to look at the policy it is not quite clear how that conclusion was reached by the Special Commissioners. But the suggestion out of which the insurance materialised was that, in the event of
B Crawford's death, the company's business would suffer and his family would not get much for his shares. The latter part of that sentence does not seem to alter the real character and object of this insurance, which was quite clearly to give the company some money to make up for the loss which it would suffer if it were deprived of the very valuable services of Crawford.

C It is clear from the stated case that Crawford was not bound to the company by any contract. He could have severed his connection with it, or he could have ceased to perform the very useful services which he was performing. But that, to my mind, does not affect the matter. From the business point of view, Crawford's connection with the company was one which obviously was likely to endure, and the absence of any contract of service binding him to the company does not alter the business position, which was that, so long as he remained there, he would naturally continue to do what he had done in the past and
D give the company the benefit of his great experience. The case, therefore, may be treated, it seems to me, in exactly the same way as a case in which a valuable servant is bound by a contract, long or short, and the benefit of his services is protected, so to speak, by a policy of insurance taken out by the employer.

E The policy contained what is called a compensation schedule, and it is, on the face of it, perhaps more appropriate to a policy designed to compensate an individual in respect of injury by accident; but that was not the object of this policy: it was not a policy such as that dealt with in *Gray & Co., Ltd. v. Murphy* (1). The object of the policy in that case was to put the company in funds in respect of payments to employees which, either through a legal obligation or through a moral obligation, it might be called upon to make. In that respect it differs from the purpose of the present policy, which was not to enable the company to make payments to Crawford, but to give the company something to
F make up for the loss which the company would sustain if it were to be deprived of Crawford's services. Under the policy a sum of £15,000 was payable in the case of death or disabling injuries of a specified character, the occurrence of which would obviously have interfered with his services, or deprived the company of them altogether; then there is a provision of £50 per week in respect of temporary partial disablement from engaging in or giving attention to profession or
G occupation. Bearing in mind the object of this policy, if Crawford had, for instance, suffered a temporary disablement over a period of 6 months, and the company had thereby been deprived of his services during that period, the company would, under this policy, have been receiving £50 per week, and that £50 per week would have been received by it, not for the purpose of handing it over to Crawford, but for the purpose of putting it into its own coffers in order to make up in whole or in part for the loss which it would suffer by being deprived
H of his services during that period. The provisions of the policy, therefore, fall into line with the general purpose which the company had in taking it out.

In point of fact, what happened was that Crawford unfortunately was killed in an accident. The company, therefore, was deprived of his services for ever, and its assets were increased by the sum of £15,000 received under the policy. That sum was distributed among the shareholders. What we have to consider is whether that sum of money received in the circumstances which I have stated and being of the nature which I have stated, is to be treated for income tax purposes as capital or income.

It is useful to consider whether there is any broad class into which payments of this character can be said to fall. I think it just to observe as a purely general proposition that in the case of a trading company both goods and services fall into the same class. The expenditure incurred in procuring the goods or producing the goods in which a person trades and the benefits derived from disposing of those goods are obviously of a revenue character. Similarly, the expenditure incurred by a person in securing the services of his employees and the benefits derived from those services, reflected as they are in the output and profits of the employer are again, generally speaking, of a revenue character. The matter can be carried a little further in the case of goods. Not merely are the profits derived from the sale of goods in which a person trades of a revenue character, but insurance moneys received in respect of the loss of trade goods are proper receipts to appear in a revenue account. If a company insures its stock of goods against fire and that stock is destroyed by fire, however great and valuable it may be, the receipts must be treated in exactly the same manner as receipts from a sale of the goods would have been treated. The trader, it is true, as has been said, does not trade in fires but in goods, but, if he disposes of the whole of his stock by sale or if the whole of his stock is destroyed by fire and the insurance money is received, there can be no ground for differentiating for tax purposes between the purchase money and the insurance money.

It seems to me that the benefits derived from a service contract fall into the same broad class. Suppose a company has a particularly valuable servant engaged under a contract of service. So long as that contract remains in force the salary which the company pays is expenditure on revenue account. The benefits which the company receives are reflected in its output and the profits that it makes. They are equally matters for revenue account. If during the course of that employment the servant is temporarily incapacitated the company's revenue account is affected by reason of the fact that during the incapacity it produces less goods or earns less profits. It may say to itself: "The services of this employee are so important for our business that it is worth our while by way of insurance to protect ourselves against the loss which we shall suffer in our trade if he is temporarily incapacitated." That loss is, of course, of two kinds: (1) the payment of salary during the incapacity, and (2) the actual loss of the profits which the company would otherwise have made. If the company takes out a policy for a sum which the directors estimate will fairly represent the loss or part of the loss—it matters not—which they will suffer if they are deprived of those services, can it be said that the £50 per week, or whatever the figure may be, that the company receives under such a policy is anything but a revenue receipt? It seems to me that the insurance moneys received to cover the company against the revenue loss which it suffers by being deprived of those services are receipts on revenue account and nothing else. But supposing the company carries the matter a step further and says: "We shall suffer loss not merely by the temporary incapacity of our servant, but if he dies during the period of service we shall suffer a very much greater loss," and, with that in mind, it decides to extend the insurance to cover the death of this valuable servant and insures his life accordingly for a lump sum. Whether or not the directors' estimate of the loss which they will suffer by the death of that servant is accurately reflected in the sum which they fix for his insurance is neither here nor there. The important matter is the object of the insurance, which may or may not be entirely achieved according to the accuracy of the estimate made. What would be the position if, after taking out that policy, the employee happened to die, with the result that the company was deprived of those benefits on revenue account which it would have received if it had continued to enjoy his services? There is no magic here in the distinction between a lump sum and a periodical sum. The question is: What is the nature of the sum—and, although the fact that there is a lump sum paid once and for all rather tends to colour the question and to make one inclined to regard it as of a capital nature, that, in my opinion, is apt to be misleading. To go back to the example I took a moment ago of temporary incapacity, I, myself, cannot see what difference there can be between a case where the insurance takes the form of a weekly payment and a case where it takes the form of a lump sum payment to cover some defined period. Similarly in the case of death, the fact that a lump sum is paid cannot, in my view, differentiate the

case from one where a periodical payment is made year by year under a policy during the unexpired part of the contract of service. Suppose that the policy, instead of providing that the company should receive a lump sum on death, provided that, during the remainder of the period of service between the death and the end of the term, the company should receive a yearly sum, the object being to compensate it for the estimated loss it would sustain. I cannot see that there can be any difference between the two cases. My view that insurance

- A moneys received in circumstances such as those which I have described are really receipts on revenue account can be tested in the case, for instance, of a particularly valuable commission agent. A company might be in a position to estimate with very considerable accuracy the amount of business which it was likely to get from a particular commission agent, and it might be in a position to fix very closely the appropriate sum for insurance against his incapacity or death. It seems to me that whether the amount of the insurance is fixed on an estimate which, in the circumstances, can be made with substantial accuracy, or whether it is fixed on the basis of a broad estimate by the employer as to the sum for which it will be worth his while to insure the employee, makes no difference. Therefore it seems to me that, in this case, the receipt must be treated as a receipt on revenue account.

- C The matter can be looked at from rather a different point of view. I do not wish to lay down any general proposition which would lead to the result that the test in the case of payments is necessarily the same as the test in the case of receipts. In the case of payments the question whether they are to be treated as deductible expenses is complicated by the special provisions of the Income Tax Acts, which lay down certain categories of expenditure which are not deductible. But, looking at the matter from the broader point of view, on the question whether a particular item of expenditure or a particular item of receipt falls into the category of revenue expenditure or receipt or capital expenditure or receipt, I think assistance is to be obtained from examination of cases which have dealt with the question of expenditure. I do not propose to go into the various cases which have been cited to us, but *B. W. Noble, Ltd. v. Mitchell* (2), is perhaps the best example. That was a case, putting it shortly, in which the company found it advisable to pay money in order to get rid of a servant whose services they no longer required and who, in point of fact, was embarrassing to the company. It was held that the sums paid in order to get rid of that servant were admissible deductions. It does seem to me to follow that if, when an employer finds it desirable to expend money in getting rid of an onerous contract of service, the expenses incurred are revenue, then money received in respect of the loss of a beneficial contract of service falls into the same category; and, apart from the fact that no actual contract existed, that appears to me to be the present case.

- F There is one more case to which I may refer, the case in the Privy Council to which our attention was called. That is *R. v. B.C. Fir and Cedar Lumber Co., Ltd.* (3). It is perfectly true that the Income Tax Act which was being dealt with there was different in language from our own Income Tax Acts, but it does afford an illustration of what happens in the matter of insurances of a particular character. I think the result of that case is of general application in this sense. The particular matter of insurance that was being dealt with there was an insurance against loss of profits. A manufacturer can, of course, insure his factory against fire. The receipts from that insurance will obviously be capital receipts. But supposing he goes further, as the manufacturer did in that case, and insures himself against the loss of profits which he will suffer while his factory is out of action, it seems to me it is beyond question that sums received in respect of that insurance against loss of profits must be of a revenue nature. Similarly the moneys received under a policy of insurance against the loss of profits through the loss of a valuable servant must in essence be receipts of a revenue nature. As I have already said, I can draw no distinction between the case where the receipts under such an insurance take the form of periodical payments and the case where they take the form of a lump sum paid down.

H The cases which were relied upon by counsel for the appellants do not, in my opinion, support his proposition. The two main ones were *Chibbett v. J. Robinson & Sons* (4) and *Du Cros v. Ryall* (5). *Chibbett v. J. Robinson & Sons* (4), was a

case in which a firm of ship managers, whose sole business consisted in managing the ships of a particular company, received in the liquidation of that company a sum of £50,000. The question was whether that sum ought to be treated as part of the profits of their business. When the employing company went into liquidation the business of the firm of ship managers came to an end, and the receipt was held to be not a receipt from business activities, but in the nature of a voluntary payment made as compensation for the loss of the profits of their employment under the company which had terminated. It seems to me that that stands in quite a different category from the present case. A

The other case, *Du Cros v. Ryall* (5), was a case in which the general manager of a company working on a fixed salary and a commission on profits had a contract for a fixed term which was repudiated by the employing company. He brought an action which was compromised, and the question was whether the large sum paid as agreed damages under that compromise was assessable under Sched. E. The contract of service was at an end. The source of income had disappeared, and the sum paid by way of damages could not be regarded as a sum derived from the employment. It was something which arose outside the employment. It was something to which *Du Cros* became entitled by reason of the disappearance of the employment. It was, therefore, of quite a different character from insurance moneys received by a going concern in order to recoup it for the loss suffered through the death or disablement of a valuable servant, or, as in this case, of a person associated with the company without a contract of service whose services, from a business point of view, the company might reasonably anticipate would continue. B

In my opinion, as I have said, MACNAGHTEN, J., came to the right conclusion in this case, and the appeal must be dismissed with costs. C

SCOTT, L.J. : I agree.

MACKINNON, L.J. : I agree. D

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Evill & Coleman* (for the appellants) ; *Solicitor of Inland Revenue* (for the Commissioners of Inland Revenue).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

FRANK SMYTHSON, LTD. v. G. A. CRAMP & SONS, LTD. AND THE SURREY MANUFACTURING CO. E

[COURT OF APPEAL (LORD GREEN, M.R., MacKinnon and Luxmoore, L.JJ.),
February 8, 9, 10, 11, 12, 15, 1943.]

Copyright—Infringement—Diary—Copyright in tables contained in diary—Knowledge, labour and judgment involved—Copyright Act, 1911 (c. 46), ss. 6 (3), 8. F

Libel—Qualified privilege—Statement in protection of common interest—Letter by owner of copyright to firms selling publication in which copyright infringed.

The appellants, who had published the Liteblue diary annually since 1933, alleged infringement of their copyright by the respondents in their Lightweight Diary, 1942. The publication on which the appellants relied as being the subject of copyright was the Liteblue diary for the year 1933. The alleged infringing diary was based on an admitted copy of the appellants' publication made in 1938 by an employee of the respondents who had formerly been employed by the appellants. The appellants contended that they were entitled to copyright in respect of the words, type and lay-out in the body of the diary as well as in the tables of information at the beginning. These tables had been compiled for the first issue of the diary by Smythson, who had since died, and no evidence was available as to the sources from which he had compiled them. The respondents contended that they were not aware and had no reasonable ground for suspecting that copyright subsisted in the appellants' diary and were, therefore, protected by the Copyright Act, 1911; s. 8. The respondents alleged that a letter written by the appellants to certain firms, who were selling diaries published by the respondents, warning them that proceedings for infringement of copyright and passing off had been instituted, was G
H

defamatory. The letter was in its terms wide enough to cover all the diaries which the respondents were putting upon the market. The terms of the writ issued by the appellants were equally wide but the claim was subsequently limited in the statement of claim and upon some of the claims the appellants failed. The respondents contended that in the circumstances there was no common interest between the appellants and the recipients of the letter sufficient to make the occasion privileged :—

A HELD : (i) [LUXMOORE, L.J., *dissenting*] the appellants were entitled to copyright in the diary but only in respect of the tables inserted in the beginning.

(ii) a person making use of a potentially copyright work without inquiry as to the existence of copyright therein is not within the protection of the Copyright Act, 1911, s. 8.

(iii) the letter complained of was written on a privileged occasion.

B [EDITORIAL NOTE. The precise amount of labour and literary skill which will give an author the right to acquire copyright in a compilation is a question of degree, and here there has been a difference of opinion as to whether a sufficient amount of labour, skill and judgment has been shown. It is agreed by all that the lay-out of the diary here considered was not a proper subject of copyright and the only question is whether the tables of information are entitled to protection. A point was taken under sect. 8 of the 1911 Act, but is only lightly dealt with and the question of privilege in the claim for libel, which seems to have important implications, is not considered in any detail.

C AS TO SUBJECT-MATTER OF COPYRIGHT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 520-522, paras. 822-824; and FOR CASES, see DIGEST, Vol. 13, p. 172, Nos. 84-86.

AS TO AMOUNT OF INTEREST NECESSARY TO CONSTITUTE PRIVILEGED OCCASION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 473-4, para. 574; and FOR CASES, see DIGEST, Vol. 32, pp. 132, 133, Nos. 1631-1637.]

D Case referred to :

(1) *Macmillan & Co. v. Cooper* (1923), 93 L.J.P.C. 113; L.R. 51 Ind. App. 109; Digest Supp.; 130 L.T. 675.

APPEAL by the plaintiffs from an order of UTHWATT, J., dated Nov. 27, 1942. There was also a cross-appeal. The facts are fully set out in the judgment of LORD GREENE, M.R.

E The appellants and respondents were both publishers of pocket diaries. The appellants published the Liteblue diary in 1933 and annually afterwards. The appellants brought an action for breach of copyright in respect of the Lightweight Diary, 1942, published by the respondents and based on an admitted copy of the appellants' publication made in 1938 by an employee of the respondents who had formerly been employed by the appellants. It was alleged that several distinctive features, found only in the Liteblue diary, had been reproduced in this manner. The appellants elected to rely on the Liteblue diary for the year 1933 as the original diary in which copyright was claimed. The compilation of tables at the beginning of this diary had been made by Smythson who had since died. In December, 1941, the appellants sent a letter to a number of firms who were selling diaries published by the respondents stating that a writ had been issued and that an injunction to restrain alleged passing off and alleged infringement of copyright was claimed. In reply to the respondents' **F** allegation that this letter was defamatory, the appellants contended that there was common interest between the appellants and the recipients of the letter sufficient to make the occasion privileged. The appellants also sued the respondents for breach of contract in respect of an undertaking given by them in 1937, and for passing off, but these claims are not dealt with in the report because no question of law was involved. The further contentions and claims of both parties sufficiently appear in the judgments.

H *K. E. Shelley, K.C., G. T. Aldous and Alan Stevenson* for the appellants.

D. N. Pritt, K.C. and F. Gahan (for *H. C. Leon* on war service) for the respondents.

LORD GREENE, M.R. : It was argued by counsel for the appellants that copyright could exist in the diary as a whole. The diary, of course, for present purposes, falls into two parts : one is the collection of tables inserted at the beginning of the diary, and the other is the general arrangement and lay-out of the body of the diary, the way in which the days and dates are set forth, and

the spaces for memoranda, and so forth. In my opinion, the latter part of such a production as this is not a good subject-matter of copyright. It seems to me impossible to say that apart from the tables at the beginning the rest of the diary is in any sense a literary work. Accordingly, I cannot accept any proposition which would attribute copyright to that part of the work. The only part of the work to which copyright could possibly attach, in my opinion, is the tables at the beginning, and the question may be considered both with regard to individual tables and with regard to the collection or compilation of tables which the appellants have selected. A

On the question of copyright, UTHWATT, J., said this :

In my view the contents of the Liteblue diary in issue in this case are such that the compilation—at any rate in part—is susceptible of copyright.

By that he means, I think, that, provided the necessary knowledge and labour and so forth had been expended in making up that compilation, it would be entitled to copyright ; in other words, what he means is that a compilation of this character is one which, provided the necessary amount of labour and so forth has been expended, can have copyright. But he then goes on to say this : B

I am prepared to infer that the various lists and tables were drawn from more than one source. I am not prepared to infer that the preparation of any one of these lists or tables was in fact the original work of Mr. Smythson or of Smythsons. I cannot see that the selection of lists and tables and the arrangement of the diary are anything other than a common-place selection of gobbets of information and a common-place arrangement, neither of which involved any real exercise of knowledge, labour, judgment or skill. C

With all respect to UTHWATT, J., I think he took too narrow a view. With regard to certain of the tables it seems to me clear that they were original in the sense that the tables were arranged by somebody, and are not to be found elsewhere save in the admitted copy made by the respondents. In particular, the list of dates is unique, and the abridgement taken from the post office guide of the postal information is again something which, although of a character common to diaries, is in fact an individual abridgement. It seems to me that copyright may well subsist in those two individual tables at least and possibly in others. But I do not propose to decide this matter on the basis of individual tables, because the safer ground of decision appears to me to be that the collection of tables is a compilation which is entitled to copyright. D

The principle which has to be applied is stated in a few words in the judgment of the Privy Council in *Macmillan & Co. v. Cooper* (1). There LORD ATKINSON, in delivering the judgment of the Board, said, at p. 121 : E

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree . . . F

In the present case, unfortunately, Smythson, who was responsible for the compilation found for the first time in the Liteblue diary produced by the appellants, is dead, and, therefore, it is impossible to hear from him what amount of labour and skill and judgment he put into the work of selection. But there are several matters which appear to me to lead to the inference that a substantial amount of labour of that character was required. First of all, although collections of tables of information are a common feature in diaries, different diaries differ completely in the type of table which the compilers think suitable. There is no common collection. The true inference appears to me to be that every person who publishes a diary exercises his own judgment in deciding what tables and what information will be of interest and use to purchasers of the diary ; and in making that selection he not only has to consider that matter, but he also has to consider what space is available. He has to make up his mind to select the best pieces of information having regard to the class of people who are going to use the diary and the space available and general usefulness. G

We have here, therefore, a unique collection made by Smythson. There is also a not inconsiderable amount of evidence which shows that in compilations of this kind time has to be taken, labour expended, and skill and judgment exercised. I do not propose to go through the evidence which appears to me to support that view, but it is not to be disregarded, and, as I say, I think H

UTHWATT, J., swept the whole of that part of the case aside rather too lightly.

A There is one further matter which, I think, is not without importance. The diary in respect of which infringement of copyright is alleged is the 1933 Liteblue diary. The alleged infringing diary produced by the respondents is admittedly based on the admitted copy made on behalf of the respondents by Eckford in, if I remember rightly, 1938. At any rate, it was the 1938 diary of the respondents which first embodied the result of Eckford's activities as a copyist. Why did
A Eckford copy the appellants' diary in 1938? The inference seems to me to be pretty clear. He copied that diary to save himself trouble. If he had had to exercise independent judgment of his own and decide what were the tables, which it would be useful to include, and had gone to the sources where that information was to be found, making abridgements where necessary and selections where necessary, he would have quite clearly, I think, been put to considerable labour, and would have had to exercise skill and judgment of his
B own. Instead of doing that he appropriated the result of the appellants' work and copied direct the appellants' diary in its entirety. It seems to me that, taking all these matters into consideration, it is established that there is a sufficient amount of skill, labour, judgment and so forth put into the selection of that group of tables to attract copyright. The 1942 diary of the respondents was not, of course, copied from the 1942 diary of the appellants in the sense that that particular document was copied. What happened was that Eckford
C took the tables in 1938 as they then existed. Year by year, of course, those tables required to be brought up to date, and necessary changes in date, for instance, inserted. That was done year by year, and that practice was adopted in compiling the respondents' 1943 diary. But the basis of the 1943 diary lay in the copying made by Eckford in 1938. That is not disputed.

D In my judgment, therefore, the appellants succeed on the issue of copyright, but only as regards the collection of tables inserted in the beginning of their diary.

The next matter which has to be mentioned is the argument presented on the basis of the Copyright Act, 1911, s. 8. That reads:

E Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

It is said that in 1942 Cramps, the respondents, were not aware that copyright existed and had no reasonable ground for suspecting that copyright subsisted in the 1942 diary. It was said that whatever Eckford may have known, he
F left some time before the 1942 diary was composed, and that those in charge of Cramp's business were not aware, and had no reasonable ground for suspecting that copyright subsisted. In my opinion that argument cannot succeed. First, the respondents copied a work in respect of which, at the lowest, copyright was capable of subsisting; in other words, it was a compilation which, given the necessary amount of labour and so forth, would be protected by copyright. They copied, therefore, a work which may be conveniently described as potentially
G a copyright work, provided those facts were established. Having, therefore, before them a work which was potentially a copyright work, they copied it without inquiring, or troubling their heads upon the question of whether it was in fact entitled to copyright. They continued while Eckford was there, and after he had left, to publish copies of the appellants' diary without troubling to inquire whether or not the compilation which they were copying was one in respect of which labour and skill, and so forth, had been exerted. I cannot see
H how the language of sect. 8 can possibly cover such a case. Not merely must a defendant who relies on that section show that he was not aware that copyright subsisted—and that, in my judgment, cannot protect him if his ignorance is due merely to a mistake in law—but he must have no reasonable ground for suspecting that copyright subsisted. What the respondents did here was that, without making any inquiry or any investigation, they resolved in their own favour all doubts as to the existence of copyright in this particular compilation. The section was never designed to protect people who act in that way. That disposes of the appeal.

It only remains to deal with the question of libel. UTHWATT, J., on that issue, held that the document complained of was defamatory. He held that the plea of justification failed. He negatived malice and upheld the plea that the document was published on a privileged occasion. In my opinion he was right on the issue of privilege. His decision on the other issues is not contested, and, therefore, the only question which we have to consider is the question of privileged occasion. I do not propose to read at length the letter that was complained of. It was dated Dec. 13, 1941, and was sent to a number of companies and firms. It stated that a writ had been issued claiming an injunction to restrain alleged passing off and alleged infringement of copyright. It informed the addressees that the appellants understood that they had been selling and still had for sale a quantity of diaries produced by the respondents, and they thought that the addressees should be immediately warned of the proceedings. It is said that the occasion cannot be privileged because there could be no common interest between the appellants and the recipients of that letter. It is said that in point of fact on some of the issues the appellants failed. It is said also that the language of the letter was wide enough to cover all diaries made by the respondents and sold or distributed by the addressees, and that when the statement of claim came to be delivered, and also when the action came to be fought and decided, the claim of the appellants in the action was limited by the fact that a number of diaries produced by the respondents turned out to be diaries in respect of which no complaint could be made. In particular the case of Boots, one of the addressees of that letter, was taken, and it was pointed out that the diary produced by the respondents for Boots could not be the subject of a claim for passing off or infringement of copyright. Therefore it was said in the case of Boots, and in the case of others which I need not go into, there could not possibly be a common interest. In my opinion, that argument is based on a misconception. The letter was written just after the writ was issued. The writ was wide enough to cover all the diaries which the respondents were putting on the market. It is perfectly true that that claim subsequently came to be limited, and in certain respects did not succeed. Nevertheless, the writ was wide enough to cover all those claims, and it seems to me really past argument that, where a person issues a writ which is wide enough to cover a number of matters, and the existence of that litigation is something which will affect the relationship of the plaintiff and third parties, a common interest arises sufficient to attract privilege to the occasion. The success or failure of the proceedings is neither here nor there. An example that occurred to me in the course of the argument was that of a plaintiff who was claiming title to freehold land. It would be obviously a matter of common interest to the plaintiff and to the persons to whom leases had been granted by the defendant to know of the existence of those proceedings. What it would be of interest to the plaintiff to inform the tenants it would be in the interest of the tenants to know. The proceedings may turn out to be completely misconceived, they may be wholly unsuccessful; they may succeed in part only, and as to part only of the land. That cannot alter the fact that when the writ is issued raising those issues the common interest arises. Similarly here, having regard to the scope of the writ, I find it impossible to say that there was no such common interest at the date when this letter was written. That was the view taken by UTHWATT, J., and, in my opinion, he was perfectly right.

MACKINNON, L.J.: The one part of the claim in which I differ from UTHWATT, J., is as to breach of copyright. That the defendants slavishly copied the printed matter in the plaintiffs' book is manifest and beyond dispute. The only question, therefore, is whether the matter so copied is susceptible of being the plaintiffs' copyright. The matter copied is information as to various topics such as the compiler of such a diary invariably prefixes to the pages of the diary proper. Such information is, of course, open to all the world as part of the stock of common knowledge. The compiler of this part of a diary, if he is really a compiler, has to do two tasks of selection, first the selection of the particular topics, and secondly the expression or selection of the written matter upon each topic. The plaintiffs' compiler fulfilled the first task by selecting seven topics: (1) A calendar for the year; (2) A selection of "Days and Dates" for the year; (3) Postal rates, Inland, Empire, and Foreign; (4) Equivalents of Metric and Imperial Weights and Measures; (5) Lighting-up

Times; (6) Empire and Foreign Time Table (i.e., the equivalent time to noon at Greenwich); and (7) Percentage Table. The contents of (1) and (3) would no doubt be the same in any account of such a topic. But the contents of (2), (4), (5), (6) and (7) would vary in the work of each independent compiler. In (2) each compiler would select the particular days to be indicated, and it is most unlikely that any two would independently select precisely the same 36 days as did the plaintiffs' compiler. In (5) the plaintiffs give three dates in January, April, October and December, and two dates in every other month. And they give for each date the time in six English and two Scottish cities. It is impossible to suppose that any two independent compilers, condensing the full information of the nautical almanac, could arrive at an identical result. So in (6) it is very unlikely that two independent compilers would select the identical 30 cities in all parts of the world. The defendants have copied slavishly the plaintiffs' 8 pages, the same topics in the same order, and every word under each topic.

There are many authorities which discuss the question how much labour and skill exerted upon non-copyright material is sufficient to create copyright in the resulting record. We were only referred to one of them, *Macmillan v. Cooper* (1), in which many of them are summarised and discussed. It was held in that case that, merely to shorten a non-copyright original by omitting passages did not confer copyright in the shortened version, though the work of abridgement, i.e., the making of a shortened version in the language of the compiler, may do so. But in that case there was also copying by the defendants of notes added to the plaintiffs' version of the text, and it was held that this copying of the notes did infringe the plaintiffs' copyright in them. My recollection of the case is that the notes were of a simple nature, such as any person of education would easily add to the text; indeed, it is recorded in the judgment that the defendants contended that anyone could compile them by hasty references to Lempriere's Classical Dictionary. None the less, it was held that the plaintiffs had in the notes produced an original work, which the defendant must not copy, however easy would have been his task in compiling similar notes for himself. What degree of labour and skill will suffice to create copyright in an original work must in every case be a question of fact. In the present case it is near the line, as is patent from the fact that I find myself in disagreement with UTHWATT, J., and perhaps with LUXMOORE, L.J. But, in my opinion, the plaintiffs are entitled to say that they have copyright in the 8 pages of printed matter which the defendants appropriated, and that, therefore, they are entitled to succeed in this part of their appeal.

I need hardly add that, in my view, the plaintiffs' copyright exists only in these pages in their precise wording. They must not be encouraged to think that they can prevent the defendants or anyone else from printing similar disquisitions on the same topics, if those disquisitions are independently compiled by their producers.

The defendants, as an alternative defence as to copyright, sought to rely on sect. 8 of the 1911 Act. What will enable one who has copied to rely on that section is, I think, a very difficult question. The substance of the section appears to have been copied from the Patents and Designs Act, 1907, s. 33. I think there is no case reported in which a defendant has successfully relied on sect. 8. What it contemplates is, as I have said, obscure. But of one thing I am certain. The section is not intended to render void the ancient maxim *ignorantia legis neminem excusat*. One who has infringed copyright matter cannot rely on his ignorance of the law as giving him relief from liability under sect. 8. In the present case that they were ignorant of the law is the only thing the defendants can rely upon for that attempt. The section, therefore, cannot avail them.

I would, therefore, allow the appeal as to the claim for breach of copyright.

LUXMOORE, L.J.: In the statement of claim the plaintiffs alleged that "they are and at all material times have been the owners of the copyright in" what they described by the phrase "diaries of a distinctive character with a distinctive binding and get-up." The only other allegations material to the copyright issue are in para. 6, which says:

The defendants have infringed and threaten and intend to infringe the plaintiffs' copyright in the said diaries by reproducing the same, or a substantial part thereof,

and by authorising the reproduction thereof . . .

Then it says that :

. . . the plaintiffs will rely upon the publishing, offer for sale, and sale of diaries as set out in para. 3 hereof . . .

which is a mistake, I think, for para. 4, where the diaries referred to are those which are said to have been sold by the defendants to certain named purchasers. The relief based on these allegations is the usual relief in a copyright action, an injunction to restrain infringement of the copyright, to quote the words of para. 2, "in their diaries." There is the consequential relief of delivery up and damages. A

It will be observed, so far as the statement of claim is concerned, that there is a general claim to copyright in all diaries published by the plaintiffs, without specifying any particular diary. The defendants asked for particulars in respect of the allegations relating to passing off and infringement of copyright, but the plaintiffs were not required to particularise the diaries in which copyright was claimed. I think it is plain that when a diary is published in the same form, or substantially the same form, from year to year there cannot be a new copyright for each separate year, and it seems to me to be essential to ascertain in which particular issue the copyright claimed to be infringed is said to exist. Quite obviously the original diary, if it is entitled to copyright, is the document on which the plaintiffs' title to copyright should be founded. Any subsequent alteration or addition may attract copyright, but the copying from a subsequent diary of tables of information appearing in the original diary would constitute an infringement of the copyright, if any, in the original diary. B

The plaintiffs have from time to time published three different classes of diary. We were told the earliest was published about 1909, and was, and still is, called the Featherweight. We were told that this diary has been published with no substantial change from 1909 down to the present time, but the earliest example of it produced to us was that dated 1913. Subsequently, the plaintiffs published two other classes of diaries under the titles "Wafer" and "Liteblue." The Liteblue diary was first published in the latter half of the year 1932. Apparently, at no time during the hearing before UTHWATT, J., were the original diaries in which copyright was claimed specified or identified. But when asked in this court to specify the diaries in which copyright was claimed, counsel for the appellants elected to rely, in the first instance, on the plaintiffs' Liteblue diary for the year 1933, which was the first issue of diaries of that particular type. It is, I think, therefore, unnecessary for me to consider any other of the plaintiffs' diaries from the point of view of the subsistence of copyright. C

The Liteblue diary for 1933 contains a title page with the plaintiffs' registered trade-mark, the title "The Liteblue Diary," the date, the publishers' name and address. On the back of this page there is a calendar for 1933 in tabular form. On the next page is a list of dates headed "Days and Dates, 1933." In this list appear some of the principal feast days and holidays, their Majesties' birthdays, St. George's day, and the respective dates when the shooting of the various game birds begins. The next two pages are occupied with postal information. Then follow two pages of weights and measures under the title "Equivalents of Metric and Imperial Weights and Measures," two pages headed "Sportsman's Ready Reckoner," a table of lighting-up times for 1933, which is stated to have been compiled by the courtesy of the Automobile Association, a table headed "Empire and Foreign Time Tables," and a percentage table. The calendar and the tables occupy some 10 pages. Those are followed by a blank page headed "Memoranda," and the following pages constitute what I may describe as the diary proper. Each page is divided into four spaces. Each pair of pages when the diary is open is allocated to the period of 1 week, one space for each day, and the space at the bottom of the right-hand page of the pair is headed "Memoranda." In the latest diary, that for 1942, these pages cover the whole year, and in the same diary a period of 14 days in the succeeding year is provided for. In the 1933 book the diary proper is followed by a calendar for 1932 and one for 1934, each in tabular form. Then there are 5 pages for memoranda, 4 pages for addresses, 3 for telephone numbers and one more page, I think, for memoranda followed by 4 pages for notes for the following year, each of these pages being divided into three spaces, one of which is devoted to a month of that year. The 1942 diary of the plaintiffs is in substantially D

the same form, but there are slight variations to which I need not call attention.

In the particulars the plaintiffs were required to give of infringement of their copyright, the plaintiffs specified, among other things, certain pages of the defendants' *Lightweight Diary, 1942*, namely, those containing the calendar, the Days and Dates, the Inland Postage Rates, the Empire and Foreign Postage, the equivalents of Metric and Imperial Weights and Measures, the Empire and Foreign Time Table, the Sunset Time Table, the Percentage Table, and the memoranda on p. 13 of the 1942 *Liteblue diary* of the plaintiffs. In addition the

A particulars contain this paragraph: "The words type and lay-out of each page of the diary proper of the defendants' diaries" which include the *Surrey Lightweight*, "are similar to those of the plaintiffs' diaries," and then they set out five classes of diaries including the *Liteblue* and continue, "and infringe the plaintiffs' copyright." The calendars for 1941 and 1943 towards the end of the defendants' diaries are similar to those towards the end of the plaintiffs' "

B *Liteblue diary* "and infringe the plaintiffs' copyright." " 'Notes for 1943' towards the end of the defendants' diaries are similar to 'Notes for 1943' at the end of the plaintiffs' " *Liteblue diary*, that is, a blank page in each with "Notes for 1943" at the head of it, "and infringe the plaintiffs' copyright." " 'Addresses' and 'Telephone Nos.' at the end of the defendants' diaries are similar to 'Addresses' and 'Telephone Nos.' towards the end of the plaintiffs' diary"—that is, the *Liteblue*—"and infringe the plaintiffs' copyright." They go on: "The words, type and lay-out of each page of the diary proper of the defendants' diaries are similar to the corresponding pages of the plaintiffs' diaries . . . and infringe the plaintiffs' copyright."

Counsel for the plaintiffs persisted in the claim that the defendants' *Lightweight diary* infringes the plaintiffs' copyright in respect of all the matters set out in the paragraphs which I have read, and that the plaintiffs were entitled to copyright in the words, type and lay-out of the diary. I am quite unable to appreciate any legal ground for a claim to copyright in the words, type or lay-out of the pages of what he called the diary proper. There can be no basis on which copyright can be claimed for the insertion of the days of the week and their dates in a diary, still less in the type selected and used, or in the actual lay-out, for it is impossible to describe any of those features as literary or artistic work. If the plaintiffs are entitled to any copyright it can be only in the tables and information at the beginning of their *Liteblue diary*. I agree that the individual tables, or some of them, might be entitled to protection as being original literary compilations, or the totality of the tables and information taken as one entirety might be entitled to protection as a literary compilation.

As was pointed out in the case to which reference has been made already, *Macmillan & Co. v. Cooper* (1), the question what is the precise amount of knowledge, labour, literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. Their Lordships went on to point out that in every case the answer must depend largely on the special facts of the case, and must in each case be very much a question of degree. In the case quoted the subject-matter of the claim for copyright was a book entitled "*Plutarch's Life of*

G *Alexander*, Sir Thomas North's translation, edited for schools by H. W. M. Parr." The book consisted of detached passages from North's translation selected by the author so as to be suitable for use in schools. The passages were interspersed with notes, where necessary, to fill in the narrative, and the book also contained notes explanatory of the context, and a glossary. Sir Thomas North's translation contained about 40,000 words, while Parr's selection comprised about 20,000 words of North's text. The respondents published an edition of North's translation of *Plutarch's Life of Alexander the Great* entitled "*Plutarch's Life of Alexander the Great*, North's translation. Edited with introduction, marginalia, notes and summary, by A. Darby." Darby's text contained selections from North's translation comprising about 27,000 words of the original text. All of the passages selected and published in Parr's book were reproduced in Darby's book. Darby's book also contained notes on the text. The board came to the conclusion that the appellants were not entitled to copyright in the selected passages, but were entitled to copyright in the notes. LORD ATKINSON on this point said, at p. 121:

... their Lordships have no hesitation in holding that there is no evidence in the present case to establish that an amount of these several things has been applied to the composition of the text of the appellants' book, as distinguished from the notes contained in it, to entitle them to copyright of it. As to the notes, it is altogether different.

Obviously the answer to the question whether there is a sufficient amount of knowledge, labour, judgment or literary skill or literary taste to entitle a person to copyright in any compilation must depend on the evidence in each case, including the consideration of the compilation itself.

So far as the tables in the Liteblue diary are concerned, they appear to be of the most common-place type. UTHWATT, J., referred to them, I think not unfairly, as gobbets of information. There is no apparent plan on which they appear to have been selected. So far as we know they may have come from one source or from a number of sources. How the compilation was made is left entirely to conjecture, for there is no evidence before the court from which it can, in my judgment, be held, either directly or by inference, that any one of the tables included in the Liteblue diary was the original work of Smythson, or of any other person. Nor is there any evidence with regard to the source or sources from which the tables were derived except in the case of the table headed "Metric and Imperial Weights and Measures" which obviously was derived either from a diary published by Harpers in 1930, or from the same source from which the compiler of Harpers' diary obtained his tables. The plaintiffs were unable to call Smythson, who was said to be responsible for the compilation claimed, because he died some years before the action was instituted, and apparently there was no other person available; but in the absence of any evidence other than the existence of the tables of information which appeared in the Liteblue diary for 1933, and continued through the succeeding years, it seems to me to be impossible for the plaintiffs to establish, to adopt the words of LORD ATKINSON in the case I have quoted, that the amount of knowledge, labour, judgment or literary skill or taste applied to the compilation of the tables and lists at the beginning of the Liteblue diary for 1933 entitles that compilation to copyright.

I agree with the view expressed by UTHWATT, J., that, looked at apart from any evidence, the compilation for which copyright is claimed is nothing more than a common-place selection of scraps of information, or a common-place arrangement, neither of which has involved any real exercise of labour, judgment or skill. Counsel for the appellants was pressed, I think, by the absence of any such evidence to which I have referred, for he, in the first place, based his claim to copyright on the fact that the circumstances were such that he was entitled under the Copyright Act, 1911, s. 6 (3) (b), to be presumed to be the owner of copyright, and that the existence of that copyright was also to be presumed unless and until the contrary was proved by the defendants. This argument, I think, is unsound. Sect. 6 (3) of the Act provides :

In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright exists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue then . . .

and then follow the paras. (a) and (b), which refer solely to the question of title and not to the question of the subsistence of copyright. I can see nothing in the subsection to justify the suggestion that the subsistence of copyright is to be presumed in any case which falls under either of the two sub-paras. (a) and (b) of the subsection. The defendants have put in issue the existence of copyright and the plaintiffs' title to copyright. Subsect. 3 (a) and (b), on the plain construction of the words, is limited to the issue of title and has nothing to do with the issue whether copyright subsists or not. The plaintiffs are entitled to the benefit of the presumption as to title, but the presumption as to the subsistence of copyright conferred by the first part of subsect. 3 does not apply, for the condition on which it rests has been removed by the defendants putting in issue the existence of copyright.

The burden of proving that copyright subsisted, therefore, remains with the plaintiffs, and, in my judgment, they have not discharged the onus of proving its existence. Therefore, I agree with UTHWATT, J., that the existence of copy-

right in the plaintiffs has not been established, and I would dismiss the plaintiffs' appeal on the copyright issue.

LORD GREENE, M.R.: The judgment which has been just delivered by LUXMOORE, L.J., reminds me that something which I said in my own judgment may be open to misconstruction. The work in which copyright is alleged to exist must, of course, be the original "Liteblue" diary, the features in which, which are subject, in my opinion, to copyright, have been produced ever since and were copied by the respondents. I did not intend to suggest that each edition of the diary was a subject of copyright, because the new editions merely consisted of bringing matters up-to-date.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Henry Pinfrey & Son* (for the appellants); *Rubinstein, Nash & Co.* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

BRITISH FERMENTATION PRODUCTS, LTD. v. TEAL.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J. and Tucker, J.),
January 28, 1943.]

Food and Drugs—Proceedings against manufacturer—Sample divided into three portions—Part of portion retained by inspector sent to manufacturer—Failure to produce whole portion at the hearing—Food and Drugs Act, 1938 (c. 56), ss. 3, 70, 80 (4), 83 (3).

The appellants were the manufacturers of a product which they described as egg substitute. A sample was purchased at a retail shop by an inspector, who informed the retailer that he was purchasing the sample for analysis and, in the retailer's presence, the inspector divided the sample into three parts, one of which he left with the retailer, the second he transmitted to the public analyst, and the third he retained as required by the Food and Drugs Act, 1938, s. 70. The inspector subsequently opened the portion he had retained and sent part of it to the manufacturers. On analysis it was found that the substance was not egg substitute and by virtue of sect. 83 (3) of the Act, the manufacturers were charged with unlawfully selling to the prejudice of the purchaser a certain article of food which was not of the nature, substance and quality demanded by the purchaser contrary to sect. 3 of the Act. At the hearing the inspector produced the remainder of the portion retained by him and the manufacturers contended that by failing to produce the whole of the portion originally retained by him, the inspector had failed to comply with sect. 80 (4) of the Act and that, therefore, the whole case failed. The inspector contended that the sampling procedure required by sect. 70 did not apply in the case of proceedings against the manufacturers brought under sect. 83 (3); and that there had been sufficient compliance with sect. 80 (4), because the appellants were not prejudiced and the portion of the sample produced was capable of analysis and was, in fact, analysed:—

HELD: the sample was a sample which had been procured in such circumstances that its division into parts was required by the Act; therefore, under sect. 80 (4), the production of the whole of the portion originally retained by the inspector was a condition precedent to a conviction, even in proceedings against the manufacturers under sect. 83 (3). The sample produced was not the retained sample at all. It had become something different by the intentional act of the inspector and he had, therefore, failed to comply with sect. 80 (4) and the case against the appellants failed.

[EDITORIAL NOTE. It was decided in *Cummings v. British Fermentation Products, Ltd.* (1), that a manufacturer against whom proceedings were taken under sect. 83 was not entitled to have a portion of the sample sent to him. In the editorial note to that case it was inadvertently said that there is no need to follow the procedure of sect. 70 so far as the manufacturer was concerned. This statement was too wide and, indeed, goes farther than the judgments in that case. The position is that the manufacturer is not entitled to receive a portion of the sample, but he is entitled to insist on the portion retained by the inspector being produced at the hearing.

AS TO PRODUCTION OF SAMPLE, see HALSBURY, Hailsham Edn., Vol. 15, p. 170, para. 283; and FOR CASES, see DIGEST, Vol. 25, pp. 74-76, Nos. 39-54.]

Cases referred to :

- (1) *Cummings v. British Fermentation Products, Ltd.*, [1942] 2 K.B. 108; [1942] 2 All E.R. 271; Digest Supp.; 111 L.J.K.B. 581; 167 L.T. 140.
- (2) *Twynham v. Badcock*, [1932] 2 K.B. 549; Digest Supp.; 101 L.J.K.B. 755; 147 L.T. 35.
- (3) *Suckling v. Parker*, [1906] 1 K.B. 527; 25 Digest 103, 257; 75 L.J.K.B. 302; 94 L.T. 552.

CASE STATED by the justices of Staple Hill, Gloucestershire, under the Summary Jurisdiction Acts, 1857 and 1879. The facts and arguments are set out in the judgment of the court.

Linton Thorp, K.C., and *Sebag Shaw* for the appellants.

Vernon Gattie for the respondent.

TUCKER, J. [delivering the judgment of the court]: This is an appeal by way of case stated by the justices of Staple Hill, Gloucester, and the proceedings arose under an information which was preferred under the Food and Drugs Act, 1938, against the appellants, who are British Fermentation Products, Ltd. They were charged that on Nov. 3, 1941, they did :

... unlawfully sell to the prejudice of Percy Wilson Teal, the purchaser, a certain article of food which was not of the nature substance and quality of the article, namely, egg substitute, demanded by the purchaser, contrary to sect. 3 of the Act.

On that information the appellants were convicted and fined, and this case stated raises the question as to whether the provisions of the Food and Drugs Act, 1938, with regard to the taking of samples have been complied with, and whether, in the circumstances of this case, it was necessary that they should be complied with or not. Although the appellants are charged under sect. 3, they are really made liable by reason of the provisions of sect. 83 (3), because they were not themselves the sellers, they were the manufacturers who, by virtue of sect. 83 (3), are made liable. The words of the subsection are :

Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under subsect. 1 of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person.

The result of that somewhat involved subsection is that it is possible for a notional sale to have taken place to the prejudice of the purchaser for which the manufacturer may be responsible, although he has not been the person who actually sold the article in question, and it is by virtue of sect. 83 (3) that it was sought to make these appellants liable for what happened.

The case finds that the appellants were at all material times the manufacturers of this article of food, which is called "Chieftain Egg Substitute Powder." It goes on to state that in February a quantity of this food was consigned for sale under that description to the Danish Bacon Co. as purchasers, and part of the consignment was resold by them in the same month in packages or tins bearing that description, and containing the address of the appellants as manufacturers. One of those tins ultimately reached Phillip Henry Kendall, who carried on a retail grocer's business, and on Nov. 3, 1941, the respondent, that is, the inspector, purchased at Kendall's shop a tin of this substance bearing the label containing the description "Chieftain Egg Substitute Powder."

On the purchase, the respondent informed Philip Henry Kendall that he was purchasing and taking a sample for the purpose of analysis, and there and then in the presence of Kendall, the inspector divided the sample into three parts, left one of those parts with Philip Henry Kendall, transmitted a second part to the public analyst, and he retained the third part. The portion sent for analysis was duly analysed, and the justices have found that the sample purchased was not an egg substitute powder, and was not of the nature, substance and quality demanded by the purchaser, and that the sale was to the prejudice of the purchaser. Having taken these samples in the way I have described, the inspector had opened the retained portion which he had kept, and he had divided it into two parts. He retained one part himself, and he sent the other part to the appellants in this case, British Fermentation Products, Ltd.

At the hearing of these proceedings, he produced in court with the seal intact the part of the retained portion of the sample, and he purported in so doing to

be producing the sample in accordance with sect. 80 (4), which provides :

In any proceedings under this Act, where a sample has been procured in such circumstances that its division into parts is required by this Act, the part of the sample retained by the person who procured it shall be produced at the hearing.

A The objection taken at the hearing was that the sample produced by the inspector was not the part of the sample retained by the person who had procured it, but was only a portion of the part of the sample retained by such person, because the remainder had been sent to the appellants. The justices said that they caused :

B . . . both the divided sealed portion and the sealed sample which had been left with the said Philip Henry Kendall and produced by him before the court to be sent to the government analyst who duly made an analysis of both the divided sealed portion and the sealed sample left with the said Philip Henry Kendall and the court was satisfied by reason of the certificate given by the government analyst that the divided sealed portion was of the same composition as the sealed sample left with the said Philip Henry Kendall.

Therefore, it is clear that the justices were satisfied, as they in fact state in their opinion, that the appellants had not been prejudiced by the re-division of the retained portion of the sample.

C The point taken by counsel for the appellants is that the inspector was, in this case, applying the sampling provisions of the Act, or was purporting to be applying the sampling provisions of this Act, but in so doing he had not fully complied with the provisions there laid down.

Sect. 70 is as follows :

D A person purchasing a sample of any food or drug with the intention of submitting it to be analysed by a public analyst, or taking a sample of food on any premises with the intention of submitting it to be so analysed, shall, after the purchase has been completed or the sample has been taken, forthwith inform the seller or his agent who sold the sample, or, as the case may be, the occupier of the premises or the person for the time being in charge thereof, of his intention to have the sample analysed by the public analyst, and shall then and there divide it into three parts, each part to be marked, and sealed or fastened up, in such manner as its nature will permit, and shall (a) if required so to do, deliver one part to the seller or his agent, or, as the case may be, to the occupier of the premises or the person for the time being in charge thereof ; (b) retain one part for future comparison ; and (c) if he thinks fit to have an analysis made, submit one part to the public analyst : Provided that, in relation to samples taken in such circumstances as are mentioned in either of the two next succeeding subsections, the foregoing provisions with respect to the giving of information and the manner of dealing with samples shall have effect as modified by those subsections.

E It is not necessary to refer to the following subsections for the purpose of this case.

F It is clear from the case stated that the inspector did in fact fully comply with all the provisions of sect. 70, but the question is, having complied with those provisions, did he at the hearing comply with sect. 80 (4), to which I have already referred, and need not read again ? Was the sample produced by him in accordance with that subsection ? Was that a compliance with the subsection ? Counsel for the appellants says that it clearly was not, because he was only producing part, namely, half of the original retained portion.

G On behalf of the respondent, counsel makes two submissions. First, he says, and this is a matter of some importance, and not without difficulty, the sampling procedure does not apply in the case of proceedings under sect. 83 (3) against the ultimate supplier or manufacturer, the person made notionally liable, or made liable for notional sales under that subsection. He says the sampling procedure only applies in the case of proceedings taken against the seller.

H It is clear, in the first instance, that, if that is so, then although the sampling procedure may not have been necessary as a matter of law, the inspector was purporting to adopt the sampling procedure in this particular case. But it is said that, even so, it was not necessary that he should do so, and these appellants have no right to complain of any failure fully to comply with that procedure.

The argument on that part of the case is founded principally upon the decision of this court in *Cummings v. British Fermentation Products, Ltd.* (1). That was a case against these same appellants, British Fermentation Products, Ltd., and in that case proceedings were taken against them under sect. 6 (1) and sect. 83 (3) of the Act. Sect. 6 (1) is the section which provides that a person who gives with any food or drug sold by him a label which falsely describes

that food or drug, or is otherwise calculated to mislead, commits an offence. Then, by sect. 83 (3), the person ultimately responsible can be made liable, although he was not the actual seller. Under those two sections proceedings were taken in *Cummings'* case (1) against these appellants, and there was a case stated. The appellants in that case took the point that no portion of the sample had been sent to them. They said :

You are taking proceedings against us as sellers, although we are only notional sellers, but we should have had a portion of the sample delivered to us.

That was the point upon which the decision proceeded, and in the judgment of VISCOUNT CALDECOTE, L.C.J., at p. 272, he states the finding of the court in these words :

Now what the respondents complained of was that they had not had the advantage of having a portion of the sample which was taken delivered to them, and everybody must appreciate the desire of this company or any other company charged with an offence under the Food and Drugs Act to receive a portion of the sample of the food as sold to the inspector.

Then reference is made to *Twynham v. Badcock* (2), and VISCOUNT CALDECOTE, L.C.J., at pp. 272, 273, proceeds :

The question is as to whether the Act of Parliament requires on the facts of a case like this that the person proceeded against must receive a sample under the only provisions, so far as I am aware, which require a sample to be given, namely, sect. 70 of the Act.

Then he cites passages from *Twynham v. Badcock* (2), and refers to a passage in the case stated, and then proceeds at p. 273 :

That seems to me to contain a fallacy, with all respect to the magistrate, when he says the provisions should have been complied with in respect of the respondent company. The provisions of sect. 70 were complied with in respect to the only persons who are brought into the matter by the provisions of sect. 70. When he says they should have been complied with in respect of the respondent company, the answer which, I think, must be made to that statement is that, at the time when the sample was taken, there was no intention of prosecuting the persons who were ultimately proceeded against under sect. 83 (3) of the Act.

Then HUMPHREYS and CASSELS, JJ., agreed.

It is clear that for the purposes of that case, it was only necessary to decide whether or not the ultimate supplier was entitled to have delivered to him a portion of the sample, and the case did not decide, nor was it necessary to decide, the question whether or not the ultimate supplier sought to be made liable under sect. 83 (3) can insist upon strict compliance with the provisions of sect. 70 taken literally, and we are of opinion that there is nothing in *Cummings v. British Fermentation Products, Ltd.* (1), which decides that matter. There is nothing in that case decisive of that point. It is true that the editorial note to that case appears to indicate a view that the decision went somewhat further than is to be found from a perusal of the actual judgment.

Accordingly, it being open to this court to decide, apart from authority, whether or not the contention of counsel for the respondent is right, namely, that the ultimate supplier cannot avail himself of the benefit of the sampling procedure, it is necessary for us to express an opinion upon that matter.

The language of sect. 70 is perfectly clear. It provides, as I have already read, that a person purchasing a sample of any food or drug with the intention of submitting it to be analysed, shall take certain steps. It is clear in this case that the purchaser did purchase for the purpose of analysis, and that he did take the steps laid down in sect. 70. It is to be observed that those provisions confer protection on the ultimate supplier who is sought to be made liable for the resulting sale in that, even although he is not entitled to be sent a portion of the sample, he can take advantage of the requirement that the retained sample is to be produced in court on the hearing of the proceedings, and it can, as was in fact done in this case, be sent by the court for analysis.

Sect. 89 (4) is equally clear, and the wording is very wide :

In any proceedings under this Act, where a sample has been procured in such circumstances that its division into parts is required by this Act, the part of the sample retained by the person who procured it shall be produced at the hearing.

In our view, this sample was a sample which had been procured in such circumstances that its division into parts was required by this Act. It had been obtained

pursuant to the provisions of sect. 70, and that being so, its production in court at the hearing was essential and a condition precedent to conviction. We are of opinion that, although the proceedings were against the appellants under sect. 83 (3), they were entitled to insist upon strict compliance with the sampling procedure which had in fact been adopted, and that there is nothing in the decision of *Cummings' case* (1) to lead to a contrary view. That being so, the first submission of counsel for the respondent fails.

A His second submission is that on the facts of this case there was a sufficient compliance with sect. 80 (4). He points out that there is a finding that the appellants were not prejudiced, that the sample or portion of the sample produced was in fact capable of analysis, and was in fact analysed. Furthermore, he relies on *Suckling v. Parker* (3). The facts in that case were, that proceedings having been taken under the Sale of Food and Drugs Act, 1875, s. 9, which Act contained similar provisions with regard to sampling, when the summons came on for hearing, the sample produced was reduced in quantity. It was milk, and there was only half of it left, because the cork had become loose after the sample had been taken and sealed up, and, therefore, the sample when produced in court was useless for the purposes of analysis. In that case, the point taken by Mr. Clarke Hall, who appeared for the appellant, was that it was a condition precedent to a conviction that the part retained shall not only be produced at the hearing, but that when produced it shall be in such a condition that analysis of it is possible, for the only object of producing it is that it may be analysed. Then he said that the sample produced was useless for the purpose of analysis, and, therefore, the Act had not been complied with. The decision of the court was that that contention was not sound, that it was not a condition precedent for conviction that the retained sample should have been analysed, but they sent the case back to the magistrate with the intimation that in order to support the conviction there must be a finding of fact by the magistrate that the sample had been sealed or fastened up in such manner as its nature would permit as provided by sect. 14 of the 1875 Act. Therefore, the decision in that case was merely to the effect that, provided the inspector had at all stages done everything that was required by the Act, and that through no default of his at the time of the hearing for some reason or another the sample had become valueless for the purpose of analysis, none the less the provisions of the Act had been complied with provided the sample had been properly taken, and that the sample was produced in court. There is nothing in that case to indicate that where the inspector intentionally and deliberately re-opens the retained sample after it has been originally taken and sealed, and does something to it resulting either in an alteration in its quantity or quality, that he can then produce the portion of the sample, or the altered sample, at the hearing and successfully maintain that he has fully complied with the provisions of the Act.

F In this case there is no suggestion at all that the inspector was doing anything improper. He was doing what he thought was right and proper and fair in giving these appellants a part of the sample, but, in our view, the result of what he did in fact do was to render it impossible for him properly to comply with sect. 80 (4), when the proceedings came on for hearing, because the sample which he produced on that occasion was not in fact the retained sample at all. It was something different, and it was something which had become different by his own intentional act.

G In our view, it is impossible to say that on these findings there has been a compliance with the provisions of sect. 80 (4). This is a penal statute. The provisions with regard to sampling are laid down for the protection of persons against whom proceedings may be taken, and they must be strictly complied with. In those circumstances, although this case does not appear to be one that is particularly meritorious, none the less, in our view, this conviction must be quashed, and the case must be remitted to the justices for that purpose, in view of the fact that there has not been a compliance with the provisions of sect. 80 (4).

Conviction quashed.

Solicitors: *A. Kramer & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Richard L. Moon*, Gloucester (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

HERBERT *v.* COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Macnaghten, J.), January 26, 1943.]

Income Tax—Assessment—Revocable settlement—More than one settlor—Income to be treated as income of settlor—Finance Act, 1938 (c. 46), s. 38 (2).

In 1930 two settlors, of whom the appellant was one and his father the other, appointed certain freehold property to trustees upon trust to pay out of the income thereof certain insurance premiums. The appellant was assessed to income tax in respect of the income arising under this settlement, the assessment being made under the Finance Act, 1938, s. 38 (2). The appellant contended that, since that section said that the income under the settlement should be treated as the income "of the settlor and not as the income of any other person," it was not applicable to the present case where there were two settlors:—

HELD: no assessment under the Finance Act, 1938, s. 38, could be made upon the appellant during the lifetime of his father in respect of the income arising under the settlement.

[EDITORIAL NOTE. This case points out a difficulty under the Finance Act, 1938, s. 38. The section seems to be inapplicable where there is more than one settlor and in such a case the income cannot be treated for the purposes of taxation as the income of the settlor and of no other person as directed by the Act. The difficulty would appear to be purely one of the wording of the Act and will no doubt be removed by amendment.]

FOR THE FINANCE ACT, 1938, s. 38 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 31, p. 349.

APPEAL from a decision of the Commissioners for the Special Purposes of the Income Tax Acts. All the facts are set out in the judgment.

Millard Tucker, K.C., and J. A. Wolfe for the appellant.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and R. P. Hills for the respondents.

MACNAGHTEN, J.: This is an appeal by Lord Herbert from a decision of the Special Commissioners with respect to three assessments to income tax made upon him under the Finance Act, 1938, s. 38, for the year 1938-39 in the sum of £13,304, for the year 1939-40 in the sum of £13,323, and for the year 1940-41 in the sum of £13,323. The Special Commissioners confirmed the assessments for 1938-39 and 1939-40; they reduced the assessment for 1940-41 from £13,323 to £13,258. These assessments were made in respect of income arising under a settlement (called the accumulation settlement) dated Apr. 5, 1930, made by Lord Pembroke and the appellant.

The appellant is the eldest son of the present Lord Pembroke. By his will the late Lord Pembroke, who died on Mar. 30, 1913, settled certain English estates, Irish estates and capital moneys on his son, the present Lord Pembroke, as tenant for life, with remainder to his grandson, the appellant, as tenant in tail. The property thus settled is referred to in the case as the "will estate." Lord Pembroke is also tenant in tail male of certain property in Wiltshire which was granted by the Crown in tail male and cannot, therefore, be disentailed. This property is referred to as "the Crown estate." The property comprised in the accumulation settlement is part of the Irish estates which were settled by the will of the late Lord Pembroke. In 1925, in order to lessen the burden on Lord Pembroke's income, the sanction of the court was obtained (the appellant being then a minor) to a scheme whereby mortgages for substantial sums on his life interests in the Crown estate and the will estate supported by collateral mortgages of policies of insurance on his life were transferred to the trustees of those estates and the mortgages so transferred to each set of trustees were subsequently consolidated.

The appellant came of age in 1927, and in 1930, in order to ensure so far as possible proper provision for Lord Pembroke and the various members of his family, a further scheme was carried out, again with the sanction of the court so far as such sanction was necessary. This further scheme was very complicated and involved the execution of no less than 16 deeds: but for the consideration of the issue arising on this appeal it is only necessary to state that one of the provisions of the scheme was that part of the Irish estates settled by the will

A of the late Lord Pembroke should be vested in trustees upon trust to apply the income arising therefrom in payment of the premiums on the policies on the present Lord Pembroke's life which were collateral security for the mortgages on his life interests in the Crown and the will estates and that the accumulation settlement was made in accordance with that provision of the scheme. This settlement dated Apr. 5, 1930, was made between Lord Pembroke of the first part, the appellant of the second part, and H. A. Vernon and W. L. Barlee as trustees of the third part. The property comprised in the settlement, which consisted for the most part of freehold property situate in the city and county of Dublin, in that part of Ireland which is now called Eire, was disentailed by a deed dated Mar. 29, 1930. By cl. 1 (ii) of the accumulation settlement, the present Lord Pembroke and Lord Herbert as settlors appointed the property in question to the trustees on trust to pay out of the income of the property the premiums on the life policies set out in Sched. IV thereto, amounting to B £10,246 12s. 1d.; but this appointment was revocable under the provisions of cl. 1 (i) of the settlement, and in that event Lord Pembroke and the appellant might become entitled to the property comprised in the settlement.

The assessments in question were made under the provisions of the Finance Act, 1938, s. 38. Subsect. (2) provides :

C If and so long as the terms of any settlement are such that (a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such D income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person.

The accumulation settlement admittedly contains provisions which bring it within sect. 38 (2), and the appellant is admittedly a settlor. But the appellant is not the only settlor. His father is also a settlor; and the point raised by E counsel for the appellant on this appeal is that in these circumstances no assessment can be made upon Lord Herbert in respect of the income from the property comprised in the settlement for the following reason. The section provides that the income :

... shall be treated as the income of the settlor for that year and not as the income of any other person.

F Lord Pembroke is admittedly a "settlor" and, therefore, the income must be treated as his income and not as the income of any other person; Lord Herbert is another person and, therefore, the income cannot be treated as his. If Lord Pembroke were assessed, the same argument could be raised. If there is no flaw in the argument and the words of the section are imperative, as they seem to be, the result is that where there is more than one settlor the provisions of the section become inapplicable.

G In view of the fact that the expression "settlement" in this section includes any disposition, trust, covenant, agreement or arrangement, and the expression "settlor" in relation to a settlement means any person by whom the settlement was made, it would seem probable that in many of the settlements that come within this section there must be more than one settlor. But the Act does not prescribe what is to happen when there is more than one settlor; and it seems that the question has never yet come up for decision. It is not suggested that H each and all of several settlors can be assessed. That, indeed, would seem to be an extravagant proposition. Nor is it suggested that the income can be distributed between them.

In the course of the argument it was suggested that where there is more than one settlor, the assessment should be made upon the settlor to whom the income would have belonged if the settlement had not been made. But that interpretation of the section is of no assistance to the Crown in the present case. The income in question is the income to which Lord Pembroke is entitled as tenant for life under the will of the 14th Earl. The appellant did not bring

it into the settlement. During the lifetime of his father he has no right, title or interest in that income whatsoever.

The interpretation of the section put forward on behalf of the respondents was that, where there are two or more settlors, the Crown has the option to assess any one of the settlors to the exclusion of the other, and that, in the case of an assessment to income tax—and the assessments in question on this appeal were assessments to income tax—the option must be exercised by the local inspector of taxes and that there was no right of appeal by the taxpayer against the inspector's choice. In the case of an assessment to sur-tax, the option would lie with the Special Commissioners. I find myself unable to accept that interpretation. It seems to me fantastic to suppose that Parliament has conferred upon inspectors of taxes, or even upon the Special Commissioners, the right to decide at their own will and pleasure which of several persons should be liable to income tax or sur-tax, as the case might be.

So I come to the conclusion that no assessment under the Finance Act, 1938, s. 38, can be made upon Lord Herbert during the lifetime of his father in respect of the income arising under the accumulation settlement, and that the decision of the Special Commissioners should be reversed and the appeal allowed with costs.

Appeal allowed with costs.

Solicitors : *Nicholl, Manisty & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

MAYOR, ALDERMEN AND BURGESSES OF THE COUNTY BOROUGH OF SOUTH SHIELDS v. LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF LIVERPOOL.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Tucker, JJ.), **January 21, 1943.**]

Children—Protection of children and young persons—Approved school order—Determination of place of residence—Children and Young Persons Act, 1933 (c. 12), ss. 62, 66 (1), 90 (2).

A young person named Josephine Anderson, whose father, mother and stepfather were deceased, after staying with her half-brother in South Shields and then in a boarding house in the same borough, travelled to London and lived there in circumstances which made it expedient that she should have care and protection. As a result she was brought before the juvenile court under the Children and Young Persons Act, 1933, s. 62, and a supervision order was made directing that she should be placed under the supervision of a probation officer in Liverpool where she was to live with her sister. A few weeks later, Anderson left Liverpool and went to South Shields where, in consequence of a message received from the metropolitan police, she was taken into custody and brought to London. She again appeared before the juvenile court, this time under sect. 66 (1) of the Act, and in an order that she be sent to an approved school, her place of residence was stated as South Shields. The South Shields Corporation appealed under sect. 90 (2) of the Act, with a view to the substitution in the order of Liverpool as Anderson's place of residence, but the appeal was dismissed on the ground that the material time for the purpose of ascertaining residence was the time at which the child was first before the court as a young person in need of care and protection and that at that time she was not resident in Liverpool :—

Held : the material time for the purpose of ascertaining residence was the time of the making of the approved school order and at that time the young person was resident in Liverpool.

[**EDITORIAL NOTE.** This is a question of construction. The young person when first she required care and protection was resident at South Shields, and she was then put under a probation officer. Later she ran away from her then home in Liverpool and an order was made sending her to an approved school. The statute requires that the name of the local authority within whose district she was resident to be inserted in the approved school order. The question was whether the place of residence to be inserted was South Shields where the young person was resident when she first required care and protection, or whether the place of residence was Liverpool where she was resident when the approved school order was made. Upon the construction of the Act, the court has decided in favour of the latter view.

AS TO APPROVED SCHOOL ORDERS, see HALSBURY, Hailsham Edn., Vol. 12, pp. 85, 86, para. 186.]

Case referred to :

(1) *London County Council v. Birmingham Corpn.* (1923), 87 J.P. 202; 19 Digest 578, 138; 40 T.L.R. 76.

(2) *Yorkshire West Riding Council v. Colne Corpn.* (1917), 87 L.J.K.B. 120; 19 Digest 577, 136; 117 L.T. 671.

CASE STATED by the Chief Metropolitan Magistrate under the Summary Jurisdiction Act, 1879, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment of Viscount

CALDECOTE, L.C.J.

Harold B. Williams for the appellants.

P. M. O'Connor for the respondents.

VISCOUNT CALDECOTE, L.C.J. : A question of some difficulty arises from the complexity, perhaps the necessary complexity, of the Children and Young Persons Act, 1933. We have listened to a careful argument by counsel for the respondents which has been of assistance to the court.

The Act, which was passed in 1933, marked a new stage in the development of the law of this country with regard to children and young persons, and a number of the sections deal with that class of persons, who are described as persons who need care or protection. Sect. 61 defines who those children or young persons are :

For the purposes of this Act a child or young person in need of care or protection means a person who is (a) a child or young person who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control.

Then in sub-cl. (b) are mentioned a number of cases in which an offence against children and young persons, with respect to which special provisions of this Act apply, has been committed. But there are a large number of the children or young persons who have not committed offences but, owing to circumstances, are in the words of the Act, in need of care or protection. In such cases a local authority or a constable or an authorised person may bring the child or young person in need of care or protection to the juvenile court, and the court may order one of four things to be done. It may order the child to be sent to an approved school, or commit him to the care of a fit person, or order the parent or guardian to enter into a recognisance to exercise proper care and guardianship,

. . . or in addition to making an order under either of the last two foregoing paragraphs, make an order placing him for a specified period, not exceeding 3 years, under the supervision of a probation officer.

When the last course is followed, sect. 66 provides what may be called a sanction, because the probation officer who is charged with the duty of visiting, advising and befriending the child placed under his supervision,

. . . may, if it appears necessary in his interests so to do, at any time while the order remains in force and he is under 17 years of age, bring him before a juvenile court, and that court may, if it thinks that it is desirable in his interests so to do, order him to be sent to an approved school or commit him to the care of a fit person . . .

Sect. 70 (2) provides :

Every approved school order . . . shall name the local authority within whose district the child or young person was resident, or if that is not known, the local

authority or one of the local authorities within whose district the offence was committed or the circumstances arose (as the case may be) rendering him liable to be sent to an approved school.

The Act, by sect. 90, provides for an appeal against the decision of the juvenile court, and subsect. (2) says :

... and if, upon hearing of the appeal, the court is satisfied that the person to whom the order relates was resident in the district of that other local authority, or was resident outside England, the court may by order vary the approved school order by substituting therein the name of that other authority . . .

It becomes necessary, that being the law as it is defined in the statute, to state the facts, and how the point which we have had to consider arises. A young person named Josephine Anderson lost her father, mother, and then a stepfather with whom she had been living. Then, after living in Jarrow for a few days, she went to the house of a half-brother in South Shields, where she stayed for 2 weeks. From that house she moved to an Indian boarding house in the same borough, and after a few days she travelled to London in company with an Indian, and the circumstances were such as clearly to make it desirable that she should have care and protection, and she was brought before the juvenile court at Toynbee Hall as the result. At the juvenile court this young person expressed willingness to live with her sister at Liverpool. Her sister, Mrs. Kassim, being the only known relation of full blood, lived with her husband in Liverpool, and a supervision order was made directing that this young person should be placed under the supervision of a Liverpool probation officer. Josephine Anderson then proceeded to Liverpool to live with her sister, Mrs. Kassim, in that borough. Unknown to the probation officer, she left Liverpool and went back to South Shields, and in consequence of some information being given to the London police, a police officer eventually brought her to London. In the order that was made then for her being sent to an approved school, the place of residence under sect. 70 (2) was stated as South Shields. An appeal was made under sect. 90 (2), and the Chief Metropolitan Magistrate heard the case, and he took the same view as the juvenile court had formed as to the local authority within whose district the child or young person was resident. He formed that view on the basis of his construction of the provisions of the Act that the time which he had to consider was when the child was first before the court as a young person needing care and attention.

It is right that I should call attention to the way in which the Chief Metropolitan Magistrate so decided. He said that he was of opinion :

... that the only question for me to determine was whether or not the evidence established the fact that the said Josephine Anderson was at the material time resident in the city of Liverpool, and that, if not, I was bound to dismiss the appeal, even though I might be of opinion that the authority which should have been named was not the county borough of South Shields. This seemed to me to follow from the wording of sect. 90 (2) of the Act. Although, as I stated, there was in my opinion some evidence upon which the juvenile court might reasonably have come to the conclusion that Anderson was resident in South Shields, I should not necessarily have come to the same conclusion ; but at all events I was not satisfied that she was resident in Liverpool, and accordingly I dismissed the appeal.

He referred to the words " was resident " in sect. 70 (2), which I have read, and contrasted them with the words " is resident " in sect. 35. Sect. 35 is a section which provides for notice to be given in certain circumstances to the local authority concerned. Then the Chief Metropolitan Magistrate went on to say :

I was satisfied by the evidence that the said Josephine Anderson at the time when the juvenile court placed her under supervision, was willing to live in the city of Liverpool, and that she did live there until (as it might be said) she ran away from there to South Shields. There she was—that is to say, South Shields—in fact, residing when she was taken away by the police, and brought back to the juvenile court, though she was prevented by the action of the police and the probation officer from residing there more than one night. I was, however, of opinion that the question whether Josephine Anderson was resident in Liverpool or in South Shields immediately before her second appearance at the juvenile court was not material. She was on that second occasion brought before the court under sect. 66 of the Act, and in my opinion the proceedings under that section did not require proof of any new facts or circumstances, but only that it was desirable in the interests of the juvenile that she should be com-

mitted to an approved school instead of remaining under supervision, and in that sense I regarded the proceedings under sect. 66 as a continuance of and referring back to the proceedings under sect. 62.

I am not at all clear that the Chief Metropolitan Magistrate is right in what he says there, that the proceedings under sect. 66 on the second occasion did not require proof of any facts or circumstances. The child had been placed in the home of her sister, Mrs. Kassim, as a fit person who was willing to undertake the care of the child, and what made it necessary for sect. 66 to be invoked was the circumstance that the child had run away from Liverpool and returned to South Shields, where she was no doubt living without anybody really responsible for her.

Then the Chief Metropolitan Magistrate said :

I took into consideration *London County Council v. Birmingham Corpn.* (1), which, though decided under earlier statutes, and in respect of an offender placed on probation, appeared to me to furnish guidance as to the principles upon which I should proceed.

The question upon which the opinion of this honourable court is desired is whether I, the said Chief Metropolitan Magistrate, being such a court of summary jurisdiction, upon the above statement of facts, came to a correct determination and decision in point of law.

I have come to the conclusion that the Chief Metropolitan Magistrate arrived at a wrong decision on the question of law. The argument has been presented by counsel for the respondents in this way. He says that when the child was first brought before the juvenile court and placed under the supervision of the probation officer, a certain status was given to the child, namely, a young person needing care and protection, and that from that time forward, whenever this young person came before the court, she was still a person of that status, in need of care and protection ; that the later proceedings were merely a continuation of the original proceedings, and that when you are considering sect. 66 in order to name the local authority within whose district the child or young person was resident, you must go back to the place in which the child or young person was resident when she was first brought before the court as a person needing care and protection.

That view of the section is based largely, I think almost entirely, upon the words "was resident." I think that that is an emphasis on the word "was" which the word will not really properly bear. One always has to be careful about such arguments as have been advanced in this case based upon the use of the present tense or the past tense. I think to contrast the words "is resident" in sect. 35 with the words "was resident" in sect. 70, and to say that the words "was resident" require the court to look back to some previous occasion, is over-straining the words of the section. The conclusion at which I have arrived is that the time at which the court should look to see what was the child's residence, was the time at which the second order was under consideration, the time, in other words, at which the case was before the court. That does not mean that the Chief Metropolitan Magistrate or the court have to ask themselves where the child slept the previous night, but where his residence was or, as it might be said, his home was.

In *Yorkshire West Riding Council v. Colne Corpn.* (2), under the Children Act, 1908, DARLING, J., used these words, expressing his agreement with the magistrates : "Where his father's house was." He said :

I should have come to the same conclusion, that the child resided at home at Skipton, where his father's house was, and that he had run away from home and gone to stay with his aunt in order to avoid the risk of apprehension for larceny.

That, I think, is the right way in which you should approach the question of the residence of these children or young persons. A child or young person would generally live with his parents. If his parents are dead he would probably live with some other adult person who was a member of his family. I think it is material to consider where the young person's home was, in order to see where his residence was and that the magistrates or the juvenile court should, therefore, not ask where he was resident it may be 1 or 2 years before, when the original order was made in respect of him as a child or young person in need of care and protection, but should consider the facts as they were at the time when the matter came before the court. If this was not the right approach to the question, this consequence would be involved, that where a child under

some order properly made had gone to reside with his parents, or with another member of the family, in some place, and then moved and lived happily with his parents or another member of the family in another place altogether for 2 or 3 years, the court would have to find that the place of residence was that in which the child had previously resided some 2 or 3 years before, whereas in truth and in fact commonsense seems to require the court to find that his residence was where his home was at that moment. I think that the argument which has been presented by counsel for the respondents must fail for these reasons.

The remaining question is what we should do in the circumstances. I think that in this particular case, under sect. 90, the appeal was to a magistrate who had powers under the section, indeed was required under the section, to say whether he was satisfied that the person to whom the order related was resident in the district of another local authority. I think that the proper course for us to take is to consider the evidence in this case, which is not in dispute—it is clearly set out in the case stated—and to express our opinion as to the place in which the child was resident, in other words, to do that which the Chief Metropolitan Magistrate should have done if he had given what I think is the right construction to the Act. I think that on the whole the circumstances are such as to show that the child's place of residence was, at the material time, at Liverpool. That is where the child would have been residing if she had not run away. That was the place where the elder married sister, or only known relative, was living. Taking everything into consideration, and having decided that the Chief Metropolitan Magistrate was wrong in his construction of the Act, I think that the proper insertion in the order should have been that the child was resident in the city of Liverpool.

The only other observation I have to make is this. I have not referred to all four cases which were cited to us. They are four cases that arose under a different Act, an Act quite differently framed, and although some passing observations, one of which I have quoted, may possibly be relevant to the Act in this case, as authorities laying down any principle of law I find them of no assistance.

For the reasons I have mentioned, I think this appeal should be allowed, and the order which I have stated should be made.

HUMPHREYS, J. : I agree.

TUCKER, J. : I agree.

Appeal allowed.

Solicitors : *Speechly, Mumford & Craig*, agents for *Harold Ayrey*, Town Clerk, South Shields (for the appellants) ; *Cree & Son*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Re SUBURBAN AND PROVINCIAL STORES, LTD.,
SUBURBAN AND PROVINCIAL STORES, LTD. *v.* LIND.
[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.).
March 1, 1943].

Company—Alteration of member's rights—Application to court to cancel resolution—Petitioner not appointed in writing by holders of requisite amount of stock at date of application—Authority given subsequently not retroactive—Motion by company to dismiss petition—Companies Act, 1929 (c. 23), s. 61.

At a meeting of ordinary stockholders held on Jan. 13, 1943, a resolution varying the rights of the stockholders was passed by the requisite majority. On Jan. 20, 1943, the appellant presented a petition asking that the resolution should be cancelled. The company, the respondents to this appeal, served a notice of motion asking that the petition be dismissed on the grounds *inter alia*, "that the petitioner was and is not the holder of 15 per cent. of the 3 per cent. cumulative preference stock of the company and was not appointed in writing for the purpose of presenting the petition by holders of 15 per cent. of the said stock." Written authority to act on behalf of that number of stockholders had been obtained by the date when the motion was heard and it was contended for the appellant that that authority operated retrospectively :—

HELD : (i) the holding of 15 per cent. stock either by one person or by a

group of persons is a necessary pre-requisite to the commencement of proceedings under the Companies Act, 1929, s. 61.

(ii) when an individual is suing under this section, the petition must show on the face of it his title to sue, and unless the petitioner himself holds 15 per cent. of the stock in question, the petition must show that he has been appointed by the necessary percentage of dissenting members.

Decision of BENNETT, J., ([1943] 1 All E.R. 297) affirmed.

[EDITORIAL NOTE.] The importance of this case lies in the fact that it arises upon a section which has seldom been acted upon and this is the first time that the section has been construed by the court. The question here is whether the petitioner must show on the face of the petition that he is holder of sufficient stock or has the authority of the holders of sufficient stock to present the petition or may by subsequently obtaining that authority show that he is in such a position at the time when the matter comes before the court. The Court of Appeal have held, affirming the decision of BENNETT, J., that it is necessary that he holds such shares or has such authority at the time when the petition is presented.

AS TO RESTRAINT ON VARIATION OF RIGHTS ATTACHED TO CLASSES OF SHARES, see HALSBURY, Halsham Edn., Vol. 5, pp. 156, 157, para. 281; and FOR CASES, see DIGEST, Vol. 10, pp. 776-780, Nos. 4857-4882.]

APPEAL by a stockholder, respondent to the motion, from an order of BENNETT, J., dated Feb. 9, 1943, striking out a petition presented under the Companies Act, 1929, s. 61. The facts are fully stated in the judgment of LORD GREENE, M.R.

Valentine Holmes for the appellant.

R. F. Roxburgh, K.C., and *Cecil W. Turner* for the respondents.

Holmes: The view taken by BENNETT, J., was that the appointment in writing must be obtained before the application is made. The appellant, however, had received the appointment in writing from the requisite percentage of members of the class on the morning of the day on which the motion was heard. It is submitted that it is not necessary for the petitioner to have authority in writing at the time the application is made. It is submitted that it is sufficient if the application is made within 7 days on behalf of 15 per cent. of the holders of the particular class of shares provided they have neither voted for the resolution nor given their consent to it and a binding ratification of the act is subsequently obtained. The application was made within 7 days by the requisite number of holders by virtue of the fact that somebody came forward on their behalf. Counsel referred to BUCKLEY, COMPANIES ACTS, 11th Edn., p. 132, and STIEBEL, COMPANY LAW AND PRECEDENTS, 3rd Edn., p. 707.]

Counsel for the respondents were not called upon.

LORD GREENE, M.R.: The jurisdiction of the court to stay an action *in limine* upon the ground that it is an abuse of the process of the court is one that, of course, must be exercised with the greatest care, and an action should not be stopped if there is what I may call a presentable case, however unlikely it may be to succeed. On the other hand, there are cases where it is manifest that the action is one in which the plaintiff cannot possibly succeed and which he has no right whatsoever to bring. The present case, in my opinion, falls into the latter class.

The present appellant was petitioner on a petition presented to the Chancery Division on Jan. 20, 1943, asking that a certain variation of the rights of the ordinary stockholders which had been effected by resolution of those holders should be cancelled. The company, who are respondents to this appeal, served a notice of motion asking that the petition be dismissed on certain grounds, of which I need only mention the first, which is:

... that the said petitioner was and is not the holder of 15 per cent. of the 3 per cent. cumulative preference stock (formerly ordinary stock) of the said company and was not appointed in writing for the purpose of presenting the said petition by holders of 15 per cent. of the said stock.

On Jan. 13, that is a week before the presentation of the petition, separate meetings of the ordinary and deferred shareholders of the company had taken place, and at the meeting of the ordinary shareholders—they are now stockholders because the shares have been converted into stock—resolutions were passed by the requisite majority modifying the rights of the ordinary stockholders in a very fundamental way, the details of which I need not give. It is sufficient perhaps to say that the stock was converted into 3 per cent. cumula-

tive preference shares, afterwards to be converted into stock, with no voting rights except when the preference dividends are in arrear. There may have been other substantial alterations, but I need not take up time by examining them. The present appellant, being dissatisfied with that change in the rights attached to the stock which he held, started the present proceedings.

The total issued ordinary share capital was £3,000,000, and the present appellant was the holder of ordinary stock to the extent of £400 nominal amount. BENNETT, J., held that the petition was an abuse of the process of the court, and he made an order striking it out and removing it from the file. A

The only question arises on the construction of the Companies Act, 1929, s. 61, under which the petition purports to be brought. That was a new section in the company code, and was intended to deal, on the face of it, with what might be called for brevity the misuse of majority rights in the matter of class resolutions affecting the rights attached to shares of the class. It provides, which was not provided before, a right to a specified proportion of the holders of shares of the class to bring the matter before the court to have it examined, and the court can cancel the resolution if it thinks proper to do so. The section provides as follows, taking only the relevant words. Subsect. (1) states the conditions on which an application can be made, that is to say, putting it quite shortly, where there has been a variation of rights under the majority clause, and it goes on as follows: B

... and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than 15 per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the court to have the variation cancelled and where any such application is made, the variation shall not have effect unless and until it is confirmed by the court. C

In the present case it would require holders of ordinary stock to the amount of £450,000 before the requisite 15 per cent. would be obtained. Subsect. (2), upon which the question really turns, is as follows: D

An application under this section must be made within 7 days after the date on which consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

It is argued by counsel for the petitioner that an aggrieved shareholder who holds less than 15 per cent. is entitled within the 7 days to present a petition, and if he obtains, after the presentation of the petition, authority from the necessary number required to make up 15 per cent. of the aggregate holding, that authority operates retrospectively, in very much the same way as a ratification operates when an act has been done in terms on behalf of a person who has not at the time given authority for it to be done on his behalf. That construction of the section, in my opinion, is manifestly wrong. The title to sue is the title which the section requires, and the holding of 15 per cent. either by one person or by a group of persons is a necessary prerequisite to the commencement of proceedings under this section. If there are more holders than one required to make up the necessary 15 per cent., they can either all join in the presentation of a petition, or if they agree—and that may be very convenient because there may be a 100 of them—they may authorise one or more of their number in writing to make the application on their behalf. But in any case there must be a group of shareholders who, either by themselves or by an appointed one or more of their number, are the persons instituting the proceedings at the time when the proceedings are instituted. If one regards this matter on the lines of a pleading, the petitioner must show on the face of his petition his title to sue. The title to sue in the present case is a purely statutory one which does not exist apart from the statute. If an individual is suing, he must show on the face of his petition his title to sue, and his title to sue under the statute is derived from one of two alternative states of affairs: if he is himself the holder of 15 per cent., he has a title to sue; if he is not the holder of 15 per cent., the only way in which he can have a title to sue is by having the authority in the statutory form from the numbers necessary to make up 15 per cent. Therefore, looking at it from the point of view of pleading, the petition would be demurrable unless, on the face of it, it showed a title in the petitioner to sue, that title taking one or other of the two forms which I have mentioned. E F G H

In the present case when one looks at the attempt that this petitioner has

made to plead himself within the statute and make his petition good on the face of it, the vice of it appears in the plainest possible terms. In para. 14 he says this :

Your petitioner did not consent to or vote in favour of the resolution for the variation of the rights of the ordinary stockholders.

That, of course, is perfectly right. He then says he is the holder of ordinary stock to the amount of £400. That quite clearly gives him no title whatsoever to present this petition ; but he goes on and says this :

It has not been possible to obtain the appointment in writing by holders of 15 per cent. of the issued ordinary stock who did not consent to or vote in favour of the resolution to make this application on their behalf but this appointment will be obtained without delay.

In other words, he is saying there : " I have not got any title to present this petition at the present moment, but I hope to get it retroactively at some future time." Then he puts in this curious sentence :

Your petitioner makes this application on behalf of the shareholders entitled to make it. I do not know what that means. The shareholders entitled to make it would be the holders of 15 per cent. ; but he does not even go so far as to say that he has authority in fact on behalf of 15 per cent. ; all that he says is : " At present I have no title to sue, I have no authority from anybody to present a petition on their behalf, but I hope to get that authority in the future."

That petition on the face of it appears to me to be bad in law. I may just cite (not of course as an authority, but in order to say that, in my opinion, the statement I am about to quote is perfectly correct) what appears on p. 1052 of the ANNUAL PRACTICE. It sets out the requisites of the form of petition under the section and what the petition must contain. After setting out a number of matters it has this sentence as one of the things that the petition must assert :

... the appointment of the petitioner by the necessary percentage of dissentients (unless the petitioner himself holds 15 per cent. of the shares of the class) . . .

That, in my opinion, is perfectly right and common form, because without an allegation to that effect the petitioner does not show his title to sue.

Then it is said, " the section cannot possibly mean that because, if it did, the 7 days allowed to obtain the necessary appointment from the holders of 15 per cent. of the shares would be quite insufficient, and, therefore, the section must have some other meaning." In my opinion there is no substance in that argument.

In the great majority of cases where there is serious opposition, that opposition has been organised beforehand. In the present case it had been very carefully organised. There was a committee who had been circularising the dissentient shareholders and was in active operation before the meeting took place. It would have been quite possible for that committee, having regard to the proxies that it had obtained, to make quite sure that the necessary 15 per cent. of stockholders was available within the 7 days assuming that there were 15 per cent.

prepared to act. By some mis-timing they did not get that ; but the 7 days mentioned in subsect. (2) is peremptory, there is no power in any court to extend it, and the object of it is quite clear : to make sure that applications of this kind, which were entirely new under this section, should be brought with the greatest promptitude. If that was not done dealings in shares might be held up indefinitely while the decision of the court was being awaited. In connection

with that it is worth pointing out that under subsect. (4) the decision of the court on any such application is to be final. I only refer to these matters to meet the argument that there is some practical impossibility in obtaining an appointment under this section unless it is to be construed as counsel for the appellant would have it construed.

In my opinion BENNETT, J., took the right view in this case. The point is quite clearly unarguable, and he took the right course in ordering the petition to be struck out and removed from the file. The appeal accordingly must be dismissed with costs.

MACKINNON, L.J. : I agree and do not think I can usefully add anything.

GODDARD, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Swann, Hardman & Co.* (for the appellant) ; *Clifford-Turner & Co.* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

GOLLIN *v.* INLAND REVENUE COMMISSIONERS.[COURT OF APPEAL (Lord Greene, M.R., Scott and MacKinnon, L.JJ.),
February 17, 18, 1943.]*Income Tax—Sur-tax—Investment company—Whole income of company not distributed—Discretion of Special Commissioners—Finance Act, 1922 (c. 17), s. 21 (1)—Finance Act, 1927 (c. 10), s. 34—Finance Act, 1939 (c. 41), s. 14.*

The respondent was the largest shareholder in an investment company and shortly after Apr. 5, 1938, the company distributed dividends amounting to just under £5,000 out of the profits for the year ending Mar. 31, 1938. The dividend so received was included by the respondent in his sur-tax return for the year 1938-39. Pursuant to the Finance Act, 1939, s. 14, the commissioners gave a direction that the annual income for the year of assessment 1938-39 should be deemed to be the income of the members of the company for the purposes of assessment to sur-tax for that year. The result was that the respondent found himself liable to be charged to sur-tax twice over in respect of what would in effect turn out to be the same income. The commissioners based their decision upon the ground that the Finance Act, 1927, s. 34, did not give them an unfettered discretion to decide what was just, but that relief must be confined to cases where paras. (a) and (b) of sect. 34 were satisfied:—

HELD: the commissioners could give such relief as appeared to be just and that in doing so they were not limited to the two paragraphs in question but could take into consideration all relevant matters.

[EDITORIAL NOTE.] In dealing with undistributed income of companies, the general case is where the distribution of the income is held up more or less indefinitely. Here, the arrangements made by the company were for the income accruing in one financial year to be distributed in the following year. The Special Commissioners having given a direction, the tax-payer found himself charged with both the distributed income from the previous year and the undistributed income of the current year. In such circumstances the Special Commissioners are directed by statute to give such relief as may be just, but they considered that the Act restricted their powers to give full relief in such a case and thus entirely avoid taxation on the same income twice over. The Court of Appeal have held that there is no such limitation on the exercise of their discretion by the commissioners. The commissioners are to do what is just and they are not to apply a particular formula or method of relief to every case of this nature. They must in every case be guided by the particular circumstances.

AS TO UNDISTRIBUTED PROFITS OF COMPANY, see HALSBURY, *Hailsham Edn.*, Vol. 17, p. 295, paras. 583, 584; and FOR CASES, see DIGEST, Supp., *Income Tax*, Nos. 674g-674cc.]

CASE STATED under the Finance Act, 1927, s. 42 (7) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The respondent and his wife held all the shares in a private investment company. It was usual for the company to distribute its income for any one financial year in the following financial year. Thus the income of the company for the year 1937-38, which amounted to £4,965, was distributed by the company in the year 1938-39, and this was duly included by the respondent in his sur-tax return for the year 1938-39. Pursuant to the Finance Act, 1939, s. 14, the commissioners gave a direction that, for the purposes of assessment of sur-tax, the company's income for the year 1938-39 should be deemed to be income of the members of the company for that year. The respondent thus found himself charged to sur-tax on the income distributed by the company in that year and the income received by the company but which would not be distributed by the company until the next year. The respondent applied for relief under the Finance Act, 1927, s. 34, which provides as follows:

If, on an application made by any individual for the purpose, either at the time of making his return for the purposes of super tax for any year or within the time limited for appealing against the assessment upon him to super tax for that year, the applicant proves to the satisfaction of the Special Commissioners:—

(a) that, as respects any assets, in consequence of the operation of the provisions of the Income Tax Acts which require that for purposes of super tax any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, the income from those assets, as estimated for the purposes of super tax for that year, represents more than the income which would be attributable

to a period of one full year if the income were deemed to have accrued from day to day : and

- (b) that, in consequence, the amount of super tax payable by him for that year exceeds by more than 5 per cent. the amount of the super tax which would have been payable by him for that year if the amount of his income from these assets had not exceeded the amount which would be attributable to a period of one full year if the income from those were deemed to have accrued from day to day ; the Special Commissioners shall charge him to super tax, or adjust his liability to super tax, for that year and any succeeding year so as to give such relief as may be just, having regard to all the circumstances and in particular to the amount of any liability or additional liability to super tax which would have arisen for any preceding year or years if : (i) the income from such assets as aforesaid were deemed to have accrued from day to day and to have been apportioned accordingly ; and (ii) the income so deemed to have been apportioned to him had been treated as part of his total income for the purposes of super tax.

- The assessing commissioners, applying the above-cited provisions, computed that the appropriate relief for the year 1938-39, to which the application related, amounted to £320 8s. 8d. sur-tax, reducing the liability for the year 1938-39 from £1,815 3s. 9d. (under the Finance Act, 1922, s. 21), to £1,494 15s. 1d. The relief was computed in the following manner :

- If the dividends from the company paid in the year 1938-39 out of its profits for the year 1937-38, viz., £4,965, were "deemed to have accrued from day to day and to have been apportioned accordingly" (the Finance Act, 1927, s. 34 (1)), and if "the income so deemed to have been apportioned to the respondent had been treated as part of his total income for the purposes of sur-tax" (sect. 34 (ii)), the result would have been to exclude the amount of £4,965 from charge for the year 1938-39, and to throw the whole of it back into the year 1937-38, with the following effect on the sur-tax payable :—

	£	s.	d.
D Total income for sur-tax 1938-39 would have been reduced by the exclusion of £4,965 to £9,133 (made up of £4,144 personal income plus £4,989 apportioned under the Finance Act, 1922, s. 21), and the total tax payable would have been reduced from £3,243 to £1,435 6s. 3d., i.e., a reduction of	1,807	13	9
As regards "any liability or additional liability to sur-tax which would have arisen for any preceding year or years" the total income for sur-tax 1937-38 would have been increased from £9,467, as actually assessed, to £14,432, and the total tax payable would have been increased from £1,372 6s. to £2,860 1s. 1d., i.e., an increase of	1,487	5	1
Relief under the Finance Act, 1927, s. 34	320	8	8

- The above method of computing the relief was objected to on behalf of the respondent. It was pointed out that the actual assessment to sur-tax for 1937-38 in the sum of £9,467 already included a dividend of £5,265 from the company, this being the dividend paid in 1937-1938 out of the profits for the year 1936-37. The throwing back of the dividend of £4,965 paid in the year 1938-39 into the year 1937-38, over which it accrued, was in itself agreed to ; but, if the computation stopped there, instead of being carried back to other preceding years, the result was that substantially 2 years' income from the company came into the notional assessment to sur-tax for the year 1937-38. The accountants acting for the respondent put forward a different method of applying the section and computing the relief, in which each year's dividend was successively thrown back into the previous year of accrual, until the year 1928-29 was reached. The respondent first held the assets in question (the shares in the company) in that year, and he first received a dividend in 1929-30. Thus, by continuing the accrual basis back to 1928-29, the inclusion of 2 years' income in the computation for any one year was eliminated. On this computation the liability for 1938-39 under the Finance Act, 1922, s. 21, would, by reference to the exclusion for that year of the dividend of £4,965, and the notional revision of the years from 1937-38 back to 1928-29, be in the sum of £641 12s. 2d. That is to say, the relief under the Finance Act, 1927, s. 34, would be £1,173 11s. 7d. in terms of the sur-tax payable, instead of £320 8s. 8d. as computed by the assessing commissioners.

The commissioners held that the provisions of the Finance Act, 1927, s. 34,

did not give them an unfettered discretion to give such relief as they thought just, for in their opinion, on the true construction of the section, the opening words of (i), "the income from such assets as aforesaid," no less than the words "income from those assets" (in (b) in the section) refer back to the words (in (a) in the section) "the income from those assets, as estimated for the purposes of sur-tax for that year," and are co-extensive in meaning with those words. Thus, only that income from the assets in question which is income for sur-tax purposes for the year to which the application relates (in this case 1938-39) can be apportioned backwards over any preceding year or years, and treated in the computation as if it were part of the sur-tax income for such year or years; there cannot be any displacement of sur-tax income for any other year or series of years. It was held by MACNAGHTEN, J., that the income should be thrown back year by year until one reached the first year in which the appellant was interested in the company and received dividends from it.

The Inland Revenue Commissioners appealed.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the appellants.

F. Heyworth Talbot for the respondent.

LORD GREENE, M.R.: This appeal relates to a company which falls within what are commonly known as the company sur-tax provisions of the income tax law. It is an investment company.

By the Finance Act, 1939, s. 14, special provision was made for the case of investment companies. The whole of the income of such a company, whatever the distribution may have been, is to be deemed for the purposes of assessment to sur-tax to be the income during that year of the members of the company, and the Special Commissioners are constrained to give a direction, under the Finance Act, 1922, s. 21 (1) (which was the section that introduced the company sur-tax, as it is rather inaccurately called) without considering whether or not the company has distributed a reasonable part of its income.

In the present case the respondent is the largest shareholder in the company, and shortly after Apr. 5, 1938, the company distributed dividends amounting to just under £5,000 out of the profits for the year ending Mar. 31, 1938. Counsel for the respondent tells us that that dividend was in fact declared as a dividend for the year to Mar. 31, 1938. The dividend so received was duly included by the respondent, together with a small dividend by his wife, in his sur-tax return for the year 1938-39. At this point there comes into operation the Finance Act, 1939, s. 14, to which I have just referred, and pursuant to that section the commissioners gave a direction that the actual income of the company for the year of assessment 1938-39 should be deemed to be the income of the members of the company for the purposes of assessment to sur-tax for that year. The result of that was, that the respondent found himself credited not merely with the actual income which the company had distributed in the financial year 1938-39, but also with the company's income for the year 1938-39, although that was merely notional income of his for the purpose of these provisions, and although in the normal course that income would come to be distributed in the following financial year of the company. Putting it shortly, the effect was that the respondent found himself liable to be charged to sur-tax twice over in respect of what, in effect, would turn out to be the same income. That, of course, affected him not merely with regard to the quantum of income on which he had to be assessed to sur-tax, but also with regard to the rate of sur-tax which he would have to pay.

I need say no more to bring out the substantial injustice of such a result, which cannot have been intended, and only shows what pitfalls lie before the feet of a draftsman who embarks on the task of drafting legislation of such a highly artificial character as this is. The conception of treating a company's income as the income of the members is a highly artificial one, and the most careful provision must be made for the purpose of seeing that illogical and unjust results do not follow.

In this case there is undoubtedly a lack of such a provision in the sections themselves, but fortunately there is a section which does enable the taxpayer to obtain some measure of relief. That section is the Finance Act, 1927, s. 34, which I cannot help thinking was passed with a view to quite a different matter, but which I am satisfied, from the explanation that has been given, on its true

construction is wide enough to cover such an application as that out of which this appeal results.

It is common ground that sect. 34 does cover the case, and, accordingly, I need not take up time by examining the language which produces that result. The necessary conditions are complied with; that is agreed by both parties.

A The operative part of the section, in cases where it applies, gives to the Special Commissioners power to charge an applicant to super tax, or adjust his liability to super tax, for the year in question and any succeeding year so as to give such relief as may be just, having regard to all the circumstances.

B Pausing there for a moment, that language appears to me to give to the Special Commissioners the widest possible discretion to do what appears to them as just-minded men to be just in the circumstances of the case. Down to that point there is nothing to suggest that there are any particular matters which the Special Commissioners are bound to take into consideration or any special matters which they are forbidden to take into consideration. The whole matter is left at large, and they would be entitled to take into consideration anything which to them appeared to be relevant to the question of justice. That, of course, does not mean that they could take into account matters which, on any view of any reasonable man, must be quite irrelevant to the question; for instance, it does not mean that they could take into account the special position of a man's family affairs or anything of that kind. It must be related to the incidence of taxation, but subject to that, the discretion, down to that point, is of the widest possible character. But the section goes on and it says this:

C . . . and in particular to the amount of any liability or additional liability to super tax which would have arisen for any preceding year or years if . . . and then it sets out two contingencies.

D When the matter came before the Special Commissioners, they, in effect, took the view that their discretion in deciding what would be just was limited by the words to which I have just referred, and that they were prohibited from throwing back the income, which was in fact received on the distribution, to any period beyond the immediately preceding year. The result of that limitation, which they thought was imposed upon their powers, was in substance this, that by curing the injustice, or attempting to cure the injustice, which arose in respect of the particular year of assessment, they were throwing back that injustice substantially to the preceding year, with the result that the relief afforded in the present case was comparatively small in amount. But the essential feature about their decision was, that they held that on the true construction of this section—to take their own language—

E . . . the provisions of the Finance Act, 1927, s. 34, could not be regarded as merely formulating a situation in which the commissioners have unfettered discretion to decide what is just.

F They went on to hold that, taking the whole of the provisions of the section to which I have referred, the words "and in particular" and the following words, those provisions must be taken as defining what is normally just, and, therefore, limiting the powers of the commissioners to examine the question of justice or injustice to the extent to which they did in fact examine it. As I have said, that enabled them to carry the amount back to the year before, but not further.

G On appeal MACNAGHTEN, J., took the view that that was not the true construction of the section. He construed it in the opposite extreme. He said that the proper way to apply the language of the section was to continue the process of throwing the income back year by year, until you reached the first year in which the respondent was interested in this company and received dividends from it. If I read his judgment correctly—and it seems, by the consent of both parties, that I am reading it correctly—he followed the view of the commissioners in this sense, that he regarded the specific matters which they are directed to take particularly into their consideration as matters which must be given effect to according to a definite scheme. He differed from them, however, in holding that those words did not limit the operation of throwing the income back to the year immediately preceding, and that that operation must be carried back right to the beginning.

H On behalf of the Crown it was argued before us that MACNAGHTEN, J., was wrong in laying it down as a matter of principle that in every case the process which he adopted must be carried through. It was in fact admitted by the Crown

that the discretion of the commissioners is a general discretion to do justice, having regard to all the circumstances of the case, and the specific matters referred to in particular are merely matters which the commissioners are bound to take into consideration, and are in no way an exhaustive description of the matters which they are entitled to take into consideration; in other words, all the legislature is doing is to say to the commissioners, that this is one of the things which they are not to omit to take into consideration. On that basis the Attorney-General criticised the decision of the judge, because he said it is wrong to lay down a particular formula which must be followed as a matter of law by the commissioners. In just the same way, no attempt was made before us on behalf of the Crown to support the view held by the commissioners that a formula must be followed in all cases, although the formula which they adopted was very much more advantageous to the Crown than that adopted by MACNAGHTEN, J.

Counsel for the respondent did not wish to argue that MACNAGHTEN, J., was right in holding that the commissioners were bound to act upon the lines which he indicated. He was content to accept the view which, in my opinion, is the correct view, that the discretion of the commissioners to do justice is of the widest possible description, and is only fettered by the following words to the extent that the matters specifically mentioned are matters which they must take into account, but that they must give to those matters, together with any other matters they consider to be relevant to the question of justice, such weight and effect as in the circumstances of any particular case they think it right that they should bear. That being so, we have a pleasing harmony between the views of the taxpayer and the views of the Inland Revenue, which is very satisfactory to all parties, and the more so because the conclusion which both sides support is one which, in my opinion, is the right conclusion in law.

The proper order, therefore, will be to discharge the order of MACNAGHTEN, J., save in so far as it declares that the determination of the commissioners is erroneous, and to refer the matter back to the commissioners with a direction. The exact form of language can be discussed later, but, in my opinion, that is the substance of the order that should be made.

SCOTT, L.J. : I agree.

MACKINNON, L.J. : I agree.

Order of MACNAGHTEN, J., varied. Case remitted to commissioners.

Solicitors : *Solicitor of Inland Revenue* (for the appellants); *Slaughter & May* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

EASTWOOD v. COMMISSIONERS OF INLAND REVENUE.

[COURT OF APPEAL (Lord Greene, M.R., Scott and MacKinnon, L.JJ.), February 17, 1943.]

Income Tax—Disposition in favour of children—Settlement—Full discretionary trust to pay income for benefit of daughter or to wife or for benefit of other children or to charitable institutions—No power of revocation—Revocable settlement—Finance Act, 1936 (c. 34), s. 21.

By a settlement, dated Aug. 6, 1935, funds were settled primarily for the benefit of the settlor's infant daughter. Cl. 2 authorised the trustees at their discretion to pay to the daughter the whole or any part of the income of the trust fund as should accrue during her lifetime or to apply the whole or part of it for her maintenance, education, advancement or benefit, and declared that they should not be bound to dispose of the whole of the income by such means. Cl. 3 provided that any income not applied under the above powers might in the absolute discretion of the trustees be paid to the settlor's wife or for or towards the maintenance, education, advancement or benefit of any other child or children of the settlor or if there should be no such child or children to pay the same to such charitable institution or institutions as they should in their absolute and uncontrolled discretion think fit. The settlor contended (a) that this was a settlement which immediately before Apr. 22, 1936, was irrevocable within the meaning of the Finance Act, 1936, s. 21, and (b) that the income for the financial year 1936-37, having been applied for the benefit of the daughter before the

commencement of the Act did not fall within sect. 21 of the Act :—

HELD : (i) the settlement was not, on the relevant date, an irrevocable settlement within the meaning of sect. 21 of the Act.

(ii) the Finance Act, 1936, s. 21, applied to income paid during the whole of the financial year in question and was not limited to income paid after the date on which the Act received the Royal Assent.

Inland Revenue Comrs. v. Delamere (Lord) (1) approved.

A **[EDITORIAL NOTE.** By this decision, the Court of Appeal have approved the decision in *Inland Revenue Comrs. v. Delamere (1)*. The principal question was whether the exclusion by subsect. (10) of irrevocable settlements made before Apr. 22, 1936, extends to all settlements irrevocable at common law, or whether it is confined to settlements deemed to be irrevocable under the terms of the section here considered. This is decided upon the wording of the section and it is held that only those settlements are excluded which are irrevocable within the meaning of this section. The second part of the decision decides that in general the Finance Act of any particular year applies to all income received during the year and that income received before the actual date of the passing of the Act is not exempt from its provisions even where the legislation is of such a special character as that here considered.

B As to DISPOSITIONS IN FAVOUR OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 268-270, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-575d.]

C Cases referred to :

(1) *Inland Revenue Comrs. v. Delamere (Lord)*, [1939] 2 K.B. 667; [1939] 3 All E.R. 386; Digest Supp.; 108 L.J.K.B. 797; 161 L.T. 273; 22 Tax Cas. 525.

(2) *Lauri v. Renad*, [1892] 3 Ch. 402; 42 Digest 696, 1116; 61 L.J.Ch. 580; 67 L.T. 275.

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated May 20, 1942.

D In August, 1935, the appellant executed a deed of settlement whereby a sum of £10,000 was settled upon his infant daughter. The provisions of the trust were set out in cl. 2 and 3 of the settlement, which were as follows :

E 2. The trustees shall from time to time receive so much of the income from the investment of the said sum of £10,000 (hereinafter called the trust fund) as shall accrue during the life of the daughter and if and while the daughter shall in their opinion conduct herself with propriety shall according to their judgment from time to time either pay the whole or any part or parts of the said income then received to the daughter or apply the whole or any part or parts thereof for her maintenance, education, advancement or benefit, or in any manner which the trustees shall think to be for her benefit and they may so pay some parts and so apply other parts of the said income and shall not be bound to dispose of the whole of the said income by either or both such means.

F 3. Any income which shall not be applied under the power in that behalf hereinbefore contained in favour of the daughter may in the absolute and uncontrolled discretion of the trustees be paid to Isabella Frances Eastwood (wife of the settlor) or for or towards the maintenance, education, advancement or benefit of any other child or children of the settlor or if there shall be no such child or children then the trustees may pay the same or any part thereof to such charitable institution or institutions as they shall in their absolute and uncontrolled discretion think fit.

G The trustees of the settlement applied the whole of the income from the settled funds for the maintenance and education of the daughter during the years material to the appeal. The Special Commissioners decided against the appellant by reason of the decision of LAWRENCE, J., in *Inland Revenue Commissioners v. Delamere (Lord) (1)*, which case raised the same point on virtually indistinguishable facts. MACNAGHTEN, J., followed that decision without making any comments of his own.

Cyril L. King, K.C., and Frederick Grant for the appellant.

H *The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.*

King, K.C. : In the present case the settlement is irrevocable. It is irrevocable at common law and was not revocable on Apr. 22, 1936. Therefore it does not come within the Finance Act, 1936, s. 21. There is no statement in the section as to when a settlement is to be deemed irrevocable. The function of subsect. (8) is to deal with cases under subsect. (3). The present tense is used in both subsections. Subsect. (8) is required for the purpose of administering the Act. Having regard to the date on which the statute was passed, it is not

right to treat, under sect. 21, income which arose and was paid before July 16, 1936. The statute derives force from that date only and it is not retrospective. The argument on behalf of the Crown involves reading subsect. (8) as if it read "is deemed or shall have been deemed." There is nothing in subsect. (3) to suggest anything retrospective, and subsect. (8) fits exactly the language of subsect. (3). The object which the Revenue seeks to achieve could have been attained by the insertion of the words "or to have been irrevocable." In *Lauri v. Renad* (2), LINDLEY, L.J., states that a statute ought not to have a greater retrospective operation than its language renders necessary. On its proper construction subsect. (8) has no effect upon subsect. (10). The section deals with income which is paid after the passing of the Act. It is submitted that the decision in *Inland Revenue Comrs. v. Delamere* (Lord) (1) is wrong.

The Attorney-General: One is entitled to take into account that the actual enactment of the Finance Act is after the beginning of the financial year. It is well established that a Finance Act applies to the whole of the financial year in which it is passed. In some cases the provisions of the Act are made retrospective, as, for instance, sect. 38 of the 1938 Act. Sect. 21 of the 1936 Act applies to the whole of the financial year 1936-37 because there are no special words excluding its application. Reference to the definition clause, sect. 21 (9) of the 1936 Act, will show that it is in the present tense. The section includes the settlement in the present case.

Hills followed on the same side.

King, K.C., in reply.

LORD GREENE, M.R.: This appeal is, in substance, an appeal from a decision of LAWRENCE, J., in an earlier case of *Inland Revenue Comrs. v. Delamere* (Lord), (1). In the present case MACNAGHTEN, J., followed that decision without making any comments of his own.

Two questions only arise for our consideration in this court. The settlement in question was dated Aug. 6, 1935, and under it funds were settled for the benefit, primarily, of a daughter of the settlor. The first question that arises is whether or not that settlement was, immediately before Apr. 22, 1936, irrevocable within the meaning of the Finance Act, 1936, s. 21. That section introduced some rather elaborate provisions for the purpose of treating income under settlements made for the benefit of children as income of the settlor. Subsect. (10) says:

This section applies to every settlement, wheresoever it was made or entered into, and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable.

The settlement in question was not revocable in the ordinary simple sense. It contained no power of revocation, nor did it contain any means whereby it could be revoked. But it is contended by the Crown—and that is the view that was taken by LAWRENCE, J., and, after him, by MACNAGHTEN, J.,—that the settlement was not, on the stated date, an irrevocable settlement for the purposes of the section because of the provisions of subsect. (8). Subsect. (8), so far as relevant, is as follows:

For the purposes of this section, a settlement shall not be deemed to be irrevocable, if the terms thereof provide . . .

and then it sets out sets of provisions which are to prevent a settlement for the purpose of the section being deemed to be irrevocable. The first of those terms relates to provisions of the settlement under which a wife of the settlor may, in the circumstances stated, be entitled to benefits, and in the present case it is admitted that the provisions in favour of the wife in this settlement fall within that language. Accordingly, if subsect. (8) is applied to the present case it would run: "For the purposes of this section the settlement made by Eastwood on Aug. 6, 1935, shall not be deemed to be irrevocable." That is *prima facie* the true construction of subsect. (8) when applied to this particular settlement.

So far, the answer to the question appears simple. Subsect. (10) deals with settlements which were irrevocable at the stated date and excepts them from the operation of the section. Subsect. (8) says that the settlement is not to be deemed irrevocable for the purposes of the section. But it is said that subsect.

(8) has nothing to do with subsect. (10) for this reason. Subsect. (10) is looking at a past date and propounds for answer the question whether a particular settlement as at a past date, namely Apr. 22, 1936, was irrevocable, and it is said that, if subsect. (8) was intended to apply to the word "irrevocable" in subsect. (10), it ought to have been drafted in some such language as this: "For the purposes of this section a settlement shall not be deemed to be or to have been irrevocable," and that argument is linked up with the provisions of subsect. (3) of the section, which deals with the special case of irrevocable settlements. The argument says that having regard to that and to the grammatical point which I have just mentioned subsect. (8) must be confined in its operation to cases falling within subsect. (3); in other words, it is introduced for the purpose only of showing what is to be and what is not to be an irrevocable settlement for the purposes of subsect. (3).

The first short answer to that argument seems to me to be this. If that was what the legislature intended, subsect. (8) ought to have said, not "for the purposes of this section," but for "the purposes of subsect. (3) of this section." It says in terms "for the purposes of this section," and subsect. (10) is part of the section. Therefore, as a matter of language so far, it is beyond question that subsect. (8) applies to subsect. (10). The only real question is whether the grammatical point to which I have referred is one which ought to be allowed to cut down the words "for the purposes of this section," and compel the court to write in the words "subsect. (3) of this section." In my opinion nothing could do more violence to the language. The lack of grammatical neatness is not a matter of such importance, it seems to me, as to compel the court to write in words of such great significance as "for the purposes of subsect. (3) of this section" when the legislature has said "for the purposes of this section." There could be no question that those are the governing words in the subsection and it would be quite illegitimate to alter them for the purpose of getting rid of the grammatical error or satisfying a more refined grammatical taste. It seems to me that the structure of the matter can be really put in one of two ways; you can either say that subsect. (8) should be read as meaning "for the purposes of this section a settlement shall not be deemed to be irrevocable as at the relevant date," or you can write into subsect. (10) "except a settlement made or entered into before Apr. 22, 1936, which, immediately before that date, was within the meaning of this section irrevocable." To insert such words in order to satisfy a grammatical purist appears to me to be very much more legitimate than to limit the operation of subsect. (8) to the case of subsect. (3).

I have put in my own words, and perhaps at too great length, what LAWRENCE, J., in effect said with greater neatness in his judgment. I do so because this is the first time that the point has come before this court and we have had a careful argument upon it.

The other question arises in this way. Sect. 21 (1) deals with income applied "for the benefit of a child of the settlor in any year of assessment." In the present case the income under the settlement was all applied for the benefit of the child before the date of the Royal Assent, namely July 16, 1936. This point only arises in the case of the assessment for the year 1936-37, and the argument is that sect. 21 (1) can only apply in the case of income received after the date when the Act received the Royal Assent, which, as I have said, was July 16, 1936. This point would not arise if the income had been applied for the benefit of the child after that date, but because it so happened that it was applied before that date it is said that it is not within the language of subsect. (1). I had, perhaps, better read the exact language of the subsection in order to bring out the point. It says:

Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment . . . and then it goes on to say that such income shall be treated as income of the settlor.

The argument really depends, and depends entirely, on the use of the present tense—"any income is paid." It is said that that cannot cover a case of income which was paid before the Act became law, notwithstanding the fact that it was paid in one of the years of assessment to which the section applies. It is not disputed that the words "in any year of assessment" in the subsection

include the year of assessment that was current when the Royal Assent was given; that is to say, it includes 1936-37, but it is said that although it unquestionably includes that year it does not apply to income received in that year of assessment before the Royal Assent was given to the bill. In my opinion, that argument fails. It is notorious, and indeed invariably happens, that the Finance Act for a particular year does not pass into law until the then current financial year has to some extent elapsed. Nevertheless the time unit with which the Finance Act invariably deals for the purposes of assessment is the financial year, and it deals normally with the taxable income in respect of the then current financial year. That, of course, does not mean that it is retrospective. It is merely the unit of time in respect of which taxation is imposed.

Bearing that in mind, there is nothing which shocks the mind in finding the present tense used, and it seems to me that in a context such as this, where any income is paid in any year of assessment, the direction really is to put yourself at the beginning of the year of assessment (which *ex hypothesi* is past when the Act becomes law) and, putting yourself at that date, to see what are the receipts in that year of assessment. If that be the scheme of the section—and it seems to me that it clearly is—the use of the present tense is quite natural. It would lead to very remarkable results if the contrary view were taken, because the whole liability to taxation under this subsection would depend on the quite fortuitous circumstance—or it might be a deliberate circumstance—that the income applied under the settlement for the benefit of the child happened to be so applied the day before the Royal Assent or the day after. I much prefer a construction which gives the sensible businesslike meaning to the subsection that, the unit of time being the year of assessment, it is with the receipts during that unit of time that the subsection is dealing.

In my opinion the appeal fails on both points and must be dismissed with costs.

SCOTT, L.J. : I agree.

MACKINNON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Ridsdale & Son*, agents for *Cornish, Forfar & Allen*, Liverpool (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., *Barrister-at-Law*.]

THORLEY v. PAYNE.

[KING'S BENCH DIVISION (Tucker, J.), February 5, 1943.]

Income Tax—Schedule A—Deductions by occupier from rent—Sub-tenants paying rents to Inland Revenue—Whether landlord is an “occupier” entitled to deduct from rent due to superior landlord—Income Tax Act, 1918 (c. 40), Sched. A, No. VII, r. 8, No. VIII, r. 9—Finance Act, 1941 (c. 30), s. 12, Sched. I, Pts. II, III.

The defendant rented from the plaintiff as from Mar. 25, 1940, a block of flats which had previously been let to the defendant's husband, who died in 1939. All rents due under the old lease granted to the husband had been paid up to Mar. 25, 1940, with tax deducted, but a considerable amount of the money so deducted had not been paid over to the revenue authorities. From March, 1940, to June, 1941, the rent was paid in full without deduction of tax and by Aug. 12, 1941, there were arrears of Sched. A tax due to the revenue authorities amounting to £1,108 13s. With the exception of one flat on the 5th floor, which was vacant, all the flats were occupied and the revenue authorities served notices on the sub-tenants demanding payment of the rents in satisfaction of the arrears of tax, as they were entitled to do under the Finance Act, 1941, s. 12 and Sched. I, Pt. III. The sub-tenants paid to the revenue £508 10s. 2d. in part satisfaction thereof and deducted the money from the rents payable to the defendant with the result that the defendant had received no rent from her sub-tenants since August, 1941. The defendant contended that her liability to pay rent to the plaintiff had been discharged, because a sum in excess of the rent due had been collected by the revenue authorities from her sub-tenants and that she was an occupier within the meaning of the Finance Act, 1941, Sched. I,

Pt. III, cl. 3, and that this was a tax which should have been paid by her husband, who was the former occupier and that she had been required to pay by reason of the fact that the tax had been deducted from the rent of the sub-tenants, and so had, in fact, been paid by her, and, accordingly, she was entitled to set off the amounts so paid against the rents payable under the lease. The defendant further contended that, if she were not the occupier she was nevertheless entitled to make the deductions under r. 9 of No. VIII, which must be interpreted widely enough to permit anyone who has to pay rent to any landlord to make deductions where, in fact, the tax has been levied on an occupier. She also contended that she was entitled to deduct tax at 10s. in the pound :—

Held : (i) the defendant and her husband were landlords and not occupiers within the meaning of the rules.

(ii) r. 9 must be construed in its narrowest sense, which only permits a deduction from rent by the occupier when he is compelled to pay tax in the case where the landlord, who has been assessed, has defaulted and tax has, accordingly, been recovered from the occupier. Neither is such a right to deduct given under Pt. II of the schedule to the Finance Act, 1941, and under Pt. III the right is expressly given to the occupier.

[EDITORIAL NOTE.] In the case of a block of flats or offices, Sched. A tax is often levied on the landlord as that is a more convenient arrangement than collection from the individual tenants. In this case the building was leased to the landlord by a superior lessor. The landlord not having accounted for or paid to the revenue the Sched. A tax, the revenue under their powers collected the rents due from the actual occupiers and the landlord sought to set off such rent from the rent due to the superior lessor. It is held that the only right of the landlord as against the superior lessor is to pay the rent with a deduction of tax at the current rate. Where the tax has been collected from the occupiers, the latter can recoup themselves by treating the payment to the revenue as a payment of rent, but this right is restricted to occupiers strictly speaking, and here the landlord was not an occupier of the premises in this sense.

AS TO ASSESSMENT OF LANDLORD, see HALSBURY, Hailsham Edn., Vol. 17, p. 60, paras. 115, 116; and FOR CASES, see DIGEST, Vol. 31, pp. 290, 292, Nos. 4357-4379.]

Cases referred to :

- (1) *Bertram v. Wightman*, [1936] 2 K.B. 521; [1936] 2 All E.R. 487; Digest Supp.; 105 L.J.K.B. 784; 155 L.T. 412.
- (2) *Back v. Daniels*, [1925] 1 K.B. 526; 28 Digest 15, 78; 94 L.J.K.B. 304; 132 L.T. 455.
- (3) *Cox v. Glue* (1848), 5 C.B. 533; 34 Digest 610, 84; 17 L.J.C.P. 162; 10 L.T.O.S. 374.

CONSOLIDATED ACTIONS for recovery of £600 arrears of rent. The facts are fully set out in the judgment.

N. E. Mustoe for the plaintiff.

P. Lamb and *G. G. Honeyman* for the defendant.

TUCKER, J. : The plaintiff claims £600 rent due for three quarters, namely, the rent due on Sept. 29, 1941, Dec. 25, 1941, and Mar. 25, 1942, in respect to premises Nos. 167 and 169, Great Portland Street, under a lease made between the plaintiff and the defendant dated Sept. 16, 1942, but to run as from Mar. 25, 1940.

It is common ground that this rent has not actually been paid in cash to the plaintiff; but the defendant claims that her liability to pay the rent has been discharged by the payment of £647 10s. to the Inland Revenue. As to £508 10s. 2d., it has been collected by the revenue authorities since Aug. 12, 1941, from her sub-tenants as the result of a notice of that date, calling upon them to pay their rents to the collector of taxes instead of to her; and she claims to be entitled to set off this amount against the rent payable under her lease. There is a further sum that has been paid by her direct, amounting to £138 19s. 10d., which appears to have been paid subsequent to the date of the issue of the writs in these actions. However that may be, the total sum paid in that way amounts to £647 10s. The defendant claims that she is discharged from her liability to pay any rent to the plaintiff by reason of those collections from the sub-tenants together with the direct payment made by her.

The agreed facts are as follows. The premises in question, Nos. 167 and 169, Great Portland Street, had previously been let by the plaintiff's husband to the defendant's husband. The plaintiff's husband died on Nov. 27, 1938, and the

plaintiff obtained probate as executrix on Mar. 1, 1939. The defendant's husband died intestate on Jan. 22, 1939; and administration was granted to her on May 1, 1939, and she became beneficially entitled to and accepted the lease. Subsequently, however, she surrendered this lease, and a new lease dated Sept. 16, 1941, running as from Mar. 25, 1940, was entered into by the plaintiff and the defendant. All rent under the old lease was paid with tax deducted down to Mar. 25, 1940. When I say "tax deducted," what purported to be tax was deducted, that is to say, a sum equivalent to tax was deducted. But it appears that in fact a very considerable amount of the money so deducted was not, in fact, paid over to the inland revenue. From March, 1940, down to June, 1941, the rent was paid in full without any deduction of tax.

As I have stated, with regard to the rent previously paid subject to deduction of tax, this tax, as to a great portion of it, was not handed over to the revenue; and, accordingly, by Aug. 12, 1941, there were arrears of Sched. A tax due to the revenue amounting to £1,108 13s. By notice of Aug. 12, 1941, the revenue, by powers conferred upon them by the Finance Act, 1941, s. 12, and Sched. I, Pt. III, demanded from the sub-tenants in occupation of parts of the premises the payment of their rents to satisfy those arrears of £1,108 13s. Pursuant to such notice, the sub-tenants then, in fact, paid £508 10s. 2d. in part satisfaction thereof; and, as I have already stated, the defendant herself has paid the sum of £138 19s. 10d. to the revenue direct. The revenue allocated the sums thus collected and paid as follows: In respect of the arrears of the year 1938-39, £181 4s. 9d.; in respect of the arrears for the year 1939-40, £371 1s. 7d.; and in respect of the year 1940-41, £95 3s. 8d.

At all material times both the defendant and her husband were assessed to Sched. A tax, under Sched. A, No. VII, r. 8. At all material times since the commencement of the current lease, the premises have been sublet by the defendant to a number of tenants who have been in occupation of different portions of the buildings. There were nine such sub-tenants. Throughout the period, however, the fifth floor back has been unlet and vacant. The tenants have the common use of the staircase and lift; which, together with the boiler and central heating apparatus, is maintained by the defendant, who also pays the wages of the lift attendant.

That, I think, completes the recital of the agreed facts: but before turning to the relevant rules of Sched. A and the Finance Act, 1941, s. 12, I pause to point out that what has been recovered by the revenue from these sub-tenants, and what the defendant is seeking to set off against her rent, in the main represents arrears of tax due from a former landlord, who in this particular case was the defendant's husband. That, of course, is a mere accident, and cannot affect the matters of law that I have to decide. In these circumstances, it is for the defendant to establish that something has happened which is equivalent to payment of rent by her and discharges her from her liability in respect of the rent now claimed from her.

It would be convenient now if I referred to the rather numerous rules and sections which are relevant to the issue I have to decide. First, there are the rules of Sched. A, No. VII, the heading to which is: "Rules as to persons chargeable." The relevant rules are as follows:

1. Save as in this Act provided in any particular case, tax under this Schedule shall be charged on and paid by the occupier for the time being.

2. Every person having the use of any lands or tenements shall be deemed to be the occupier thereof.

3. The tax on each assessment shall be levied on the occupier for the time being, without any new assessment, notwithstanding any change of occupation.

8. The assessment and charge shall be made upon the landlord in respect of . . . (c) any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement: Provided that in each of the above cases in default of payment by the landlord, the tax may be levied upon the occupier or occupiers respectively.

I pause there to draw attention to the fact that it is under cl. (c) of that rule that the defendant and her husband have at all times been assessed and charged to this tax. I now refer to the amendment which has been made with regard to that proviso by the Finance Act, 1941, s. 12 (3), and (4), which are as follows:

(3) Any tax under any assessment to income tax made under the said r. 8, in respect of any house or building let in different apartments or tenements and occupied by two or more persons severally may also (so far as not otherwise recovered) be recovered from all or any of those persons in accordance with the provisions of Pt. III of the said Schedule.

A (4) The powers conferred by the last preceding subsection shall, as respects the cases to which that subsection applies, be in lieu of the power conferred by the proviso to Sched. A, No. VII, r. 8, to recover from the occupiers, but, save as aforesaid, the powers conferred by this section are in addition to and not in derogation of any other powers conferred by the Income Tax Acts for the recovery of tax.

B The result of that is to substitute for the proviso to r. 8 of No. VII the machinery laid down in the Finance Act, 1941, Sched. I, Pt. III, as regards the method of recovering from an occupier tax which had been assessed and charged upon a landlord but not paid by him, he having been assessed under No. VII, r. 8, cl. (c). It establishes a new method of recovery in that case from the occupier, namely, a method by which (I am summarising it) the collector can call upon the actual occupiers to pay their rents direct to him in satisfaction of the outstanding arrears of Sched. A tax. I draw attention, however, to r. 9, which provides for the landlord being assessed where he exercises his option to be so assessed.

In order to complete the matter, I think it convenient to refer to the Finance Act, 1941, s. 12 (2), which provides :

C Any tax under any assessment to income tax made under the said r. 8 may also (so far as not otherwise recovered) be recovered in accordance with the provisions of Pt. II of the said Schedule by requiring rent to be paid over in or towards the satisfaction of the tax.

Again that is tax assessed under r. 8, that is to say, tax assessed in certain circumstances on the landlord.

D The Finance Act, 1941, Sched. I, pt. II, provides for a method of recovery in respect of that tax, when it has not been paid by the person charged. Pt. II, cl. 1, is in these words :

E The collector may serve a notice in writing in the prescribed form on the landlord for the time being, or on any other person who receives any rent paid in respect of the whole or any part of the land to which the assessment relates . . . requiring the landlord or other such person as aforesaid to pay to the collector in or towards the satisfaction of the tax any sums from time to time received on account of rent, or as the case may be, such rent as aforesaid, until the liability in respect of the tax has been satisfied, and the person on whom the notice is served shall pay all such sums over to the collector accordingly and, if he has accounted for the rent to any other person, he shall be acquitted and discharged as against that other person by the payment.

Therefore, it will be observed that the Finance Act, 1941, s. 12, and Sched. I, Pts. II and III, provide alternative methods for recovering the tax assessed on a landlord under r. 8 which has not been paid. Pt. II provides machinery for recovering those arrears from the landlord for the time being by calling upon him to hand over the rent which he is receiving, or by calling upon any person collecting that rent on his behalf to hand over such rent. Pt. III, on the other hand, provides the machinery which was adopted in this particular case of recovering arrears direct from the actual occupiers, that is to say, from the sub-tenants of the landlord. Before leaving the Schedule, I ought to point out that where the machinery of Pt. II is adopted, there is no express provision in the Schedule or in that Act entitling the landlord for the time being who has been called upon to discharge arrears due from a former landlord to deduct such sums from any rent payable by him to his superior landlord. On the other hand, when we come to Pt. III, as regards the machinery whereby arrears of tax assessed under No. VII, r. 8, are recovered direct from the occupiers, there is an express provision enabling the occupiers to deduct such sums from the rent payable by them under the Finance Act, 1941, Sched. I, Pt. III, cl. 3, which is in these terms :

Where any sum on account of the tax has been collected from an occupier in pursuance of this part of this Schedule, he may deduct that sum from any subsequent payment on account of rent and shall be acquitted and discharged of the amount so deducted.

I pass to Sched. A, No. VIII, and the rules thereunder. No. VIII is headed : " Rules as to the right of persons by whom tax is paid to recoupment in all cases." The relevant rules are as follows :

1. A tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted) an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every 20s. thereof, the said deduction to be made out of the first payment thereafter made on account of rent, and any receiver on behalf of the Crown or other person receiving the rent shall (on production of the receipt for the payment of the tax) allow the deduction on receipt of the residue of the rent . . . Provided also that a tenant or occupier shall not be entitled to deduct out of the rent any greater sum than the amount of tax charged in respect of such property as aforesaid, and actually paid by him.

4 (1). Where any lands, tenements, hereditaments, or heritages are subject to the payment a landlord, owner or proprietor who has been charged to tax under this Schedule or from whom tax is deductible under this rule, or r. 1 or r. 3, shall be entitled on making such payment to deduct and retain thereout so much of the said tax as represents the rate or rates of income tax in force during the period through which the said payment was accruing due, for every 20s. thereof (the just proportion of any sums allowed by the commissioners being first deducted), and every receiver on behalf of the Crown, and every person to whom such payment is made shall, on receipt of the residue thereof, and without any charge for so doing, allow the deduction.

That rule, however, is to be read subject to the amendment contained in the Finance Act, 1927, s. 39 (1), which provides as follows :

Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due . . . shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due . . .

No. VIII, r. 4, must now be read subject to that amendment ; and the result is that it entitles the tax to be deducted at what is the standard rate of income tax for the time being ; and so in this case it would allow deduction at the rate of 10s. in the £. The second proviso to r. 4 is :

Provided also that no such person as aforesaid who is also a tenant or the occupier of the lands, tenements, hereditaments, or heritages, shall be entitled to deduct out of any rent any greater sum than the amount of tax charged in respect of any such property and actually paid by him.

The remaining rules provide as follows :

7. A tenant occupier for the time being of any lands, tenements or hereditaments, who has been required to pay, and has paid, any sums charged in respect thereof under this Schedule which, under the provisions of this Act, ought to have been or ought to be paid by a former tenant or occupier, may deduct and retain out of any subsequent payment of rent to his landlord, the sum, or any part thereof, which ought to have been or ought to be so paid.

8. Where under No. VII, r. 8, tax has been charged upon a landlord in respect of any premises mentioned in paras. (a) or (b) of that rule, and in default of payment by the landlord the tax has been levied upon the occupier, the tax may be deducted and shall be allowed out of the next payment on account of rent.

9. Where under No. VII, r. 8, tax has been charged upon a landlord in respect of any premises mentioned in para. (c) of that rule, and in default of payment by the landlord the tax has been levied upon the occupier or occupiers, the tax may be deducted and shall be allowed out of the next or any subsequent payment on account of rent.

I think those are all the relevant rules and sections.

Counsel for the defendant in this case claims that the effect of these rules is to enable him to take advantage of those sums which have been recovered from the sub-tenants and use them as constituting a discharge of the rent payable by his client to the plaintiff. In the forefront of his argument he submits that the defendant in this case is, and always was, an occupier or tenant-occupier within the meaning of these rules. He draws attention to the scheme of the legislation whereby the tax is primarily charged upon and paid by the occupier. He also draws attention to the definition of "occupier," namely, "every person having the right to use any lands," etc. ; and then he says that he is an occupier, and, if so, No. VIII, r. 7, in express terms gives him power to make these deductions from his rent. I need not read that rule again, as I have quite recently read it ; but in terms it is dealing with a case where the tax ought to have been or ought to be paid by a former tenant or occupier, and has not been so paid ;

A and where the tenant-occupier for the time being has been called upon to pay those arrears. It is in those circumstances he may deduct and retain out of any subsequent payment of rent to his landlord the sum, or any part thereof which ought to have been or ought to be so paid. Counsel for the defendant says that the defendant in this case is an occupier; and this was tax which should have been paid by her husband, who was a former occupier, and that she has in fact been required to pay by reason of the fact that it has been deducted from the rent of her sub-tenants, and so has in fact been paid by her; and that she is accordingly entitled to deduct it from the rent payable by her to her landlord. If he is right in saying that the defendant is an occupier for the purposes of these rules, then it seems to me clear that she would be entitled to make this deduction. The question is, is she an occupier? In that connection counsel for the defendant also relies upon two cases. The first is *Bertram v. Wightman* (1). The headnote says:

B The appellant was assessed under the Income Tax Act, 1918, Scheds. A and B, in respect of some 40 acres of land, consisting of lawns, gardens, drives, pathways, woods and shrubberies surrounding a house of which he was the owner. The property was vacated by the appellant on Dec. 2, 1933, and since that date had been unoccupied. The proportion of tax charged in respect of the house and buildings had been discharged under Sched. A, No. VII, r. 4. The commissioners held that the appellant was properly chargeable as being the person who was the occupier of the property within the meaning of the Income Tax Acts, and that the property was assessable to income tax whether or not the occupier chose to exercise his rights of occupation . . .

D LAWRENCE, J., held that the commissioners were right in so deciding. He decided that, in order to be an occupier, it was not necessary that the appellant should actually be using the lands, but it was sufficient if he was entitled to the beneficial use of any of the lands or tenements, and that on the facts of that case he was entitled to the use, but did not choose to avail himself of it in fact. I think

E the present case is very different from that case. The only part of these premises in respect of which the defendant was entitled to the beneficial use was the fifth floor back, which was vacant and unoccupied, and with regard to which a question might possibly have arisen under No. VII, r. 4; but I put that on one side for the moment. Taking the building as a whole, apart from that vacant flat, the defendant, in my view, was not entitled to the beneficial use of the building, which it is to be observed under No. VII, r. 8, is to be assessed and charged as one entire house or tenement. She was not entitled to the beneficial use of that one entire house or tenement, because she had put it out of her power to use the premises by letting them to these sub-tenants. I think it is quite impossible to say that the right to receive the rent is equivalent to the right to have the beneficial use of the hereditament itself.

F Counsel for the defendant also prays in aid *Back v. Daniels* (2). That, again, was a case which turned on very special facts. The respondents were wholesale potato merchants, and they grew potatoes on some land in Lincolnshire which they hired from the neighbouring farmers under special agreements. The lands so acquired were changed each season under those special agreements. The respondents had possession of the lands until the potatoes were fully ripe, which, in some cases, was more than 1 year from the date of the agreement and in other cases was less than 1 year. The headnote says:

G The landlord under the agreement had to plough the land, do all the carting and provide all the horse labour that was necessary. The respondents supplied all the seed, artificial manure, and the manual labour necessary to drill the manure, plant the seed, take up and pit the potatoes and afterwards prepare them for market.

H The respondents claimed to be assessed in respect to that land under Sched. B (which for these purposes is the same as Sched. A), rather than under Sched. D; but it was a fact that there the landlord was assessed under Sched. B in respect of those lands. One of the arguments in the case was that two people could not be assessed under Sched. B in respect of the same land. It was held, however, among other things:

. . . the fact that the landlord had been assessed and charged to income tax under Sched. B in respect of the occupation of the lands, did not conclude the matter against the respondent as, having regard to the reasoning of the court in *Cox v. Glue* (3), there might under Sched. B be two persons who were chargeable as occupiers in respect of the same lands.

It was pointed out by SCRUTTON, L.J., on p. 542 :

Now it is clear that at common law, for the same land, though hardly for the same portion of it, two persons may be in possession at the same time, and each can bring trespass.

Then he went on to decide that, on the facts of that case, the respondents were sufficiently in occupation in some respects of those fields to entitle them to be assessed under Sched. B, notwithstanding the fact that their landlords also were in occupation in certain respects of the same property. They had different rights with regard to the land, but rights which entitled each of them to occupation of a different kind. I do not think any real assistance can be obtained by counsel for the defendant from that case.

The present case is a simple one. It is merely the case of a landlord who has let a house to a tenant. It is quite impossible, under the scheme of this Schedule in this legislation, or in any way that I am aware of, to say that in these circumstances the landlord and the sub-tenants are both occupiers of this one entire house or tenement. It is conceded that the sub-tenants are occupiers of the portions sublet to them ; but it is said that, at the same time the defendant was an occupier. I think the defendant was not an occupier. Furthermore, I think it is impossible so to contend, among other reasons for the reason that the defendant and her husband were both in fact assessed under No. VII, r. 8, which is the rule expressly providing in certain circumstances for the assessment of the landlord instead of the occupier, who is the person primarily and ordinarily assessed. For these reasons, I think that contention fails. But, before passing from it, I should say that counsel for the defendant also relied in support of his argument on the fact that it is agreed that the defendant has to maintain the staircase, the lift, the boiler and the heating apparatus and provide an attendant to look after the lift, and that the tenants of those buildings merely have the right to use the staircase and lift in common with their sub-tenants. I do not think those facts are sufficient to make the defendant an occupier of this entire building or tenement for the purposes of these rules, or at all. I am, accordingly, of opinion that neither she nor her husband were occupiers. In my view, they were landlords within the meaning of these rules as distinct from occupiers.

The next argument of counsel for the defendant was that, if he failed to establish that his client was an occupier, none the less she was entitled to make this deduction by virtue of No. VIII, r. 9, which I have read, but which, for the sake of clarity at this stage, I will read again :

Where under r. 8 of No. VII tax has been charged upon a landlord in respect of any premises mentioned in para. (c) of that rule, and in default of payment by the landlord the tax has been levied upon the occupier or occupiers, the tax may be deducted and shall be allowed out of the next or any subsequent payment on account of rent.

The question here is whether the deduction there allowed and provided for means a deduction by the occupier from the rent payable by him to his landlord ; or whether it entitles anybody who has to pay rent to any landlord to make deductions where in fact further down the scale the tax has actually been levied upon an occupier. If it has the wider meaning, then counsel for the defendant would succeed. If it has the narrower meaning he fails. I think on the whole (though I do not think the matter is by any means free from doubt) that this rule must have the narrower meaning. It is dealing with the proviso of No. VII, r. 8. That is the proviso that enables the tax to be recovered from the occupier. I have already referred to the amendment to that proviso made in the Finance Act, 1941, and, I think, under the whole scheme of this legislation it is intended to enable the occupier in all circumstances where the tax is recovered from him (although he was not the person originally assessed) to make the deduction when he pays his landlord. But I think it would require express words enabling that landlord to make the deduction in these circumstances from any rent payable to his superior landlord. I do not think that right can be read into r. 9, when r. 9 is considered in this scheme of legislation.

Counsel for the defendant strongly relied upon the fact that in No. VIII, r. 7, the words are :

. . . any subsequent payment of rent to his landlord . . .

whereas in r. 9 the words are :

... the next or any subsequent payment on account of rent ... the words "to his landlord" being omitted. Nevertheless, as I have said, I think that rule, when one considers all these rules together, was intended to apply only to the tax deducted by the occupier when he is compelled to pay in the case where the landlord who has been assessed has defaulted, and where the tax is accordingly recovered from the occupier.

When the Finance Act, 1941, was passed, and when this machinery for recovering arrears from the actual occupier was extended, as it has been extended, it would have been perfectly possible to provide for this case and to give the intermediate landlord a right to deduct when paying his superior landlord. I have already pointed out that no such right is given him under Pt. II of the Schedule ; and under Pt. III the right is expressly given only to the occupier.

One must also have regard to the very wide language of the Finance Act, 1941, s. 13, which is in these terms :

Any tax payable under Sched. A for any year of assessment in respect of any land which is not otherwise recovered, may be recovered from the person who is for the time being the immediate lessor of the land as if he had been charged therewith and in the same way as any other tax charged by him may be recovered.

I omit the provisos. That language is very wide, and imposes upon the immediate lessor a very heavy liability in certain circumstances ; but apparently, the legislature has not thought fit to provide that where that section is applied the intermediate landlord has any right to make any deduction as against his superior landlord. When I say "any deduction," I mean any deduction other than that which is already provided for in No. VIII, r. 4 ; because it is conceded in this case that, subject always to the proviso in No. VIII, r. 4, the defendant is entitled to deduct tax at the rate of 10s. in the £ from this rent which is owing by her. The words are :

... that no such person as aforesaid who is also a tenant or the occupier of the lands, tenements, hereditaments, or heritages, shall be entitled to deduct out of any rent any greater sum than the amount of tax charged in respect of any such property and actually paid by him.

Subject to that proviso, it is conceded that the defendant here is entitled to deduct tax at 10s. in the £. I think her case is covered by No. VIII, r. 4, and by no other rule. Her right of deduction is limited to the rights conferred upon her under that rule.

The result of that is that, provided she has been charged in respect of this property and has actually paid tax to the extent of 10s. in the £ on the rent, she is entitled to make this deduction. Throughout this case it has always been conceded that she was entitled to make this deduction.

I pointed out to counsel shortly before beginning this judgment that it did not appear to me clear on the admitted facts whether or not, in the circumstances of this particular case, she had paid this tax. In my view, it appears that the tax which has been paid has been paid, or principally paid, by means of these sums recovered from the sub-tenants ; and I have no evidence as to what the position is with regard to the current Sched. A tax, for which the defendant, I assume, is liable, and in respect of which, and in respect of which alone, she would be entitled to deduct tax at 10s. in the £ from this rent which is claimed against her. Accordingly, I informed counsel that I would decide the matter of principle in this case, and leave it to them to apply to me at a later date with regard to the precise amount for which judgment should be entered for the plaintiff in this case.

Judgment for plaintiff with costs.

Solicitors : *Briggs and Johnson* (for the plaintiff) ; *Burton, Yeates & Hart* (for the defendant).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

J. & J. MAKIN, LTD. v. LONDON AND NORTH EASTERN RAILWAY CO.

[KING'S BENCH DIVISION (Atkinson, J.), January 18, 1943.]

Statutes—Interpretation—Construction of general provisions—Act of God—Peak Forest Canal Act, 1794, s. 15.

The defendants are the owners of a canal which crosses a valley at the top of a high embankment. On June 22, 1941, as the result of a violent storm, the embankment collapsed, and a great quantity of water escaped from the canal into the stream below and was carried down to the plaintiffs' mill where it was deposited together with a large number of stones. The canal was constructed in pursuance of powers conferred on the proprietors by the Peak Forest Canal Act, 1794, s. 15, which imposed liability for injury caused by water flowing from the canal or "from any other accident." The plaintiffs, in claiming damages, said that the Act imposed an absolute liability on the defendants, irrespective of negligence. The defendants contended that the construction of the earlier words in s. 15 of the Act must be governed by the succeeding phrase "or from any other accident," that liability was, therefore, limited to an escape due to accident and that an escape of water due to an act of God was not within the section:—

HELD: the Act of 1794 imposed a liability for damage on the defendants, even if such damage was caused by an act of God.

[EDITORIAL NOTE. The Act under which the canal here in question was constructed provided that the proprietors should be liable in damages for any injury caused by any breach of the canal works or by water flowing therefrom or from any other accident. The contention here is first that the whole passage is controlled by the words "any accident" and that the liability is restricted to injury caused by accidents. Then it is said an act of God is not an accident. This argument is rejected and it is held that the Act imposes liability for injury due to the specified causes or to any other unintended or unexpected occurrences. Upon this construction it is further held that the liability includes liability for injury due to an act of God.

As to INTERPRETATION OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 470-510, paras. 581-660; and FOR CASES, see DIGEST, Vol. 42, p. 674, Nos. 849-859.] Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* S.C. *sub nom.* *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.
- (2) *Richards v. Lothian*, [1913] A.C. 263; 17 Digest 118, 279; 82 L.J.P.C. 42; 108 L.T. 225.
- (3) *Nichols v. Marsland* (1876), 2 Ex.D. 1; 36 Digest 104, 695; 46 L.J.Q.B. 174; 35 L.T. 725.
- (4) *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 36 Digest 105, 705; 47 L.J.Q.B. 193; 37 L.T. 543; *affg.* (1876), 1 Q.B.D. 546.
- (5) *Arrow Shipping Co. v. Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 41 Digest 822, 6807; 63 L.J.P. 146; 71 L.T. 346.
- (6) *Great Western Ry. Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 41 Digest 974, 8645; 97 L.J.P. 8; 138 L.T. 403.
- (7) *Fenwick v. Schmalz* (1868), L.R. 3 C.P. 313; 41 Digest 458, 2884; 37 L.J.C.P. 78; 18 L.T. 27.
- (8) *Trent and Mersey Navigation Co. v. Wood* (1785), 4 Doug. K.B. 286; 42 Digest 993, 209.
- (9) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 34 Digest 266, 2264; 72 L.J.K.B. 787; 89 L.T. 314.

SPECIAL CASE stated under R.S.C., Ord. 34, r. 2, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

H. Wynn Parry, K.C., and *D. A. Scott Cairns* (for *John P. Ashworth* on war service) for the plaintiffs.

Millard Tucker, K.C., *F. A. Sellers, K.C.*, and *L. I. Horniman* for the defendants.

ATKINSON, J.: The plaintiffs are the owners of a paper mill known as Disley Mill, near Disley, Cheshire. The defendants, the London and North Eastern Ry. Co., are the owners of an undertaking known as the Peak Forest Canal. This canal was constructed soon after 1794 by the then proprietors in pursuance of powers conferred upon them by the Peak Forest Canal Act, 1794. The canal had to cross a narrow valley known as Higgins Clough. It crosses the

Clough at the top of an embankment about 60ft. high, and a stream runs down the Clough and passes through the embankment by means of a culvert and proceeds onwards towards the plaintiffs' premises. On June 22, 1941, there was a very violent storm in the neighbourhood, and the result of the storm was that this 60ft. high embankment collapsed and a great quantity of water escaped from the canal into the stream below and swept on carrying with it a great quantity of stones, with the result that water and stones were deposited in the plaintiffs' mill, for which plaintiffs are claiming damages.

I have not seen the pleadings, but the case for the plaintiffs is that this bank collapsed through the defendants' neglect, but they also say, neglect or no neglect, the Act imposed an absolute liability upon the defendants and, therefore, there is no need to call evidence to prove negligence. On the other hand, the defendants say the Act does not impose an absolute liability, they are only liable for negligence. Obviously, it was convenient to get the point decided first as to whether it was a case of absolute liability, because, if it is, so far as I can see there would be no issue to be tried; whereas, on the other hand, if absolute liability is not imposed, then the parties must be prepared to fight the issue of negligence. Therefore, the master made the order that the case be set down and the question for the opinion of the court is :

Does the said Act of 1794 impose a liability on the defendants in respect of the escape of water causing damage to the plaintiffs' property notwithstanding such escape of water be caused by an act of God or *vis major* ?

So that all I have to do is to determine the measure of the liability imposed on the defendants by the statute. Is the liability absolute, and, if not, to what extent is it not ?

Apart from the statute, the defendants would probably be liable only for negligence. If this canal had been constructed upon land purchased by the undertakers without statutory authority, their liability would be that defined in *Rylands v. Fletcher* (1) and the line of cases clarifying what was there said. Probably the most authoritative exposition of the law is that found in *Rickards v. Lothian* (2), and, quite shortly, such owners would be liable for any escape of water, whether due to negligence or not, unless they could show that it was due to an act of God or the King's enemies or the malicious act of a third person. Just in passing, it is interesting to observe that an act of God was defined in *Nichols v. Marsland* (3) for the guidance of the jury as :

A sudden and unprecedented rainfall, giving rise to a flood of such magnitude that it could not reasonably have been anticipated.

An act of God, if I may take as a reliable definition the one in WEBSTER'S INTERNATIONAL DICTIONARY, is :

An inevitable accident : such an extraordinary interruption of the usual course of events as is not looked for in advance and against which ordinary prudence could not guard.

The defendants say that, as this canal was constructed by statutory authority, their liability would be more restricted than if the rule in *Rylands v. Fletcher* (1) applied, and that their liability would be confined to damage arising from negligence. We have not fully explored that argument, but I think that is very likely quite correct.

The relevant section in the Act is sect. 15, but before I read it I want to say this. I am not without guidance as to the method of approach to the construction of this section. There have been at least three cases in the House of Lords. There is nothing to be gained by going into them in detail. The first case is *River Wear Comrs. v. Adamson* (4). Then that case was considered in *Arrow Shipping Co., Ltd. v. Tyne Improvement Comrs.* (5), and *Great Western Ry. Co. v. Mostyn (Owners)* (6). Having read them all with some care, I think the method of approach is probably best described by LORD BLACKBURN, in *River Wear Comrs. v. Adamson* (4), where he said, at p. 764 :

But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the court injudicious ; and I believe that it is not disputed that what LORD WENSLEYDALE used to call the golden rule is right, namely, that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their

ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear.

It is quite clear that the principle enunciated by the Court of Appeal in the *River Wear Comrs. v. Adamson* (4) is wrong and not law. What was there said was that the language of a somewhat equivalent section, though general, must be interpreted with reference to the well-known principle of common law, that a person is not to be made liable for damage caused by his property, without any default of his, through what is generally termed an act of God. That has been dissented from in the House of Lords on two or three occasions.

I do not think that the plaintiffs here are troubled with the exception indicated by LORD BLACKBURN, namely, a result so unfair as to show that the words could not have been intended to bear their ordinary meaning. I imagine that most people would say that damage caused by the breaking of the banks of this canal ought to be borne by the undertakers who put it there. It was obviously a potential source of danger, perched up 60ft. high above the bottom of the valley, and there is nothing unreasonable in supposing that Parliament may very well have said: "If we give you permission to construct this canal it must be there at your risk and you must pay for any damage done by your water even if that is due to a storm of unexpected or unusual violence, rather than that the loss should fall upon some innocent mill owner who has had nothing to do with the creation of the source of the damage." Therefore, I am untrammelled by the possible results, and I have to consider the relevant words in the relevant section, bearing in mind the rest of the statute and any light that it may throw upon the problem. The relevant part is this:

And be it further enacted, that if any injury or damage shall happen to be done to the owner or occupier of any mill, edifice, lands, or hereditaments, by the breach of any reservoir to be made for the purpose of the said intended canal or cut, or any of the locks or works of the said navigation, or by the water flowing from the said canal or cut, or any such reservoir, or from any other accident, then, and in every such case, full compensation shall be made to the owner and occupier of, and all other persons interested in, any such mill, edifice, lands, or hereditaments, by the said company of proprietors, for all such injury and damage.

It is conceded that, but for these words "or from any other accident," the section would impose an absolute liability; but the defendants contend that the *prima facie* meaning is modified by the words "or from any other accident." It will be observed that the earlier words refer only to the proximate cause of the damage suffered, a breach of the works or water flowing from the canal. It does not concern itself at all with the cause of the breach or the cause of the water flowing from the canal. But it is said that these words "or from any other accident" cut down the *prima facie* generality of the earlier words and limit the liability to cases where the breach or the escape is due to accident; in other words, that the section must be read in this way:

Any injury or damage that shall happen to be done by the accidental breach of the works or by any accidental flowing of water from the canal.

For the purpose of this case, but without deciding the point, I will assume that that contention is well founded and that I must read the section as if the word "accidental" did occur before each of the two specified causes of damage. Of course, it follows, and indeed it is admitted, that so construed the common law liability of statutory undertakers is extended beyond liability for negligence so as to include liability for everything that can properly be described as "accidental" whether it is due to negligence or not. But it is said that an act of God is not an "accident," and that the wilful act of the King's enemies is not an "accident," and that the malicious act of a third party is not an "accident." I have only to deal with the act of God for the purpose of this case. So that the argument that I have to consider is this: If damage is caused by a breach of the reservoir or by water escaping as the result of an act of God, whether that falls within the section or not? Ordinarily an "accident" is an unexpected and unintended befalling or happening. That is the only definition you get in the dictionaries. The law is concerned only with happenings which affect legal relationships or legal rights: for example, if the alleged happening interferes with or prevents the performance of a contract, or if it causes injury to persons or things. The cases cited, in my view, establish this: in the former event the happening is regarded as an accident, but only

if it is one out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence. Where injury is caused it is the happening to the person or the thing which is regarded as the accident rather than the cause of that happening. In this class of case, a thunder-storm which has no legal effect is not an accident, any more than a motor car travelling along a road at 100 miles per hour is an accident, but if by lightning or by the force of the wind a tree is caused to fall and strike a man, that happening to the tree and that happening to the man are accidents just as much as if the car strikes a lamp post and knocks it down and causes it to fall upon a nearby man. A banana skin lying in the road is not an accident, but if it causes a man to slip and fall and break his leg, that happening to the man is an accident. The first case to which I have been referred is *Fenwick v. Schmalz* (7), a case relied upon by the defendants. There the defendant had agreed to load the plaintiff's ship with coal, excepting in the case of riots, strikes or any other accident beyond his control which might prevent or delay her loading. He failed to perform his contract, he was sued for damages, and he pleaded that he had been prevented from loading by a snowstorm. What WILLES, J., said, at p. 316, was this :

... the defendant is without defence unless the cause of his delay was within the exception. The defendant says that the cause of his delay was a fall of snow, which prevented his bringing the coal to the place of loading : the most favourable supposition for the defendant would be that the snow blocked up the railway, and it might be said that the defendant should have brought the coal down before, and that it did not, except through the defendant's own default, prevent his loading the plaintiff's vessel. Riots and strikes, however, appear to be accidents which would affect the loading, by preventing the coals being brought from the pit, and we must, therefore, give the exception a wider interpretation. Was the snowstorm, however, "an accident beyond the control" of the defendant ? No doubt it was beyond his control, but was it an accident ? I think not, because an accident is not the same as an occurrence, but is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature, and is an incident rather than an accident ; and, therefore, without going into the rule that general words are to be restricted to the same genus as the specific words which precede them, I think this natural occurrence did not come within the terms of the exception in the charter-party.

With that MONTAGUE SMITH, J., agreed. Now what does that come to ? So far from helping the defendants it is dead against them. All that WILLES, J., said was that an ordinary snowstorm is not an accident, it is only an incident which happens in the ordinary course of things. To make it an accident you would have to show that it was a storm of such a kind as no reasonable man could have foreseen or expected. It seems to me that that case does not help the defendants, but it suggests that they are wrong. On the definition of an act of God, "an extraordinary interruption of the usual course of events which an ordinary man would not anticipate and could not be expected to guard against," the snowstorm there was not an act of God. The other case from which the defendants sought to get some help is *Trent and Mersey Navigation v. Wood* (8). What happened there was this : a carrier was being sued for damage to goods which he carried in his ship. They had been damaged because his ship had fouled an anchor which was not marked by a buoy. A common carrier is liable for damage done unless he can establish that it is due (*à titre d'acte de Dieu*) to an act of God, and the defendants tried to get the court to say that the fouling of the anchor was an act of God. Of course, it was not, and what LORD MANSFIELD said, at p. 290, was this :

"The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident.

What he is saying there is this : there is no act of God here at all, the ship fouled the anchor because it happened to be there, but that was not an act of God. He is not saying that an act of God is or is not an accident ; all he is saying is that there was no act of God in that case and, therefore, the defendants were liable.

On the other hand, two passages were referred to, one of which is in the opinion of LORD HATHERLEY in *River Wear Comrs. v. Adamson* (4). It will be remembered that the point in that case was this : A ship had been driven ashore in a violent gale and had been abandoned and then the wreck had been carried on against a pier and had damaged the pier or harbour, and the question was whether the

owners of the ship were liable to the River Wear Commissioners for the damage done. There were as many different reasons given as there were judges and Law Lords who dealt with the case, and quite obviously everybody was so impressed with the injustice of holding the defendants liable that everybody sought to find some way of finding for the defendants, but, at any rate, the passage throws some little light on the question whether an act of God can be an accident. LORD HATHERLEY says, at p. 752 :

I cannot concur in the views expressed in the court below by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in law courts, the act of God, namely, a storm, the owner of the vessel would be excused. . . .

There LORD HATHERLEY is saying in the plainest terms that an unprecedented storm is an accident and is usually in the courts spoken of as an act of God. In *Fenton v. J. Thorley & Co., Ltd.* (9), the Lords were dealing with what the word "accident" meant in the Workmen's Compensation Act, and they said the word was used in the popular and ordinary sense, and it meant a mishap or an untoward event not expected or designed. LORD MACNAGHTEN said this, at p. 448 :

I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed . . . and at p. 451 LORD SHAND put it in this way :

. . . the word "accident" in the statute is to be taken in its popular and ordinary sense, I think it denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence. LORD DAVEY agreed with that in terms, and LORD ROBERTSON said the same thing, but the most interesting passage is in the opinion of LORD LINDLEY, at p. 453 :

The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause ; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness ; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events.

Therefore, if one reads sect. 15 in this way, "or from any other unintended and unexpected occurrence," it is quite obvious to my mind that an event, when the mischief is caused by an act of God, is within the section. I really cannot myself see how it is open to argument. It is said here that lightning uprooted a tree and that caused a weakening of the bank and then heavy rain brought about the disaster. Surely one of those unexpected and unanticipated events, which, as WILLES, J., had certainly held, amounted to an accident ; the happening to the bank was an accident and the happening to the plaintiff's property was an accident.

Is there anything in the rest of the Act which indicates that this view is wrong ? Any section that one refers to, to my mind, indicates that this view is right. Reference was made to the end of the preamble. I think that this preamble is only relating to damage caused in and by the execution of the powers given by the Act. I need not read it, I merely point out that the words are as wide as they can be—to make full satisfaction for all damage sustained in or by the execution of all or any of the powers. It is expressed in the widest terms. Then sect. 38, which I think I may take sufficiently from the special case, is this :

And be it further enacted, that the said commissioners—they are the people who are to determine the questions arising under the Act—acting in any question, matter or difference, which shall or may arise, are hereby authorised and empowered . . . to determine and adjust what other distinct sum or sums of money shall be paid by the said company of proprietors as a recompense for any damages which may or shall, at any time or times whatsoever be sustained by . . . any person . . . being owners of and interested in any lands . . . for or by reason of . . . the making, repairing or maintaining the said intended canal . . . or by the flowing, leaking or oozing of the water over or through the banks of the said intended canal or by reason or means of the execution of any of the powers herein contained, by the said company of proprietors, or their agents, workmen or servants.

There again one cannot conceive of anything being expressed in wider terms. Then sect. 43 is the section where the commissioners and juries are given power to assess the value of lands and :

... damages sustained or to be sustained by any person or persons in consequence of the execution of any of the powers of this Act.

Section 86 was referred to. That was a section imposing liability upon owners of boats for any damage caused or for any expense which resulted, and again the words are expressed in the most general language and rather in sharp contrast with the words used in the following section which entitles owners made liable under sect. 86 to recover from their servants who had been in control of the boat when the damage was done ; it gives a right of indemnity which is limited to the damage caused by the negligence of the servant. There the contrast is clear ; the owners are liable without any qualification, but have only a restricted right to recover against their servants. There is only one other section, sect. 114, to which I need refer. That seems to have been inserted with this in mind : A great deal has been said about the undertakers being liable, and if anything has been omitted we put this in in order to make it quite clear that there is never to be any escape :

And be it further enacted, that if at any time or times hereafter any person or persons shall sustain any damage in his, her, or their lands, tenements, hereditaments, or property, by reason of the execution of any of the powers hereby given, and through or by means not hereby provided for, then and in every such case such damages shall, from time to time, be settled by the said commissioners, and be recovered, levied, and applied, in such manner as other damages hereinbefore mentioned are provided for.

It seems to me that the Act is doing everything it can to make it quite clear that the canal is to be at the defendants' risk so far as accidental damage may occur, and that even if that damage is caused by an act of God their liability is clear.

It is not necessary for me to say anything about the two other points raised : the malicious act of a third party, and damage done by the King's enemies. They can be decided when they arise. I merely indicate this, that, if the damage was done by a bomb dropped from a great height which merely by accident hit the canal, I should have thought that that happening was an accident. On the other hand, if the damage was done by troops being dropped by parachute and was done deliberately for the purpose of flooding the valley, then I do not think that would be an accident, nor would the malicious act of a third party be an accident. Therefore, if the defendants' contention that those words "or from any other accident" do control the earlier events is well-founded, it may be that with regard to those two causes there would be a defence, but I am not going to decide more than is necessary. I merely decide that, even if the original cause of the damage was an act of God, liability is imposed upon the defendants.

Judgment for the plaintiffs on the special case with costs.

Solicitors : *Hall, Brydon & Chapman*, agents for *Grundy, Kershaw, Farrar & Co.*, Manchester (for the plaintiffs) ; *W. H. Hanscombe* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

AKERELE v. R.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Porter, Sir George Rankin, Sir Madhavan Nair), **October 28, 29, December 7, 1942.**]

Criminal Law—Man-slaughter—Negligence of professional man in the course of his profession—Degree of negligence necessary to constitute criminal offence.

The appellant was a medical practitioner carrying on practice in Nigeria. In May, 1940, he was touring the Owerri Province in the course of his medical practice and on May 6 and 7 he visited the districts of Asaga and Akanu respectively and treated several of the inhabitants who were suffering from a disease known as yaws. The method of treatment he adopted was the injection of a mixture of sobita which he prepared fresh each day. No cases of resulting illness were reported from Akanu, but of the 57 children

treated at Asaga, 10 died. The appellant was charged with the manslaughter of Kalu Ibe, one of these children, who was taken ill with stomatitis induced by bismuth poisoning caused by the injection, and subsequently died. The appellant denied that the death was due to an overdose and submitted that Kalu Ibe succumbed because he was abnormally susceptible to the effect of bismuth :—

HELD : the appellant's one act of carelessness in preparing too strong a solution did not amount to criminal negligence.

[EDITORIAL NOTE. The point that is made here is that there was in fact only one act of negligence, though 10 children died and others were made ill. The negligence, upon the evidence, consisted only of one act in the preparation of the solution to be injected, the same solution being injected in all the cases where injurious results followed. In the courts below the matter was treated as though each injection was a separate negligent act and that when taken together they amounted to gross negligence. In considering whether negligence amounts to a criminal offence, the actual negligent act must be considered and not its results. A medical practitioner is not required in law to make as certain as is humanly possible that he injects a correct dose of any preparation. It has to be shown that he was not grossly negligent in the preparation and administration of the drug or poison and in considering this it is important to know the permissible margin of error in making up the preparation. It seems that there was in the case of the injection here used little information as to this permissible margin.

AS TO GROSS NEGLIGENCE AMOUNTING TO MANSLAUGHTER, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 441-446, para. 759; and FOR CASES, see DIGEST, Vol. 15, pp. 800-802, Nos. 8665-8685.]

Cases referred to :

- (1) *R. v. Bateman* (1925), 94 L.J.K.B. 791; Digest Supp.; 133 L.T. 730; 19 Cr. App. Rep. 8.
- (2) *R. v. Noakes* (1866), 4 F. & F. 920; 15 Digest 802, 8638.
- (3) *R. v. Crick* (1859), 1 F. & F. 519; 15 Digest 801, 8680.
- (4) *Dal Singh v. King-Emperor* (1917), 86 L.J.P.C. 140; 17 Digest 489, 534; L.R. 44 Ind. App. 137; 116 L.T. 621; 25 Cox, C.C. 705.

APPEAL by the accused from the judgment of the Court of Appeal of West Africa given on May 8, 1941. The facts are fully stated in the judgment of their Lordships delivered by LORD PORTER.

Horace Douglas, K.C., and *S. N. Bernstein* for the appellant.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and Kenelm Preedy for the respondent.

LORD PORTER : The appellant in this case is a duly qualified medical practitioner who carried on practice in Nigeria.

On Mar. 7, 1941, he was charged before the assistant judge at Umudhia Sessions of the High Court of the Enugu-Onitsha Division in the Protectorate of Nigeria on three charges.

(i) Manslaughter contrary to the Criminal Code, s. 325, in killing one Kalu Ibe in May, 1940.

(ii) Reckless and negligent acts contrary to sect. 343 (i) (e) of the said Code in giving medical treatment to the said Kalu in a manner so rash or negligent as to endanger human life or to be likely to cause harm.

(iii) Reckless and negligent acts contrary to sect. 343 (1) (f) of the said Code in dispensing or administering medicine or poisonous or dangerous matter to the said Kalu.

The assistant judge who tried the case without a jury found the appellant not guilty on the second count but guilty on the first and third counts, sentenced him on the first charge to 3 years' imprisonment with hard labour and on the third to a fine of £100 or 12 months' imprisonment with hard labour to run concurrently with the punishment awarded on the other charge, and refused bail pending an appeal.

On appeal the West African Court of Appeal quashed the sentence on the third charge, affirmed the conviction on the first charge, but varied the sentence to a fine of £500 and in default of payment to imprisonment with hard labour for 12 months. The appellant's case states that as a result of this conviction his name was struck off the local medical register by the Board of Examiners for Nigeria.

The fine was paid but the appellant petitioned His Majesty in Council for

special leave to appeal from the conviction and sentence of the Court of Appeal and on Nov. 27, 1941, his petition was granted by His Majesty in Council. Pursuant to this leave their Lordships heard the appeal on Oct. 28 and 29 last.

- A At that hearing the Attorney-General on behalf of the Crown, whilst maintaining that it was open to him to support the conviction on the third charge on the ground that the sentence alone had been quashed, admitted that if the conviction for manslaughter should not be upheld, the conviction for the negligent dispensing or administering of medicine could not be supported. It accordingly becomes unnecessary for their Lordships to consider either the propriety of recording a conviction on the two counts or whether the evidence would support a conviction on the third count. The sole question is whether sufficient grounds were shown to persuade their Lordships that the case was one in which it would be proper for the Board, in accordance with the principles upon which it acts, to advise His Majesty to grant the petition of appeal against the decision of the
- B West African Court of Appeal upholding the conviction for manslaughter recorded by the assistant judge.

The facts giving rise to the charge may be briefly stated. The appellant in the course of his medical practice was touring the Owerri Province in May, 1940, and the inhabitants of the districts of Asaga and Akanu were notified that they could be treated by him on May 6 and 7.

- C According to a list kept by the appellant 78 persons were treated at Asaga of whom 57 were children : 44 of these, of whom 36 were children, were dealt with on May 6, and 34, of whom 21 were children, on May 7. On the latter day the appellant proceeded to Akanu where 61 persons were treated of whom 33 were children and the remainder adults.

- D With a few exceptions the patients appear to have been suffering from an endemic disease known as yaws which attacks both adults and children causing lesions and ulcerations on all parts of the body and in particular on the lower limbs and feet. Two methods of inoculative treatment for this disease are now well recognised : the injection (i) of N.A.B. an arsenical preparation and (ii) of sobita, which consists of sodium bismuth tartrate as given in the British Pharmacopoeia, and is a trade preparation supplied to the doctor by a drug company in the form of a powder. It is now common ground that the proper dose for an adult is 3 grains and for a child 1 grain. The appellant was accustomed to use
- E the second specific and on his visit to Asaga and Akanu used it in the case of nearly all his patients though apparently not in every one.

Following his treatment 10 children died and there seem to have been some other cases of sequent illness, but the history of the latter was only lightly developed. All the 10 children who died came from Asaga and, so far as their Lordships are able to ascertain from the evidence, 5 were inoculated on May 6 and 5 on May 7. No illness was reported from Akanu.

- F The charge relates to one of these children, viz. : Kalu Ibe. At the trial, besides the testimony of his mother and half-brother, evidence as to his symptoms was given by Dr. Ibiam, a qualified medical practitioner, who had been called in to treat him but not until 10 days after the inoculation. In corroboration of this evidence the deposition was put in of Miss Margaret U. B. Reid, a district mission worker of the Church of Scotland at Asaga, who had seen this boy a
- G day earlier. From this evidence it was apparent that he was suffering from stomatitis induced by bismuth poisoning. There was no doubt and indeed no dispute but that this poisoning resulted from the injection, and both Dr. Ibiam and a Dr. Henry, who was also called for the Crown, inferred that the subsequent death was caused by an overdose. The defence on the other hand maintained that Kalu Ibe was peculiarly susceptible to the effect of bismuth and therefore unexpectedly succumbed to a dose which would have been harmless
- H in the case of a normal child, and that in any case the negligence, if any, did not amount to criminal negligence.

In order to show that the injection given was too strong and to negative the suggestion that the boy's death was due to an exceptional reaction to sobita in his case, the Crown tendered evidence of the symptoms, illness and death of 9 other children. In their Lordships' view this evidence was rightly received. The judge speaks of it as being :

... evidence of a course of conduct resulting in these various consequences of which the death of Kalu Ibe was only one.

In their Lordships' view, no question as to a course of conduct arises, but the summing up goes on :

The evidence is admissible in proof that Kalu Ibe's was not an isolated case which might conceivably be due to mere inadvertence or idiosyncrasy in relation to bismuth in Kalu Ibe himself.

If the words "inadvertence or " are omitted, this statement, in their Lordships' opinion, expresses the true ground for the admission of the evidence, and its propriety is perhaps better explained by the Court of Appeal when its President says :

The evidence of the illness and death of other persons was tendered not to prove the bad character of the appellant, nor to prove a course of conduct or system but to establish one of the essential points which the prosecution had to establish . . . to show that such a large proportion of the other children who were similarly injected by the appellant at the same time and place had reactions similar to those of Kalu Ibe as to prove that his reaction could not be due to his own idiosyncrasy and, therefore, must be due to an overdose.

According to the appellant's own evidence, he himself dissolved the powder in sterile water and carried a 20-oz. bottle made up for the day's work : made up as he said fresh the same day. Strictly speaking, this evidence would lead one to suppose that the mixture injected at Asaga on May 7 was made up separately from that injected on May 6, and, if this were so, some question might arise as to the admissibility of the effects of that administered on the latter date. But the appellant's counsel before their Lordships withdrew any objection to the admissibility of the evidence as a whole because he was anxious to make use of the argument that many of the patients on both days were unaffected—a result which could not, as he maintained, have been reached if the mixture had been dangerously strong.

Even if only the events of May 6 are to be considered, not less than 5 children out of 36, so far as their Lordships are able to ascertain, died after the first day's treatment ; and from the description of the symptoms the courts in Nigeria were plainly justified in inferring that the cause was stomatitis resulting from bismuth poisoning.

No doubt an overdose might be given in one of two ways, either by injecting too much of a proper mixture or by injecting the right quantity of too strong a preparation. In the former case, the evidence would not be admissible as showing that, because the appellant had been careless in one administration, he was likely to be negligent in another. But it is clear that the charge was based upon the latter suggestion and, therefore, the evidence was admissible as tending to show, from the effect produced, the strength of the mixture in the bottle.

The question, therefore, for their Lordships to determine is whether it is proved that the appellant negligently prepared too strong a mixture on the morning of May 6, and if so, whether that one act amounted to criminal negligence. Various other acts of negligence were at one time suggested by the prosecution viz. : that the accused failed to instruct his patients to come back after injection and took no adequate steps to treat them after he was informed of their illness. These suggestions were subsequently withdrawn, and were rightly discarded by the trial judge in his summing-up. It is, therefore, unnecessary for their Lordships to pronounce upon his criticism of the appellant's excuse, when he returned to Asaga on the 17th after having been informed of his patients' illnesses, that the fault was his "boy's," and of his failure to treat them further. Their Lordships would only observe in passing that he did come back, that out of his own pocket he provided mouthwash and milk, that he endeavoured without success to enlist an assistant to continue the treatment : that the excuse, admittedly false and recognised to be false at the time it was made by those who heard it, was put forward when the appellant was in the midst of a hostile mob, some armed with knives, who were at least threatening him and one of whom tried to kill him, though he ultimately managed to escape.

The trial judge found that the appellant negligently prepared too strong a mixture and that his negligence was criminal. In his summing-up he points out that the negligence on which the case rests lies not in the manner in which the accused proceeded but in what he injected, and relies upon the evidence as to the deaths of the other 9 children and upon that of a government medical officer called for the defence who said that he only knew of ten to twelve cases

of severe reaction in 1,000 to 2,000 sobita injections given by him and that he would be shocked at a proportion of ten to fourteen out of seventy.

The judge goes on to ask whether on this evidence it can be said that the accused was guilty of negligence in a criminal degree in causing the death of Kalu Ibe. No complaint can be made of what he says in reference to the degree which the courts have held essential to constitute a criminal offence of negligence. He quotes the summary of the decision in *R. v. Bateman* (1), given in HALSBURY,

A LAWS OF ENGLAND, Hailsham Edn., Vol. 9, p. 441 :

... a doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the state. . . .

He also refers to a statement of the law in the same volume at pp. 444, 445 :

What amount of negligence is to be regarded as gross is a question of degree for the jury, depending on the circumstances of each particular case.

B Both statements are true and perhaps cannot safely be made more definite, but it must be remembered that the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. The words spoken by LORD HEWART, L.C.J., in that case, at p. 796, are, in their Lordships' opinion at least as important as those which have been set out :

C It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.

How necessary it is to keep this distinction in mind may be illustrated by reference to two cases.

In a note to *R. v. Noakes* (2) it is said at p. 921 :

D It is impossible to define it [i.e., culpable or criminal negligence] and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinions.

That was a case in which a customer sent two bottles to a chemist, one for aconite and the other for henbane. The chemist by mistake put the aconite into the henbane bottle with the result that the customer took 30 drops of the former and died of it. ERLE, C.J., left the case to the jury, but at p. 921

E Strongly put it to the jury that they ought not to call upon the prisoner for his defence ; that the case was not sufficiently strong to warrant them in finding the prisoner guilty on a charge of felony.

In *R. v. Crick* (3), POLLOCK, C.B., summing up in a case in which the prisoner, who was not a regular practitioner, had administered lobelia, a dangerous medicine, which produced death, said at p. 520 :

F If the prisoner had been a medical man I should have recommended you to take the most favourable view of his conduct, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.

The two cases quoted are of course only examples, but in their Lordships' view they do rightly stress the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession.

G It is unfortunate that in the present case the two doctors called for the Crown were accustomed to use N.A.B. and had little if any practical experience of sobita, with the result that no information was forthcoming as to what excess of strength in the mixture would be required to produce the observed consequences in a normal patient and how widespread amongst the medical profession is or ought to be the knowledge of the danger of an overdose. It may be conceded that both N.A.B. and sobita are dangerous drugs if not properly used, as Dr. Ibiam said, but the known margin of error is nowhere referred to.

H The trial judge ends his summing up by saying :

The question now is, on this evidence, can it be said that the accused was guilty of negligence of criminal degree in causing the death of Kalu Ibe ? We have heard that sobita is supplied in powder form which has to be dissolved in water in a certain strength. Evidently this involves no matter of any particular technical finesse. But accused in giving these injections managed to make at least 11 persons gravely ill with symptoms of the most revolting order. In the single visit to Asaga, when he gave the injection to Kalu Ibe, out of a total of 78, there were 8 other cases besides this boy—a proportion

of over 11 per cent. serious casualties all like Kalu Ibe, through overdose of sobita.

One would think that in travelling the countryside, as is the accused's practice, giving these injections on what may be termed a wholesale scale, to these somewhat primitive people who have little knowledge of what to do if anything goes wrong and little access to medical assistance, he would at least make as certain as is humanly possible that he injects the correct doses. In my view the conclusion is inescapable that accused acted with a degree of negligence that can only be described as criminal.

If, as their Lordships have indicated, the only negligence on which reliance could be placed is the single act of dissolving the powder in water before giving the inoculations, it is immaterial that the symptoms were revolting or that the result was to make many persons ill: the act had already taken place and its observed consequences which only showed themselves at a later date could not add to its criminality. The negligence to be imputed depends upon the probable, not the actual, result. It is unfortunate that the judge nowhere states in what he finds the negligence to consist unless it be in its fatal consequences in so large a number of instances. If one may judge from his reference to the fatal consequences in the case of the other children, he seems to have thought that 1 death might have been due to inadvertence, whereas 10 could not, and to have forgotten that one act only could be complained of, viz.:—the mixing of too strong a solution in making up the preparation. To hold this opinion is to impute to the accused repeated acts of negligence as if he were to be blamed for want of care in the case of each injection instead of the one act of carelessness in preparing the mixture to be injected. Moreover, the judge in the penultimate paragraph of his summing up, quoted above, so far from considering whether gross negligence has to be proved, appears to think it enough if the appellant did not make as certain as is humanly possible that he injected the correct doses.

Their Lordships cannot accept the view that criminal negligence has been proved merely because a number of persons have been made gravely ill after receiving an injection of sobita from the appellant coupled with a finding that a high degree of care has not been exercised. They do not think that merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, a criminal degree of negligence was proved.

In coming to this conclusion their Lordships do not find themselves in substantial disagreement with the judgment of the Court of Appeal in Nigeria save in one respect, viz.: in their understanding of the grounds upon which the judge based his decision. That court as they apprehend did not itself pronounce upon the facts but inquired only whether the finding of the court below had sufficient evidence to support it. It did not consider whether the judge had sufficiently directed his mind to an analysis of the acts said to constitute a felony and to the degree of care required of a professional man against whom a criminal charge is preferred.

Nor are their Lordships conscious of departing from the rules which they have laid down for their own guidance in considering whether they should allow an appeal in a criminal matter. In *Dal Singh v. King-Emperor* (4), VISCOUNT HALDANE said, at p. 141:

The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the court below, as, for example, in the admission of improper evidence, will not suffice, if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the courts below.

Their Lordships are not in any circumstances prepared to differ from the courts below in a criminal case for any less cogent reason than those required by this statement. In this particular case, however, in their view the distinction between civil and criminal liability has been inexactly drawn, the ground upon which a criminal charge is based ill defined, and the instances of negligence increased from one to many by imputing a fresh act of negligence in the case of each death. In the result the case is one in which they consider that they ought humbly to advise His Majesty to allow the appeal and quash the conviction.

Appeal allowed.

Solicitors: *Oldfields* (for the appellant); *Burchells* (for the respondent).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

Re ORBIT TRUST, LTD.'S LEASE.

[CHANCERY DIVISION (Uthwatt, J.), **March 3, 1943.**]

Emergency Legislation—Landlord and tenant—War damage—Conditional notice of retention—Reduction of rent under ground lease—Landlord and Tenant (War Damage) Act, 1939 (c. 72), ss. 13, 14—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (c. 41), s. 10.

A block of flats consisting of 107 flats and 35 garages was damaged by enemy action in 1940 and 1941 resulting in 47 flats and 10 garages being rendered unfit for occupation within the meaning of the Landlord and Tenant (War Damage) Act, 1939. Another block of flats consisting of 32 flats and 10 garages had one flat rendered unfit in 1940. Following on the passing of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, conditional notices of retention were served on the ground landlords on Aug. 29, 1941, by the tenant of the blocks of flats, and on Sept. 26, 1941, applications were made by the ground landlords to fix a rent, the ground rents payable to them under the leases being £1,750 and £750 respectively. For the applicants it was contended that the rents should remain unaltered and that the loss should be borne by the tenant, and for the tenants it was contended that the loss should be shared by the landlords and tenants and the rents reduced.

HELD : (i) the loss should be shared between the landlord and the tenant, and the rent should be reduced by the proportion borne at the date of the happening of the war damage, by the annual value of the land as unaffected by the war damage to the annual value of the land so affected.

(ii) where property is valued as a whole, damage so slight as that suffered by the second block should not be taken into consideration, but where such damage is capable of a separate assessment such as one flat being rendered unfit, there was no reason why such damage should not be taken into account.

(iii) it was irrelevant that such leases contained full repairing covenants.

(iv) there was no reason to treat differently a position created by a conditional notice of retention from that created by an unconditional notice of retention.

[EDITORIAL NOTE.] The question here is substantially whether, where the tenant elects to retain the lease, the ground rent is to be reduced proportionately to the damage sustained. The argument was that a ground rent was not fixed upon the value of the buildings and that no case for a reduction could be based upon the fact that part of the buildings had been damaged and were unfit for occupation. The court has, however, adopted the view that the Act was designed to do justice between the parties and that it was inequitable that a tenant, who had lost the use of part of the property, should be obliged to continue to pay the full rent reserved. For this reason it is held that the loss should be shared between the landlord and the tenant and the ground rent reduced in proportion to the damage sustained. It will be noticed that the case is concerned only with the position where the lease is retained and there is little difficulty in arranging substantial justice between the parties. The real difficulty under the Acts arises where the tenant disclaims a long lease of property which has been practically destroyed. Under the Landlord and Tenant (War Damage) Act the tenant is freed from his liabilities and under the War Damage Acts he appears entitled to receive practically the whole of the insurance money without any liability to reinstate. It is true that the Treasury have power to make regulations as to the application of the insurance money, but, if they order reinstatement, the ground landlord will gain everything, and, if they do not, the tenant will gain everything. Further, as in this case, the leasehold interest may be subject to a substantial mortgage and the rights of mortgagees may have to be considered. It is in a case of this nature that the real question of doing justice between the parties arises and the matter is of the utmost importance today because tenants, who may be trustees or personal representatives, may have to decide now whether they will disclaim or retain. No such question as this arises in the present case and the matter is mentioned only to show that there are difficulties which did not have to be dealt with here.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) (AMENDMENT) ACT, 1941, s. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 169.]

APPLICATION under the Landlord and Tenant (War Damage) Acts, 1939 and 1941 to fix a rent in respect of property damaged by enemy action. All the facts are set out in the judgment.

A. T. Denning, K.C., and G. Granville Slack for the applicants.

Hon. C. R. R. Romer, K.C., and L. M. Jopling for the respondents.

UTHWATT, J. : There is raised in these two cases the question of the general principle upon which the court should act in fixing in the case of ground leases, as that phrase is commonly understood, the amount of the rent to be payable under the Landlord and Tenant (War Damage) Act, 1939, s. 10 (1) (c). The conflicting contentions are : (a) on the part of the tenant, that the loss should be shared between landlord and tenant, and the rent accordingly reduced below the agreed rent ; and (b) on the part of the landlord, that the whole loss should be thrown on the tenant, and the old rent maintained.

The facts in the first case are as follows : In the year 1935 there were in existence three companies, Beulah Trust, Ltd. with a nominal capital of £100, Langford Property Co., Ltd. with a nominal capital of £300,000, and Orbit Trust, Ltd. All these companies were controlled by the same group of persons, whom I will call the controllers.

In 1936 the then freeholders of certain property at Norwood, having built thereon a block of buildings consisting of flats and garages, agreed to sell the fee simple to Beulah Trust, Ltd., for £83,000. The controllers then proceeded to parcel out the fee simple in possession into a leasehold interest in Langford for a term of 99 years at a rent of £1,750 per annum, and a reversion on that leasehold interest in Orbit.

The transaction was carried out as follows : Langford purchased the share capital of Beulah for £31,000 or thereabouts, and undertook to pay Beulah's liabilities which amounted to £84,000 or thereabouts, being the purchase price of the property, £83,000, and incidental costs. The total sum found by Langford is stated to have been £115,250. The property was then conveyed to Beulah for £83,000 on Apr. 21, 1936, and on Apr. 29, 1936, Beulah passed a resolution for voluntary winding up, and on the same day the property was conveyed to Langford on a distribution of the assets of Beulah in its winding up. Langford on the same day conveyed the fee simple in the property to Orbit in consideration of £40,250 (that is, £115,250 less £75,000) subject to the obligation to grant the proposed lease to Langford. Orbit then leased the property to Langford for 99 years from Mar. 25, 1936, at a yearly rent of £1,750. One way of stating the result of the transaction is that Langford paid £75,000 by way of premium for the lease.

The subsequent facts relating to the title are that Langford in July, 1936, mortgaged the lease for £44,000 carrying interest at $4\frac{1}{2}$ per cent. per annum and that on Aug. 26, 1937, Orbit sold the freehold reversion to the applicants the Royal Liver Friendly Society for £40,250. On Sept. 29, Oct. 10 and 31, 1940, and Mar. 15, 1941, the property was damaged by enemy action with the result that 47 flats and 10 garages, out of a total of 107 flats and 35 garages, were rendered unfit within the meaning of the Act. Following on the passing of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, a conditional notice of retention was on Aug. 29, 1941, served by Langford. On Sept. 26, 1941, this application was made by the applicants to fix a rent and that application has been transferred to this court.

The material figures relating to the values are as follows. The annual value of the property immediately prior to the war damage was £4,149 gross and £3,081 rateable. The annual value immediately prior to the war damage of the 47 flats and 10 garages rendered unfit was £1,735 gross and £1,295 rateable. As regards the terms of the lease, it is necessary only to state that it contains full repairing covenants by the lessee.

In the second case developed property at Wimbledon was dealt with in exactly the same way. The parties to the transaction were the same as in the first case, except that a company called Pent Trust, Ltd., with a capital of £100 performed the functions assigned to Beulah in the first case. The developed freehold was bought by Pent Trust for £41,438 10s. Langford bought the shares in Pent Trust for £7,800 and undertook to pay £41,950 being the purchase price of the property and incidental expenses. The fee simple acquired by Pent Trust was conveyed to Langford on the liquidation of Pent Trust. Langford then sold to Orbit for £17,250 subject to an obligation to grant a 99-year lease back to Langford at a rent of £750 and that lease was duly granted. The lease is in similar terms to the lease of the Norwood property.

These transactions took place in the years 1935 and 1936. On May 11, 1936, Langford mortgaged the lease for £21,500 carrying interest at $4\frac{1}{2}$ per cent. per

annum. On June 15, 1937, Orbit sold the freehold reversion to the Royal Liver Friendly Society for £18,000. The property was damaged by enemy action on Oct. 11 and 27 and Nov. 16, 1940, with the result that one flat out of a total of 23 flats and 10 garages were rendered unfit. A conditional notice of retention was served on Aug. 29, 1941. On Sept. 26, 1941, the application to fix a rent was made. The annual value immediately prior to the war damage of the whole property was £1,700 gross and £1,350 rateable. The annual value immediately prior to the war damage of the flat rendered unfit was £52 gross and £42 rateable.

In each case the lease has a long term to run and the rent reserved is well secured. Each falls within the usually accepted conception of a ground lease. Commercially the interest of the reversioner in each case may be properly regarded as a ground rent and as a ground rent only, for the value of the reversion—apart from the right to receive the rent—is practically nothing, and the acquisition of reversions such as exist here would in substance be an investment of moneys to return a certain yield and not an adventure into the property market.

Under the Landlord and Tenant (War Damage) Act, 1939, s. 13, ground leases as therein defined were excepted from the unqualified operation of the general provisions of that Act relating to notices of disclaimer and retention. The tenant was not entitled to serve any notice other than a notice of disclaimer and could serve a notice of disclaimer only if authorised to do so by the court. The court could only authorise the service of the notice if satisfied, having regard to all the circumstances of the case, including the length of the unexpired term of the lease and any offers of extension of the term made by the landlord, that it was equitable to allow the tenant to disclaim the lease. If leave was given the court was empowered to impose conditions as to payment of compensation and otherwise.

The result was that in no event was the rent liable to be reduced, but, where fairness to the tenant could not otherwise be secured, the lease could be disclaimed. The landlord was entitled either to the full rent or to the property freed from the lease. To my mind the section was based upon, and gave effect to, the view that reversions on ground leases as defined in the Act were to be regarded primarily as investments to be accorded special protection, and not as in essence proprietary interests which ought to be affected by the misfortunes happening to the land. It is to be observed that this special protection was very limited in its operation, for the definition of ground lease in the Act is narrower in scope than the ordinary conception of a ground lease. No lease was, under the Act, a ground lease if the rent were higher than the proper rent at the beginning of the lease for a lease of the ground without the buildings. Many ground leases in the ordinary acceptance of the term fall outside that definition.

The Landlord and Tenant (War Damage) (Amendment) Act, 1941, fundamentally alters this position. Sect. 10 of the 1941 Act repeals sects. 13 and 14 of the 1939 Act and provides that the 1939 Act shall apply to ground leases "in like manner as it applies to other leases." The result is that all leases whatever their rent are subject to the general scheme of the 1939 Act. The distinction in principle made by the 1939 Act between ground leases and other leases entirely disappears. The landlord under a ground lease, where war damage causing unfitness occurs, can no longer say: "*Non haec in foedera veni.*" In exercising the jurisdiction under sect. 10 there is no reason to be found in the Act for treating ground leases on a principle different from that proper to be applied to other leases.

To determine the principle upon which the court should act under sect. 10 of the 1939 Act in fixing a rent, it is necessary to consider that section in the light of the general effect of the Act. The starting point of sect. 10 is the provision in subsect. (1) (b) that, for the period between the date of service of notice of retention and the date when the land is rendered fit, no rent is to be paid. That starting point was obviously necessary if every possible case of unfitness caused by war damage was to be provided for. Subsect. (1) (c) provides that, subject to the maximum, the rent shall be such as the court may direct, and that the rent shall be payable in respect of such period as the court may fix.

It is implicit that the court is to try to fix a rent which is fair and equitable in light of all the relevant circumstances. The maximum yearly rent specified

in the section is, whichever shall be the less, the annual value, at the time of the application of the landlord to fix a rent, of so much of the land as is at the time capable of beneficial occupation, or the full annual rent reserved. The only point that can be made on the maximum is that it contemplates that a case may arise where the full reserved rent may be payable notwithstanding that the premises have been rendered unfit by war damage. There is not much in this point, when it is recalled that only comparatively small damage may have the effect of rendering the premises unfit. Both the minimum and the maximum are dictated by the need to give the court full power to do justice.

From the section taken by itself I fail to get any guidance on the point of principle I am asked to decide, and it is necessary to look at the general scheme of the 1939 Act. Pt. I of the 1939 Act has the effect that whatever the terms of the bargain between the landlord and the tenant, neither of them is to be liable to make good war damage. It follows to my mind that in fixing a rent under sect. 10 it is irrelevant to consider whether it was the landlord or the tenant who was under the lease subject to a liability to repair which comprehended war damage. But beyond this the provisions of Pt. I are not of any assistance in determining the matter in hand. Pt. II of the 1939 Act deals with the case where premises held under the lease are by reason of war damage rendered unfit. The effect of the provisions is in substance that it lies with the tenant to make the first substantive move: that no tenant can be compelled to remain against his wish unless the landlord assumes the burden of rendering the premises fit, or is entitled to remain against his landlord's wish unless he, the tenant, is prepared to assume that burden. The effect of the 1941 Act as to conditional notices of retention is that the tenant may serve a notice which will entitle the tenant to retain his tenancy until the nature of the payment to be made under the War Damage Act, 1941, has been decided, and then his notice operates thenceforth as a notice of retention if that decision be that a cost of works payment is to be made, and as a notice of disclaimer if a value payment is to be made. To my mind, the general basis on which this part of the Act proceeds is that war damage causing unfitness is treated as a common disaster to be shared by the landlord and tenant. Taking this view, I think that the jurisdiction conferred by sect. 10 should be exercised on the lines that the rent to be fixed should reflect the fact of a common loss.

It is, I think, worth recalling that in the Statute of Charles II, passed to meet the position caused by the Fire of London, Parliament made a declaration upon this point. That position was similar in character to the present position. The destruction in London caused by the fire is comparable to that which the present legislation is designed to meet. In a court of law the fire was held to be attributable to enemy action. It was recognised that the enforcement of covenants to repair would cause hardship, and legislation was felt to be necessary.

Pepys in his diary gives part of the history. He says:

But my LORD CREWE was discoursing at table how the judges have determined in the case whether the landlords or the tenants, who are, in their leases, all of them generally tied to maintain and uphold their houses, shall bear the loss of the fire; and they say that tenants should against all casualties of fire beginning either in their own or in their neighbour's (premises); but, where it is done by an enemy, they are not to do it. And this was by an enemy, there having been one convicted and hanged upon this very score . . .

And then he adds, characteristically:

This is an excellent salvo for the tenants, and for which I am glad, because of my father's house.

This entry, appropriately enough, appears, under date "November 5." The point of law mentioned by Pepys was, so far as I have been able to ascertain, never formally argued and decided. The matter was set at rest by Parliament. The Statute 18 and 19 Car. 11, c. 7—drafted by SIR MATTHEW HALE, then Chief Baron of the Exchequer—set up the Court of Fire Judges which was empowered to cancel leases, order new leases and to grant extended terms, and the declaration to which I have referred is contained in the preamble, which runs as follows:

Whereas the greatest of the Houses in the City of London and some in the Suburbs thereof have been burnt by the dreadfull and dismall Fire which happened in September last Many of the Tennants Under tenants or late occupiers whereof are lyeable unto

Suites and Actions to compell them to repair and rebuild the same and to pay their Rents as if the same had not been burned and are not relievable therein in any ordinary course of Law and great Differences are like to arise concerning the said Repaires and new Building of the said Houses and payment of Rents which if they should not be determined with all speede and without charge would much obstruct the rebuilding of the said City. And for that it is just that every one concerned should beare a proportionable share of the losse according to their severall interests wherein in respect of the multitude of cases varying in their circumstances noe certaine generall rule can be prescribed.

A The method adopted by Parliament for dealing with the problem raised by the destruction of property caused by enemy action in this war differs somewhat from that adopted by Parliament in the case of the problem arising from the Fire of London, but I see no reason for thinking that there is not implicit in the legislation of 1939 the principle of sharing loss which Parliament proclaimed as just in 1666.

B It is convenient here to deal with one argument put forward by counsel for the applicants. He correctly pointed out that where there are mortgages on the leasehold interest and also on the reversion—a likely event in the case of ground leases—the mortgage of the reversion is a better security than the mortgage of the lease, for unless the rent be paid the lease is liable to forfeiture. The mortgagee of the reversion has, therefore, either the security of a reversion in respect of which the rent is paid or of the fee simple freed from the lease. If C the rent were reduced, one improved the security of the mortgagee of the lease and worsened that of the reversioner. That, he argued, could not have been intended. The answer given by counsel for the respondent to this argument is, I think, right, namely, that the 1939 Act in Pt. II set out to modify the relation between landlord and tenant and that relation only: that it did not attempt to follow up the matter in all its consequences by dealing with the D position of mortgagees and mortgagors *inter se* in any way: that the circumstance that either party might have mortgaged his interest was not on the construction of the Act material in determining the general question whether a common loss to the landlord and tenant should be the basis on which the jurisdiction given by sect. 10 should be exercised.

E Accepting the general principle that the war damage is to be regarded as a common loss, it appears to me that, where there are no special circumstances, a practical way of giving effect to the principle is to ascertain the proportion borne at the date of the happening of the war damage, by the annual value of the land as unaffected by the war damage to the annual value of the land as so affected, and to reduce the reserved rent proportionately. This, indeed, was conceded by counsel for the applicants as being the correct principle to apply if he were wrong in his substantive contention that the loss should fall entirely F on the ground lessee. Where there are special circumstances, the figure so obtained should, in my view, be treated as a starting point. Further, unless there are special circumstances, I think that the rent so fixed should be fixed at the outset once and for all and should run for the whole period beginning with the date when the notice of retention was served and ending with the date on which the land is rendered fit or, where there is served a conditional notice of retention which ultimately becomes an effective notice of disclaimer, ending G with the date on which the lease is thereby determined. Put in another way, I think that the position should be crystallised at the date of the happening of the war damage and that the court should not be asked to embark upon a speculation upon the future outlook for the property.

H Leaving aside the question raised by the comparatively small damage in the second case, there are not, in my view, any relevant special circumstances in either case. For the reasons I have given, I regard as irrelevant the incidence of the original covenant to repair and the fact that the lease is a ground lease in the common acceptance of the term. No evidence was given on the question whether or not either lease was a ground lease within the meaning of the Acts, and I regard that matter as irrelevant. I see no reason for treating the position created by a conditional notice of retention differently from that created by a notice of retention which is unconditional. My attention has not been drawn to any particular facts relating to the nature of the damage suffered which might bear on the propriety of departing from the rule of proportion. Further, it is not suggested that the annual value at the date of the damage of either property

had fallen by reason of the failure of the tenant before that date to perform the covenants in the lease. Lastly, I regard the method in which in the present cases the leases were created as irrelevant, and I would regard the actual payment of a premium on the granting of a lease as equally irrelevant, for the court is concerned with apportioning the loss between the interests in the land as they happen to exist at the relevant date.

I have already stated the figures of value. In the first case the proportionate sum, £1,295 over £3,081 multiplied by £1,750 works out at £1,014. I fix the annual rent at £1,014, to be paid from the date of the service of the notice of retention for the period I have mentioned. That rent is to be paid by the instalments and on the days specified in the lease, except that any arrears due to date are to be paid within 14 days from today. To safeguard the position as respects unforeseeable happenings in the future, the payment directed will be subject to any further order.

In the second case the damage was small. The property comprised 32 flats and 10 garages and only one flat was rendered unfit. The application of the rule of proportion results in a rent of £727 as compared with a former rent of £750. The question is whether I should regard the damage as a "rub of the green" not calling for any adjustment in the amount of the reserved rent.

In a case where all the property in the lease is used and valued as a single unit, I should be inclined to take the view that a depreciation in annual value of the order of 3 per cent., as in this case, or, indeed, a higher percentage, did not call for a departure from the original rent. But, in the present case, the property affected by the war damage is in substance a distinct property capable of separate valuation and normally separately valued, and I see no reason why the rule of proportion should not be applied. Nor do I think that an annual sum of £23—the difference between £750 and £727—payable for an undefined term not necessarily ending with the war, falls within the *de minimis* rule. I accordingly fix the rent at £727, that rent to be payable on the same terms as I have mentioned in the first case.

I desire to refer to one general matter. In the present case the parties have negotiated openly. Frequently negotiations take place without prejudice and the court, in dealing with the question of costs, is then somewhat at a disadvantage. It would be a good practice, which I wish to see followed in any other cases which may come before me, if, either before proceedings are brought or at an early stage in the proceedings, the landlord made a firm offer of the least rent he was willing to accept and the tenant made a firm offer of the highest rent he was willing to pay.

There is no reason why, unless the parties so desire, the court should be informed of the terms of these offers until the amount of the rent has been fixed by the court and the question of costs comes to be decided. This practice will enable the court adequately to deal with the question of costs, and it has other considerable advantages.

Declaration accordingly. Applicants to pay three-fourths of the respondents' costs.

Solicitors: *Montagu's and Cox & Cardale*, agents for *Bremner, Sons & Corlett*, *Liverpool* (for the applicants); *Wedlake, Letts & Birds* (for the respondents).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

RUSKIN INVESTMENTS, LTD. v. COPEMAN (H.M. INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Greene, M.R., Scott and MacKinnon, L.JJ.),
February 18, 19, March 5, 1943.]

Income Tax—Profits from trade and trade receipts—Financing building operation—Loan repaid by conveyance of ground rents—Ground rents greater in value than loan—Income Tax Act, 1918 (c. 40), Sched. D, case III, case VI.

The appellant company agreed to lend the C. company £15,000 by instalments. The agreement provided for interest at 5 per cent. per annum on amounts outstanding, but the lenders agreed to waive all claims to interest upon the due performance by the borrowers of the whole of their obligations under the agreement. The C. company agreed to expend the £15,000 in the erection of houses and upon the completion of each house to grant a

lease to the purchaser for 99 years at a ground rent of £6 per annum. The C. company also agreed to convey the freehold of each house together with the ground rent reserved by the leases to the appellant company and that the sum of £58 16s. 5½d. should be taken as the value of each ground rent. Upon each such conveyance the appellant company agreed that their loan of £15,000 should be satisfied to the extent of £58 16s. 5½d. 249 houses were completed and the conveyances to the appellant company were duly executed. The appellant company accepted these as due performance of the C. company's obligations and by an agreement dated Dec. 31, 1938, the appellant company released the C. company from all liabilities. The market value of each ground rent was about £130. The appellant company was assessed to income tax upon the difference between the market value and the sum advanced :—

HELD : (i) the transaction was not one of sale and purchase but a loan. (ii) by lending their money the appellants had realised a profit, not in cash but in kind, and this profit was clearly of an income nature and was assessable under Sched. D, case III or, if not assessable under that case, then under Sched. D, case VI.

Decision of MACNAGHTEN, J. ([1942] 2 All E.R. 520) affirmed.

[EDITORIAL NOTE.] The whole point in this case is whether the transaction was one of sale and purchase or one of loan. After a careful analysis, the Court of Appeal have come to the same conclusion as MACNAGHTEN, J., that it was a loan and, therefore, the profit made was assessable to tax.

As to ANNUAL PROFITS IN THE NATURE OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, pp. 178-180, paras. 372-376; and FOR CASES, see DIGEST, Vol. 28, pp. 62-64, Nos. 316-328.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; *sub nom. Westminster (Duke) v. Inland Revenue Comrs.* (1935), 19 Tax Cas. 490.
- (2) *Inland Revenue Comrs. v. Ballantine* (1924), 8 Tax Cas. 595; 28 Digest 63, t.
- (3) *Eastern National Omnibus Co., Ltd. v. Inland Revenue Comrs.*, [1939] 1 K.B. 161; [1938] 3 All E.R. 526; Digest Supp.; 108 L.J.K.B. 167; 160 L.T. 270.
- (4) *Lowry v. Field*, *Lowry v. Williams*, *Tutcomb v. Clancy*, *De Burgh Whyte v. Clancy*, [1936] 2 All E.R. 735; Digest Supp.; 20 Tax Cas. 679.
- (5) *Wilson v. Mannooch*, [1937] 3 All E.R. 120; Digest Supp.; 21 Tax Cas. 178.
- (6) *Inland Revenue Comrs. v. Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.
- (7) *Secretary of State in Council of India v. Scoble*, [1903] A.C. 299; 28 Digest 65, 337; 72 L.J.K.B. 617; 89 L.T. 1; *sub nom. Scoble v. Secretary of State for India*, 4 Tax Cas. 618.
- (8) *Morley v. Tattersall*, [1938] 3 All E.R. 296; Digest Supp.; 108 L.J.K.B. 11; 159 L.T. 197; 22 Tax Cas. 51.

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated July 27, 1942, reported [1942] 2 All E.R. 520. The facts are fully set out in the judgments. *J. Millard Tucker, K.C.*, and *L. C. Graham-Dixon* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Reginald P. Hills* for the respondent.

Tucker, K.C. : The true view of this transaction is that the appellants purchased the ground rents for £15,000. There was no provision that the sum advanced should ever be repaid in money. The fact that something is described as interest does not make it interest on money within the meaning of r. 1 (a) of case III. In order to ascertain whether anything under the agreement in the present case is interest within the meaning of that rule, it is necessary to get the true meaning of the agreement from the agreement itself. Although the parties have described themselves as lenders and borrowers, it does not matter what terms the parties have used, they were really purchasers and vendors. The transaction is a purchase with the advance of the purchase money. The appellants have not had interest either in cash or in kind. In the present case the advance is not a loan in the ordinary use of the word. The interest provided for in the agreement was really a penalty to be exacted in the case of the non-fulfilment by the developers of their obligations. *Inland Revenue Comrs. v. Ballantine* (2) is an instance of what was called interest being held not to be interest in the eye of the law. If I have satisfied the court that in no circumstances could any part of the ground rents, *qua* ground rents, be interest

on money, case III cannot apply because the appellants never received the interest. If there is any interest on money, in its strict legal sense, all that the appellants have to show is that under the transaction there was a defeasible right to charge interest, *eo nomine*, and that defeasible right never arose because it could only arise upon the developers' default. There never was, in the present case, any provision that the sum advanced should be repaid in money and there is no room for the application of the principle "Once a mortgage, always a mortgage." [Counsel referred to *Westminster (Duke) v. Inland Revenue Comrs.* (1), *Eastern National Omnibus Co., Ltd. v. Inland Revenue Comrs.* (3), and *De Burgh Whyte v. Clancy* (4).]

The Attorney-General: It is well recognised that it makes no difference in income tax law whether money or money's worth is received in an income capacity. If ground rents are received as income they fall to be assessed as though money had been received. *Wilson v. Mannooch* (5) was a case in which two sums were lent to certain builders to enable them to purchase properties on the terms that the lender should receive a sum on the re-sale of each. In that case it was held that the sums were annual profits and liable to income tax. I entirely agree that the present case depends upon the construction of the agreement. From the Crown's point of view it does not matter whether this case falls within case III or case VI. In the present case, counsel for the appellant company is seeking to do what the House of Lords, in *Duke of Westminster's* case (1) said could not be done. His argument amounts to saying that the agreement should be disregarded and that one should fix one's mind upon the fact that the appellant company parted with £15,000 and finished up with 249 ground rents, and, therefore, the transaction was not a loan. If the scheme had not been completed the full rigour of cl. 8 of the agreement might have led to the same sort of hardship as courts of equity have had to deal with in connection with ordinary mortgages. The transaction was more like a secured loan than anything else. The agreement shows that the parties had worked out how the loan was to be repaid. The compensation for being out of the money was that money's worth, instead of money, should be given back. Although the contract in the present case has unusual features, from the income tax point of view the transaction was a loan. The lender received compensation for making the loan by receiving money's worth over the amount of the loan. [Counsel referred to *Inland Revenue Comrs. v. Ramsay* (6).]

Hills followed on the same side.

Tucker, K.C., in reply: In making his observations in *Ramsay's* case (6), LORD ROMER could not have had in mind the decision of the House of Lords in *Scoble's* case (7). I ask the court to look at the strict legal nature of the transaction in the present case, whatever the wording of it may be. The money was advanced on the footing that it should not be repaid but that the appellants should receive the ground rents. If the transaction in the present case is a loan in equity and the appellants are liable on equitable principles to repay the value of the ground rents above the amount of the interest at 5 per cent. per annum, then the appellants are only liable to be charged with income tax on 5 per cent. That is shown by *Tattersall's* case (8). No tax, however, is payable because the transaction was an indirect method of paying for the ground rents. [Counsel referred to *Westminster (Duke) v. Inland Revenue Comrs.* (1).]

LORD GREENE, M.R.: This question arises out of a transaction between the appellants and Cosil Estates, Ltd., who were engaged in developing a building estate and were in need of financial help for the purpose of their operations. As the result of the transaction, Cosil Estates, Ltd., received from the appellants the sum of £15,000 in instalments as the building work proceeded and upon completion of the houses, 249 in number instead of 255 as originally contemplated, they transferred to the appellants in absolute ownership the 249 freehold ground rents which had been created. If the transaction which led to this result was, as the appellants assert, one of sale and purchase of the ground rents, the profit representing the excess value of the ground rents over the sum of £15,000 (which was considerable) would be a capital profit not assessable to income tax. If, on the other hand, the transaction was one of loan, the profit is an income profit assessable to tax either under Sched. D, case III, or case VI, it matters not which. The Special Commissioners held that the transaction was one of loan and their decision was affirmed by MACNAGHTEN, J.

The terms of the transaction are to be found in an agreement of Jan. 25, 1935. It is a curious document and perhaps it is not unfair to say that anything less like a contract of sale and purchase I have never seen. The parties are described as "borrowers" and "lenders" respectively, the £15,000 is described as an "advance" made "by way of loan" carrying interest at the rate of 5 per cent., and "repayment" of the "loan" is to be made in the manner stated. The phraseology and structure of the agreement show beyond possibility of doubt that the parties regarded the transaction as one of loan and were at pains to ensure that it should be emphatically so described. On the face of it, the agreement was for a loan to be repaid, not in cash, but in kind, and although, if the borrowers duly performed the whole of their obligations, the appellants agreed to waive all claim for interest (cl. 3), but, if they made default in the performance of any of those obligations, the interest would be payable. The borrowers did not, in fact, perform the whole of their obligations since they only transferred 249 ground rents instead of 255. Nevertheless, by an agreement of Dec. 31, 1938, the appellants released them from all liabilities. In substance, therefore, the appellants were agreeing to accept the ground rents in satisfaction of the principal advanced and all claims to interest thereon.

The appellants' case was to the effect that in spite of the language used by the parties, the contract could not in law be anything but a contract of sale and purchase since the provision for satisfaction of the so-called loan, not in cash, but by the transfer of the ground rents, necessarily stamped the character of sale and purchase upon the transaction. It was said that this must be so since the appellants could not in any circumstances sue for the amount advanced and their only remedy would be an action for specific performance of the undertaking to transfer the ground rents or for damages for its breach. I do not think that this view as to the only remedies open to the appellants is correct. The true effect of the provisions as to the "liquidation" of the "loan" by the transfer of ground rents appears to me to be that the borrowers are to be bound to transfer the ground rents and that the appellants are bound to accept them if tendered; but, if the borrowers refuse to transfer the ground rents, the obligation to accept them no longer prevails and the appellants are entitled to sue for repayment of the principal as well as the interest. But even if this view is incorrect, the provisions as to interest make it impossible to accept the appellants' argument since they are quite irreconcilable with the theory that the transaction was one of sale and purchase. The appellants, by lending their money, have realised a profit, not in cash but in kind, and this profit is clearly of an income nature. The view taken by the Special Commissioners and by MACNAGHTEN, J., is, in my opinion, unassailable and the appeal must be dismissed with costs.

SCOTT, L.J.: I agree, but in deference to the arguments of counsel for the appellant company, I will read the judgment which I had already written before I had the opportunity of reading that of LORD GREENE, M.R.

The sole question in this appeal is whether 249 small pieces of land, each carrying a house, subject to 99 year leases at £6 per annum ground rent, the freehold titles to which were transferred with the benefit of the leases to the appellant company (to whom I refer as the company) during the accounting years of the company which ended on Mar. 31, 1936, 1937 and 1938, are to be treated for income tax purposes as part of the company's income in the tax years of 1935-6, 1936-7 and 1937-8 to the extent of a large part of their ground rent values. So stated, the contention of the Commissioners of Inland Revenue seems a paradox; but on consideration I think that, in principle, their contention is right. The problem is raised by a written agreement of an extraordinary character, made by the company with another company, called Cosil Estates, Ltd. (to whom I refer as Cosil) on June 25, 1935. The Special Commissioners found in favour of the Crown, and MACNAGHTEN, J., dismissed the appeal of the company. The special case is fully and clearly stated, and it is only necessary to refer briefly to the facts in order to understand the surrounding circumstances in which the agreement came to be made. The sole shareholders in the company were R. Silverstone and M. H. Cowen. The sole shareholders in Cosil were A. Silverstone (a brother of R. Silverstone) and Cohen, a brother-in-law of M. H. Cowen. In each company the two shareholders were also directors. The two Silverstones were also partners in a firm called "Silverstone & Co.,

estate agents." What happened was this. The firm, at an unstated date, bought an estate which they thought suitable for what is usually miscalled "development," and for that purpose sold part of it to Cosil for £13,500, Cosil's business being that of builders and "developers." Cosil had to raise the money to pay the firm. The appellant company was registered on May 7, 1935. Whether it was registered for the purpose of providing Cosil with the money does not appear. Its memorandum made its primary object the acquisition of landed property, and expressly forbade dealing in land; it also provided that, in the event of some realisation becoming necessary, the resulting surplus or deficit was to go to capital account. The company was asked by Cosil to find the necessary money, and was willing to do so on the terms subsequently expressed in the written agreement. There is no suggestion of any ground for treating either company as anything but an independent entity and effective juridical person, or for regarding the written agreement as embodying anything but the real intention of both the contracting companies. The only function, therefore, of the court is to construe the language used, giving the words their natural meaning if there is nothing in the agreement which makes it impossible to do so; and by that interpretation to ascertain what was the bargain into which the parties in fact entered. A

The contention of the Crown is that the instrument means what it says, that the company were the lenders and Cosil the borrowers; that the transaction provided for by it was a loan by the appellant company to Cosil of £15,000; that the company's remuneration for the service of the loan was not money interest, but included very much more valuable fruit, namely, the absolute transfer of the reversionary title to each of the 255 plots, with the ground rent of £6 per annum on each, payable under the 99 year leases, which Cosil were to grant to the purchasers of the houses; and finally, that each transfer to the company of one plot was to "liquidate" its part of the loan, as to both capital and interest, to the extent of 1-255th of the £15,000 lent. The whole transaction was duly carried out. The company advanced the £15,000. Cosil built the houses; leased the plots; and transferred to the company all the land, which they had bought, with all the houses which they had built; exactly as provided by the agreement, except that the total number of houses built was 249, that is, 6 short of the agreed total; but the company waived the breach by an indorsement on the agreement on Dec. 31, 1938. B C

The main contention of the company, both before us and below, was that in law the transaction to be effected under the terms of the agreement was not a loan at all, but a purchase, or rather a series of purchases, of the land acquired by Cosil from the firm, and then "developed" by Cosil. It was submitted that the £15,000 was the purchase price; and that the stipulation as to interest was limited, in effect, by the terms of the agreement to interest on prepaid purchase money in that it was only to be paid by the vendors in case they made default in carrying out the stipulated transfers without delay. Upon those premises the conclusion was said to follow in law that it was a mere misuse of language to describe the company as making a loan when they were, in truth and in law, effecting a purchase of real property; that in the event no interest ever became payable, and nothing but a capital asset accrued to the company. D E

Our decision must depend on what the transaction really was, and in the circumstances of the case that can only be ascertained by interpreting the agreement. That document, in unequivocal English, provides that the company (called throughout "the lenders") shall advance the £15,000 "by way of loan" to Cosil (called throughout "the borrowers") in round sums of £1,000 on one day's notice, the first advance being £2,000. The first clause provides that "repayment . . . shall only be liquidated by the transfer to the lenders by the borrowers of the ground rents" to be created and transferred as provided in cl. 2, which is as follows: F G

The borrowers will, on the sale of each of the said two hundred and fifty-five houses to be erected on the said land as aforesaid grant leases in a form to be approved by the lenders' solicitors to the various purchasers thereof for the term of 99 years from Sept. 29, 1935, at a ground rent of £6 per annum in respect of each house and as soon as each lease has been completed the borrowers will transfer the freehold of each piece of land with the house erected thereon so leased (subject to but with the benefit of such lease) to the lenders. Transfers to the lenders by the borrowers shall be made either in respect of each house or in blocks as the lenders may request the borrowers. H

Passing over, for the moment, cl. 3, which deals with interest, I observe that cl. 4 provides for the deposit with the lenders, if requested, of the land registration certificate of absolute title (for the whole of the land), such deposit not to interfere with the borrowers' right to grant leases. By cl. 5 the borrowers' covenant to build the 255 houses within 5 years to the satisfaction of the lenders' surveyor and in accordance with plans to be approved by him. Cl. 6 entitles the lenders to refuse further advances, if the borrowers wholly or partly cease work on their building schemes for 2 months. Cl. 7 provides that the value of each of the 255 ground rents of £6 "shall be taken to be" the aliquot part of £15,000, namely, £58 16s. 5½d.; and that "when the borrowers have completed all the houses, granted all the leases and transferred to the lenders the freehold of each of the plots, the loan of £15,000 shall be deemed to have been liquidated and the borrowers' obligations hereunder fulfilled"; with a comparable proviso in case of part performance of the whole agreement.

The wording of cl. 8 is important. It is as follows :

The borrowers will if for any cause whatsoever they are unable to complete their building scheme within the period of 5 years from the date hereof or shall fail or neglect to proceed with such scheme or if the lenders shall at any time request them so to do forthwith transfer to the lenders such of the said land together with any buildings thereon as they may not have previously transferred to them.

Cl. 9 is similar to the proviso to cl. 7.

I now return to the question of interest. Cl. 3 provides in terms for interest at 5 per cent. on the £2,000 first advanced, and similarly on all further sums advanced, to accrue from the date of each advance or so much thereof as shall be from time to time outstanding and remain unsatisfied by the transfer of the said ground rents to the lenders, provided always that the lenders shall "waive all claims to such interest upon the due performance by the borrowers of the whole of their obligations hereunder."

In cl. 7 there was also a provision (to which I did not refer in my previous summary) in regard to payment of interest; but as it was not to apply in the event of the lenders being compelled by the agreement to waive their claims, whether to repayment of capital in cash or to payment of interest, in the event of the borrowers duly performing the whole of their obligations, and as the borrowers did, in fact, perform all their obligations, the provision never became operative, and need not further be considered.

It was really because by the agreement Cosil was bound to transfer the title to the land, subject to the leases, to the company at the cost to the company of £15,000, that it was possible for the company to contend that the transaction contemplated by the agreement, if duly performed on both sides, was the purchase of the reversion. It is a plausible way of presenting the appellants' case, and had there been any single term of the agreement which we should, of necessity, be obliged to recognise as inconsistent with the basic idea of a loan, it would have been a strong and perhaps even a sufficient reason for rejecting the many words of loan which the parties have used in the document. I confess that I was attracted by that presentation of the case just because of the possibility, as it appeared to me, that the business transaction at the back of the agreement could equally well have been expressed in terms of purchase; for both a right to interest and also equitable protection, by deposit of the land certificate, against default by Cosil after they had received some or all of the prepaid instalments of the purchase price could have been provided for in such a contract of sale. But what compels me to reject that argument is that I can find no provision whatever in the document which is necessarily inconsistent with the idea of loan. And, if that is so, the decision in *Duke of Westminster's* case (1) and the passages in the judgment of SLESSER, L.J., in this court and in the opinions in the House of Lords cited to us by counsel for the appellants are a very two-edged weapon for him to use. The House of Lords' mandate of interpretation is that it is our duty to construe the words which the parties have chosen in order to express their intention in accordance with their natural meaning in the English language—or, if they be words of legal art, in their legal meaning—and to reject no word unless the context compels the rejection. The agreement, undoubtedly, adopts a very odd way of effecting the business purpose which the parties had in view; but it is not an impossible way of doing it. The investment was a risky one—the risk of war was one; a new depression in

trade as in 1930 was another; ground landlords have not always been wholly free from political fears; the company might even have had a misplaced fear of an assessment on it for tax as a trading concern dealing in land, in spite of its memorandum; all these considerations would make it wise to put a low valuation on the ground rents.

I need not, indeed I ought not, to speculate on the company's motives; for it, in fact, got by its loan transaction everything that it could have got by an avowed purchase, except immunity from income tax and perhaps from sur-tax for its two members, and that risk, perhaps, escaped the attention of the draftsman. The result was that the reversion and ground rents of the 249 plots were received primarily in repayment of the capital loan of £15,000. The balance of their rather speculative value was the company's remuneration for the service of the loan, taxable under Sched. D, case VI. I express no opinion about case III.

I do not think that the appellant company has any real point as an alternative to its main argument. There is, I understand, no dispute on the figures. I agree with the order proposed by LORD GREENE, M.R.

MACKINNON, L.J.: I agree, and do not think it necessary to add anything.

Appeal dismissed with costs.

Solicitors: *Beckingsales & Naylor*, agents for *Joseph Cohen & Cowen*, Birmingham (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Considered. PAOLANTONIO v. PAOLANTONIO. [1950] 2 All E.R. 404.

LUCCIONI v. LUCCIONI.

[COURT OF APPEAL (Scott, MacKinnon and du Parc, L.J.J.), **March 8, 1943.**]

Divorce—Service—Dispensing with service—Respondent resident in enemy-occupied territory—Matrimonial Causes Act, 1857 (c. 85), s. 42.

In a petition for divorce on the ground of the husband's desertion, the petitioner sought leave to dispense with service of the petition on the respondent whose last known address was in enemy-occupied territory and whose present address was unascertainable. The refusal of the German Government to allow the communication of legal process to parties in German-occupied territories rendered any form of substituted service impossible and the petitioner therefore contended that she was entitled to an order dispensing with service under the Matrimonial Causes Act, 1857, s. 42:—

HELD: (i) where the petition involves a change of status, the court should not dispense with service unless it is satisfied that the respondent has been made aware of the presentation of the petition and has had an opportunity of entering an answer.

(ii) by stating such a general indication as to the lines upon which the discretion of the court should be exercised, the judge is not placing any fetter upon the exercise of that discretion in any particular case.

Decision of LORD MERRIMAN, P. ([1943] 1 All E.R. 260) affirmed.

[EDITORIAL NOTE.] The Court of Appeal have affirmed the decision of LORD MERRIMAN, P., as to the general lines upon which the discretion in such a case should be exercised. It was contended that the laying down of these principles for the guidance of the court in exercising such a discretion was placing a fetter upon the absolute discretion given by the Act of 1857. Such a statement, however, is not properly to be regarded as a fetter upon the exercise of the discretion, but a statement for the future guidance of the court and of parties as to the principal matters which will be considered when the court is asked to exercise that discretion.

AS TO SERVICE OF DIVORCE PETITION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 705-707, paras. 1055-1060; and FOR CASES, see DIGEST, Vol. 27, pp. 391-393, Nos. 3854-3856, 3860-3883.]

Case referred to:

(1) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; *sub nom. Bartlam v. Evans*, 157 L.T. 311.

APPEAL from an order made on an *ex parte* application by LORD MERRIMAN, P., dated Feb. 2, 1943, reported [1943] 1 All E.R. 260.

The application was for leave to dispense with the service of a wife's petition

for divorce on the ground of desertion on her husband. The facts are fully set out in the judgment of SCOTT, L.J.

Gilbert Beyfus, K.C., and M. P. Solomon for the appellant.

SCOTT, L.J. : This is an appeal from an order made by LORD MERRIMAN, P., refusing leave to proceed without effecting service, under the power conferred on him by the Matrimonial Causes Act, 1857, s. 42, which is one of the sections of that Act still in force. The Matrimonial Causes Act, 1937, gave a power to **A** make rules whereby authority was given to the rule-making authority to repeal sections of the Act of 1857. Many sections were repealed, but sect. 42 remains unrepealed. It is in these terms :

Every petition shall be served on the party to be affected . . . in such manner as a court shall by any general or special order from time to time direct ; . . . Provided always that the said court may dispense with such service altogether in case it shall seem necessary or expedient so to do.

B That is the power which LORD MERRIMAN, P., was asked to exercise in the present case.

The facts are stated in the judgment of LORD MERRIMAN, P., and need not be again stated by this court in detail. The respondent, the husband, left his wife in October, 1936, after 2 years of marriage, and, as she says, then deserted her after threats which indicated an intention to desert. He then went to live in **C** Paris, he being, by origin, a French subject and having a French domicile of origin. War broke out in September, 1939, and from that time the wife has heard nothing of him. In July, 1940, she asked the Red Cross, through their investigating department, to see if they could find out anything at all about her husband, and she gave them her husband's address in Paris. In March, 1942, she heard that no news of any kind was obtainable about him.

D In these circumstances she made up her mind to try and obtain a divorce on the ground of desertion. She started proceedings in October, 1942, and asked, by her affidavit in support, that the court in the exercise of its discretion under sect. 42 of the 1857 Act would dispense with service on the respondent.

A very carefully considered judgment was given by LORD MERRIMAN, P., in which he stated all the facts, pointing out, *inter alia*, that the petition might have been presented in October, 1939; and that between then and the occupation of France by **E** the Germans in June, 1940, substituted service could have been effected had the petition then been presented. He agreed that substituted service was impossible at the present time. In the exercise of his discretion, which is absolute, he refused to give leave to dispense with service; but, in his judgment, he made a statement which counsel for the appellant submits was erroneous in law, as imposing upon himself a fetter in the exercise of the discretion which sect. 42 **F** had not imposed. Therefore counsel for the appellant contended that at the least the case should be sent back for reconsideration. The sentence in question is this, at p. 262 :

In my opinion, in the case of petitions which involve a change of status and where any form of substituted service is impossible, the court, before dispensing with service, should require to be satisfied that the respondent spouse has become aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute **G** it, and in either case has had time and opportunity to indicate whether he or she desires to defend.

Counsel for the appellant submitted that those requirements constitute conditions which LORD MERRIMAN, P., was laying down as conditions of a general kind for the exercise of jurisdiction under sect. 42. Had that been the case, it would have been wrong for him to suggest any such limitation, for the reasons given very clearly by LORD WRIGHT in *Evans v. Bartlam* (1), at p. 488 ([1937] **H** 2 All E.R., at pp. 655, 656). A discretion which is unfettered by law must not be fettered by judicial interpretation of it.

In my view, however, LORD MERRIMAN, P., was not for one moment intending to impose limitations of that kind. The two or three hypothetical events connected with a petition to which he refers are each of them within the category of relevant matters for consideration in connection with the exercise of discretion : but I think he only spoke of them in that context as conceivably relevant matters which, if proved, would undoubtedly be additional reasons for the exercise of the discretion ; but no more than that.

That being so, I treat the appeal as an appeal from an unfettered exercise by LORD MERRIMAN, P., of the discretion given to him under the Act, and, therefore, approach it as such. I should be very slow, in any event, in such a matter, to differ from the considered exercise of discretion by the President of the Divorce Division in a matter with which he is so essentially familiar; but, in the present case, I confess that I should have exercised it in the same way myself, on the ground that it is a real hardship on a respondent to a divorce petition to be deprived of his status by a decree made in his absence and without his knowledge of the pending proceedings. That is a matter of justice to a respondent analogous to the presumption in criminal law that a person charged is presumed innocent till he is proved guilty. Although I have great sympathy with the petitioner, who on her statement has been thus deserted, I cannot, because of sympathy with the petitioner, do injustice to the respondent. The appeal must be dismissed with costs. A

MACKINNON, L.J. : I agree. B

DU PARCQ, L.J. : I agree. I would like to say also for myself that, in my opinion, if I may respectfully say so, the decision of LORD MERRIMAN, P., in this particular case was quite right. I agree with SCOTT, L.J., that the passage from the opinion of LORD WRIGHT in *Evans v. Bartlam* (1) is much in point where he emphasised the importance of laying down no rules which would fetter the discretion to be exercised by the Court. But LORD WRIGHT added this sentence, at p. 488 ([1937] 2 All E.R., at p. 656) : C

It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the court in exercising the discretion, though in matters of discretion no one case can be an authority for another.

I think that what was said by LORD MERRIMAN, P., may properly be regarded as a statement of such general indication, though it is most important that every judge who is asked to make an order dispensing with service of a petition of divorce should remember that in matters of discretion no one case can be an authority for another. D

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors : *Spiro & Steele* (for the appellant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.] E

LEIVERS v. BARBER, WALKER & CO., LTD.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), January 26, 27, March 9, 1943.]

Workmen's Compensation—Review of compensation—Applicability of Limitation Act, 1939—Claim made under the Workmen's Compensation Act, 1906— F
Workmen's Compensation Act, 1906 (c. 58), Sched. I, para. 16—Limitation Act, 1939 (c. 21), s. 2 (1) (d) (3).

In 1913, when he was 17½ years old, the applicant, who was employed at the appellants' colliery, was severely injured by an accident, within the Workmen's Compensation Act, 1906. The employers paid him compensation until 1921, although there was no award or recorded agreement, but in respect of his partial incapacity from 1921 to Oct., 1940, and from Nov. 6, 1940, to Aug. 13, 1941, he received no compensation; and in respect of his total incapacity from Oct. 8 to Nov. 6, 1940, and from Aug. 13, 1941, onwards, compensation was paid at the rate of 28s. per week. The applicant in an application for review, under the 1906 Act, Sched. I, para. 16, asked for an increase in respect of his incapacity from 1921 onwards, and claimed that in assessing the rate of compensation, regard should be had to the wages he would have earned if he had remained uninjured. The employers contended that the proceeding for review was an action within the Limitation Act, 1939, s. 2 (1) (d), and that the claim was, therefore, barred :— G

HELD : (i) [GODDARD, L.J., dissenting] the Limitation Act, 1939, s. 2 (1) (d) had no application to the proceedings taken by the applicant workman.

(ii) the applicant was not stopped from claiming a review of the compensation payable from 1921. H

(iii) the provisions of the Workmen's Compensation Act, 1906, did not bar a review of the compensation payable for 1921.

EDITORIAL NOTE. This case considers quite generally the question whether the Statutes of Limitation apply to proceedings under the Workmen's Compensation Act. The majority of the court have decided that the Act itself provides a limit of time for taking proceedings and that, therefore, the Limitation Act, 1939, has no application. GODDARD, L.J., has dissented from this view on the ground that the limitation imposed by the Workmen's Compensation Acts is a limitation of the time for making a preliminary claim before the actual proceedings are commenced and he refers to many cases where there is or has been both a limitation of time in respect of such a claim and also a limitation of time for commencing proceedings. The decision of the majority is largely based on the fact that the Workmen's Compensation Acts have always been liberally construed and that they were deliberately drafted to avoid anything like technology. Perhaps it is significant that the question has not been litigated in the many cases which have been decided since the first Workmen's Compensation Act was passed. It should be noticed that the decision of the majority of the court is that the Limitation Act, 1939, has no application to the Workmen's Compensation Acts in general, although the claim here is made under the 1906 Act and the matter here litigated is in the case of accidents occurring after 1923 provided for by sect. 11 (2) of the 1925 Act.

AS TO REVIEW IN THE CASE OF AN INFANT WORKMAN, see HALSBURY, Hailsham Edn., Vol. 34, pp. 953, 954, paras. 1304, 1305; and FOR CASES, see DIGEST, Vol. 34, pp. 458, 459, Nos. 3752-3760.]

Cases referred to:

- (1) *Birch v. Pease and Partners, Ltd.*, [1941] 1 K.B. 615; [1941] 1 All E.R. 343; Digest Supp.; 110 L.J.K.B. 273; 165 L.T. 146; 34 B.W.C.C. 37.
- (2) *Gibson (George) & Co. v. Wishart*, [1915] A.C. 18; 34 Digest 431, 3511; 83 L.J.P.C. 321; 111 L.T. 466; 7 B.W.C.C. 348.
- (3) *Donaldson Bros. v. Cowen*, [1909] S.C. 1292; 34 Digest 435 h; 2 B.W.C.C. 390.
- (4) *Wolseley Motors, Ltd. v. Sharp* (1925), 133 L.T. 70; 34 Digest 452, 3708; 18 B.W.C.C. 15.
- (5) *Williams v. Guest, Keen & Nettlefolds, Ltd.* (1925), 133 L.T. 111; 34 Digest 453, 3718; *sub nom. Guest, Keen & Nettlefolds, Ltd. v. Williams*, 18 B.W.C.C. 68;
- (6) *Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd.*, [1925] 2 K.B. 667; 34 Digest 458, 3752; 95 L.J.K.B. 275; 133 L.T. 409; 18 B.W.C.C. 163.
- (7) *Wilson v. Baird & Co.*, [1923] S.C. 164; 34 Digest 452, b.
- (8) *Vickers-Armstrong, Ltd. v. Regan*, [1933] 1 K.B. 232; Digest Supp.; 101 L.J.K.B. 657; 147 L.T. 298; 25 B.W.C.C. 211.
- (9) *Piper v. India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* (1939), 32 B.W.C.C. 100; Digest Supp.
- (10) *Dobson Ship Repairing Co., Ltd. v. Burton*, [1939] A.C. 590; [1939] 3 All E.R. 431; Digest Supp.; 108 L.J.K.B. 542; 161 L.T. 122; 32 B.W.C.C. 151; *affg. sub nom. Burton v. Dobson Ship Repairing Co., Ltd.*, [1938] 3 All E.R. 410; 31 B.W.C.C. 294.
- (11) *Willis v. New Hucknall Colliery Co.* Unreported.
- (12) *Powell v. Main Colliery Co.*, [1900] A.C. 366; 34 Digest 367, 2971; 69 L.J.Q.B. 758; 83 L.T. 85; 2 W.C.C. 29.
- (13) *Gloucester (Bishop) v. Cunningham*, [1943] 1 All E.R. 61.
- (14) *M'Cafferty v. MacAndrews & Co., Ltd.*, [1930] A.C. 599; Digest Supp.; 99 L.J.P.C. 145; 143 L.T. 682.
- (15) *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1940] A.C. 437; [1940] 1 All E.R. 410; Digest Supp.; 109 L.J.K.B. 293; 162 L.T. 243.
- (16) *Kenyon v. Darwen Cotton Manufacturing Co., Ltd.*, [1936] 2 K.B. 193; [1936] 1 All E.R. 310; Digest Supp.; 105 L.J.K.B. 342; 154 L.T. 553.
- (17) *Ivimey v. Ivimey*, [1908] 2 K.B. 260; 27 Digest 547, 5991; 77 L.J.K.B. 714; 99 L.T. 75.
- (18) *Bailey v. Bailey* (1884), 13 Q.B.D. 855; 27 Digest 547, 5989; 53 L.J.Q.B. 583.
- (19) *Hunter v. Simmer*, [1922] 2 K.B. 170; 34 Digest 482, 3977; 91 L.J.K.B. 581; 127 L.T. 342; 15 B.W.C.C. 91.
- (20) *Talory v. Jackson* (1638), Cro. Car. 513; 32 Digest 321, 66.
- (21) *Jones v. Pope* (1666), 1 Wms. Saund. 37; 41 Digest 100, 458; 1 Sid. 305.
- (22) *Cork and Bandon Ry. Co. v. Goode* (1853), 13 C.B. 826; 32 Digest 320, 59; 22 L.J.C.P. 198; 21 L.T.O.S. 141.

APPEAL by the employers from an award of His Honour JUDGE WILLES, given at Ilkeston County Court, and dated Nov. 7, 1942. The facts are fully set out in the judgment.

The appeal by the employers was based on the contention that the proceedings were an action within the Limitation Act, 1939, s. 2 (1) (d), being "a proceeding in a court of law" within the definition in sect. 31 (1) of the Act, and that, there-

fore, the appropriate limitation was 6 years from the date of the accrual of the cause of action. Alternatively, the employers contended that it was an arbitration under an Act of Parliament within sect. 27 (6) of the 1939 Act, and that consequently under sect. 27 (1) the provisions of sect. 2 (1) applied and the appropriate limitation was 6 years. There was a cross-appeal by the workman on the ground that the Limitation Act, 1939, had no application to these proceedings, but that, if it did apply, then the appropriate limitation was 12 years since the claim was a specialty within sect. 2 (3) of the Act.

Norman Winning and J. L. Gamgee for the appellants.

G. Justin Lynskey, K.C., and *F. W. Beney* for the respondent.

SCOTT, L.J.: This is an appeal by the employers from an order made by His Honour JUDGE WILLES on an application for review filed by a workman, who in 1913, at the age of 17½, when employed underground at the appellants' colliery on the haulage system, had his spine severely injured by an accident within the Act. His father and grandfather had been miners at the coal-face and but for his injuries he too would, in a few years, have become a miner at the coal-face, as the county court judge has found. After being a complete invalid for 5 years he recovered sufficiently to be given light work at the same pit. After a short time on other work, he was in 1918 given the job of driver on a stationary electric haulage engine. This job he held till 1941. He was often unable to attend; but he managed with lessening powers and increasing interruption to carry on. Gradually his disability got worse; and after interruptions he had finally to give in and from Aug. 13, 1941, became totally incapacitated, and is likely to remain so as long as he lives. The employers have throughout recognised his state of incapacity, total or partial, and the accident as its cause. There is no dispute that it is the 1906 Act, and that Act alone, which governs the rights and responsibilities of both parties, save on certain questions relating to the rates of compensation payable. Down to 1920 or 1921 the appellants paid him compensation—at first for total incapacity and then for partial incapacity, the negotiations on his behalf being conducted by the representative of the man's union. No arbitration ever took place; no agreement was ever recorded; but beyond doubt, as the county court judge found, there was an agreement that he had been injured by accident arising out of and in the course of his employment, and that his incapacity was caused thereby; that agreement was, under sect. 1 (3) of the 1906 Act, equivalent in effect to an award.

On some date in 1920 or 1921 (the exact date is immaterial) the appellants stopped the reduced payment of compensation for partial incapacity, which they had latterly been making, of 3s. per week; and from then onwards no more compensation was paid him till Oct. 8, 1940, when his incapacity became total, and continued total till Nov. 6, 1940. He was paid 28s. per week for that month. From Nov. 6, 1940, he worked on again at his haulage engine till Aug. 13, 1941, when he again broke down altogether. Between Nov., 1940, and Aug., 1941, he was paid no compensation; but from Aug. 13, 1941, onwards the appellants paid him 28s. per week as for total incapacity caused by the original accident in 1913.

There was at one time a question as to the rate of payment for total disability from Oct. 8 to Nov. 6, 1940, and since Aug., 1941, 35s. being claimed as due instead of 28s. as paid; but liability for the rate of 35s. was conceded before us; and the main dispute arises out of the failure of the appellants to make any payment at all during the long period of partial incapacity between 1921 and 1940, although the workman's claim was, before the hearing in the county court, limited to 10 years preceding the workman's application for review, which was dated Feb. 12, 1942. The reason the rights and liabilities of the parties are governed exclusively (apart from *quantum* of compensation) by the 1906 Act, is that the 1923 and later Acts do not apply to accidents occurring before Jan. 1, 1924. The main provision for present purposes is the 1906 Act, Sched. I, para. 16, which is as follows:

Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act: Provided that where the workman was at the date of the accident under 21 years of age and the review takes place more than 12

months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1.

A The county court judge found as a fact—in my opinion, he could not have done otherwise—that every payment of compensation, down to the moment in 1921 when it was stopped, was made pursuant to the agreement between the parties under the Act. The payments at the rate of 28s. for total incapacity in Nov., 1940, and since Aug., 1941, were made nominally “without prejudice”—whatever that may mean in that context; but the employers never really disputed that the total incapacity at that stage was due to the accident in 1913; and their denials in their answer are merely formal. And even if they had disputed those facts, it would not have affected the old agreement which still continued to be the legal foundation of the relationship of the parties under the Act.

B By his particulars of claim for a review, delivered on Feb. 12, 1942, the workman claimed that, although the compensation was stopped by the employers in 1921, their legal liability to pay continued thereafter; and asked for “an increase” in respect of the two periods of partial incapacity between 1921 and Aug. 13, 1941, and the two periods of total incapacity, namely, in the autumn of 1940, and since Aug. 13, 1941. In regard to rate of compensation he asked by his
C para. 6 (i) for its assessment on the basis:

That the applicant, if he had remained uninjured would at a date not later than June 11, 1918, probably have been employed as a coal-face worker and earning the wages payable for that class of work and would have continued to be so employed to the date hereof and for the future.

That basis follows the wording of Sched. I, para. 16.

D The employers after formal denials alleged (a) estoppel by delay in claiming; (b) an informal agreement as to the figure of his pre-accident earnings as a boy; (c) an agreement in 1921, terminating their liability; (d) an agreement to be implied by conduct in effect that the workman was not prevented by his injuries from earning as much as he would have been earning if uninjured. They further relied (e) on the Statutes of Limitation. I was under the impression that they also challenged the allegation of the workman in his particulars that liability
E under the Act continued after 1921, apart from their five substantive defences above-mentioned, but GODDARD and DU PARCQ, L.JJ., doubt this.

His Honour JUDGE WILLES took time for consideration and then delivered an admirable judgment, with which I wholly agree except on the point of the Limitation Act. He has found all the facts necessary for decision, clearly and definitely, upon sufficient evidence to preclude any appeal from his findings of fact. He has also dealt with the many questions of law, upon which his decision
F was required. The only conclusion of law with which I disagree is as to the applicability of the Limitation Act, 1939, to the proceedings taken by the applicant workman in the present case. I do not think that that Act applies at all; but I will state my reasons after considering the various issues raised under the Workmen's Compensation Act, 1906. For that purpose it will be convenient to recapitulate the findings of fact and law arrived at by the county
G court judge as expressed in his formal award; they were: (i) that the workman is entitled to a review under Sched. I, para. 16 of the 1906 Act; (ii) that, if the applicant, who was under the age of 21 years at the date of the said accident, had remained uninjured he would as from a date anterior to Feb. 12, 1932, probably have been employed as a stallman and earning since that date the wages shown in item (2) of the Table “F” produced to me and agreed by the parties; Table “F” is an agreed table giving details of average weekly earnings in the
H classes of employment known as (1) “leaders”, and (2) “stallmen”, respectively at the employers' colliery during the years 1932-1942, inclusive, a “leader” being less highly paid than a stallman. It also shows for those years (3) the average earnings of Leivers at his “light” work as actually earned and (4) what those average earnings would have been but for his broken time-keeping due to his partial incapacity. The county court judge has taken the difference between items (2) and (3) as the correct basis in regard to compensation for Leivers' partial incapacity. (iii) That there was total incapacity from Oct. 8 to Nov. 6, 1940, and since Aug. 13, 1941. (iv) That except as in (iii), there was partial

incapacity from Feb. 12, 1932.

As the result of the said accident and because of such incapacity the appellant has only been capable of earning the wages he in fact earned during that period in the employment of the respondents, particulars of which earnings are contained in item (3) of the aforesaid table.

On these findings he ordered: (1) payment of £1 15s. compensation weekly during total incapacity and to continue until ended, diminished, increased, or redeemed under the Acts; (2) that payments during partial incapacity should, as agreed between the parties, be half the difference between the stallman's average weekly earnings and the applicant's actual average weekly earnings as shown on the aforesaid table; (3) payment of £395 5s. 11d. being the amount under (1) and (2), calculated to Sept. 25, 1942, and of £1 15s. thereafter weekly; (4) and (5) costs; (6) a stay pending the appeal.

I understood at the hearing not only that there is no dispute about the liability of the employers to pay the 35s. during total incapacity, but further that there is no need for us to go into the question of the amount of compensation for partial incapacity. The only questions we have to decide are on the various defences of principle advanced on the issue of liability for partial compensation limited to the time since Feb. 12, 1932.

It is important to keep in mind that the appeal relates to a review under Sched. I, para. 16 of the 1906 Act, and not under sect. 11 of the 1925 Act (which differs from it in the first and fifth of the points which I am about to mention).

(1) There is no limitation of the time at which the review may take place; (2) It may be either by agreement or "in default of agreement" by arbitration; (3) The subject matter of the review is "any weekly payment" in connection with the ending of it, or a diminution of it, or an increase of it; and there is authority that the words "any weekly payment" are to be construed as including "the right or liability to weekly payments," in a case where none is being made at the time of review; (4) There is an implicit assumption that the right to receive weekly compensation has been established in accordance with the Act—that is, either by agreement or award; (5) The proviso part of the paragraph confers a valuable benefit on young people under 21 years of age employed and insured within the Act by entitling them to a revision in later years on the money basis of what, but for their injury, would probably have been their manhood earning power, of course, still subject to the implied condition that the disability which then reduces the earning power is the continuing incapacity caused by the original accident. Leivers' case falls within that benefit and also satisfies its conditions.

On his findings of fact and law the county court judge held that the applicant was thus entitled to go back for the purpose of review to the appropriate past date when his right to compensation had been ascertained (unless prevented by the Limitation Act). I agree with this conclusion. It is, I think, already covered in principle by authority binding on this court. In the present case the earliest date to which it is appropriate to look back, in order to ascertain the subsequent legal position of the parties under the Act, and thereby to test the validity of the employers' answers, is 1921, when the employers stopped payment of compensation. Up to then they had been paying pursuant to the original agreement made when the accident occurred, by which the workman's right to the benefits of the Act and their own liability to implement them had been duly "settled." Even if the workman's earnings in 1921, when the employers stopped payment, were then such as to relieve them of present liability to make any money payments over and above the wages they were paying him, they none the less continued under a latent obligation to resume payment whenever his earnings should fall, or his degree of incapacity should so affect his earning power as to create in him a present right to a money payment. This legal position is in truth assumed in each of the pleas of estoppel and agreement put forward in the employers' answer, and argued below and before us. It is convenient to deal with those answers now.

As regards estoppel, it is enough to say that I agree with the county court judge. There was no basis of fact for alleging any estoppel *in pais*: and, obviously, there was no other estoppel. As for the alleged agreements, the county court judge has found there was in fact no agreement beyond the original one as to the acceptance of liability by the employers to pay compensation as and

when required under the Act; and those findings of fact cannot be attacked for want of evidence. Not only have the employers failed in this court to show that there was no evidence on which the county court judge could base his findings, but they have ignored the prohibition of the Act against contracting out: see the last two lines of sect. 3 (1)—a prohibition which is re-enacted in sect. 1 (3) of the 1925 Act; and, indeed, is inherent in the whole system of workmen's compensation. The agreements alleged are all obnoxious to that prohibition; for they are not mere agreements as to facts for the temporary purpose of quantifying the measure of compensation, but purport to deprive the workman of his right to a review when a change of circumstances occurs. I understood counsel for the appellants to contend that, apart from the specific pleas of estoppel and agreement, para. 16 of the 1906 Act in itself fails to entitle the workman to go back, as the county court judge held that the applicant was entitled to in the present case. I think he is wrong. The language is quite general; no apparent limit is put upon the freedom of the parties to agree to or demand by arbitration such revision as may be requisite to make any weekly payments conform to the requirements of the Act, since the last occasion when by agreement or arbitration the rights and liabilities were quantified. It is relevant to this question of supposed limitation upon the right of review to keep in mind the statutory principle of equivalence between agreement and arbitration as two ways of settling questions: see *Birch v. Pease* (1), pp. 625-627, ([1941] 1 All E.R. at pp. 345-347) to which I refer in order not to repeat myself. That a review may extend to a past date, prior to the date of the application for review, was decided by the House of Lords in *Gibson v. Wishart* (2), overruling *Donaldson v. Cowen* (3), per VISCOUNT HALDANE, L.C., at pp. 22-24, and LORD ATKINSON, at pp. 27-29. That was a case of ending a weekly payment; but LORD ATKINSON, at p. 29 said:

Though it is not necessary for the decision of this case to determine whether any different rule or principle should apply where it is merely claimed that the weekly payments should be diminished or increased, still I may say for myself that the inclination of my present opinion is that the same general principle should apply in the one case as in the other, and that the weekly payments should be varied from the time the circumstances justifying the change are shown to have occurred.

Other cases are *Wolsley Motors v. Sharp* (4), *Guest, Keen & Co. v. Williams* (5) per SCRUTTON, L.J., at pp. 77 and 78; *Talbot v. Vickers* (6), particularly per WARRINGTON, L.J., at pp. 193 and 194.

All the above cases were decided upon the 1906 Act; they are conclusive that the workman's right to a weekly payment may for the purpose of ending it, diminishing it, or increasing it, be reviewed as from any past date subsequent to the date when either by agreement or by arbitration it was last quantified. That must be the limit of retrospection, because the issue as then determined became as it were *res judicata* by the agreement, or at least settled *inter partes* and, therefore, continued binding on both parties, until a change of circumstances should introduce some new factor which under the Act would subject the previous determination to review. But as from that moment the right to a review would attach and, on change of circumstances, entitle either party or the arbitrator to carry the review back to that date.

In a series of cases it has been decided that the continuance of actual payment is not a condition precedent to the right of review; both under the 1906 Act (*Wilson v. Baird* (7)), and under the 1925 Act (*Vickers-Armstrong v. Regan* (8)), a case under sect. 11 (2), which partially reproduces the proviso to Sched. I, para. 16 of the 1906 Act, but, as altered by the 1926 Act, adds a condition that the claim by the workman for review shall be made within 6 months of attaining the age of 21 years. Both in that case and in *Piper v. India Rubber Co.* (9), the court recognised the above legal position, although both cases turned on the time limit in sect. 11 (2). In *Burton v. Dobson Ship Repairing Co., Ltd.* (10), SLESSER, L.J., at p. 414, dealt with the meaning of the word "review" in sect. 11 (2) of the 1925 Act, and said it is the same as in subsect. (1):

To my mind, were there no authority on the matter, what is meant by the date of review would be clear by a consideration of the whole of sect. 11. The date of review, as is, I think, stated in subsect. (1), is the date when the weekly payment may be ended diminished or increased. It is not necessarily the date when the case is heard, or when the award is signed. It is the date from which the alteration operates.

That case went to the House of Lords, but LORD PORTER, whose opinion was adopted by the House, left open the particular point dealt with by SLESSER, L.J. (see 32 B.W.C.C., at p. 151). Whether in subsect. (3) the word "review" has a different meaning or scope, as was recently argued before us (but subsequently to the arguments in the present case) in *Willis v. New Hucknall Colliery Co.* (11), does not arise in the present appeal.

For the above reasons, I am of opinion that the county court judge was entitled to go back as he did as far as the workman asked him to do, that is, to Feb. 12, 1932; and subject to any adjustment of figures, his award so far must stand. A

There remains the very important controversy as to whether the Workmen's Compensation Acts are within or without the purview of the Limitation Act, 1939; and in particular (i) whether the rights and remedies of the respondent in the appeal are or are not struck at by that Act; and (ii) if they are, whether the county court judge was right or wrong in holding that the claims which he has allowed are protected by the provision in the Limitation Act, 1939, s. 2 (3), about "specialties." There is a cross-appeal on that second issue. B

It is contended by counsel for the appellants, that the proceeding for review in the present case is an action within the Limitation Act, 1939, s. 2 (1) (d), because it was a "proceeding in a court of law" within the definition in sect. 31 (1) of the Act and that, therefore, it is barred under sect. 2 (1) (d) if the "cause or action" accrued "more than 6 years before." He then submits that the proceeding was an arbitration under an Act of Parliament within sect. 27 (6), and that consequently under sect. 27 (1) the provisions of sect. 2 (1) about actions apply; with the result that, as the application for review was only filed on Feb. 12, 1942, any "cause of action" which accrued before Feb. 12, 1936, is barred. C

In my view, the language of the Limitation Act itself is sufficiently clear to exclude the whole statutory system of the Workmen's Compensation Acts from its purview. Proceedings under them, whether by agreement or arbitration, are not in my opinion "actions to recover a sum recoverable by virtue of any enactment" under sect. 2 (1) (d); the arbitrations which take place under the Workmen's Compensation Acts are not arbitrations to which sect. 27 (1) and (7) have any application; and, lastly if they were, they would be under enactments which for the purpose of the expression in the Limitation Act, 1939, s. 32, "prescribe their own periods"; see for example the 1925 Act, s. 14. If there is, contrary to my view, any ambiguity about the matter in the Limitation Act, I suspect the reason is that neither Parliament, nor the draftsman, ever for a moment had in mind the idea that anybody would suggest that the Limitation Act should be read as applying to workmen's compensation. There are many reasons why it seems to me wholly inappropriate; and it may, perhaps, be useful to state some of them. (i) Out of the 3,500 or so reported cases which are quoted in the case index to *WILLIS ON WORKMEN'S COMPENSATION*, I do not think there is one in which it has been suggested that the old Statutes of Limitations had any application to the Workmen's Compensation Acts. (ii) The first Workmen's Compensation Act and the 1906 Act was, in each case, a self-contained code, intended primarily to be worked by agreement and without lawyers; as to the popular language and simple machinery, see the opinion of the EARL OF HALSBURY, in *Powell v. Main Colliery Co.* (12), at pp. 371, 372. Arbitration was only to be invoked in default of agreement. Disputes were not left to the arbitrament of the courts: in the 1906 Act (to which I chiefly refer because it governs the present appeal) Sched. II, para. 4, excluded even the comparatively informal legal procedure of the Arbitration Act, 1889; and only gave compulsory powers for witnesses and documents "as if the proceeding were an action in the county court." Only for the purposes of execution did it provide that the memorandum of decision of the committee, or of the award of the arbitrator, or of the agreement between the parties might be recorded, and if recorded should be enforceable as a county court judgment: see the observations of LORD SUMNER in *George Gibson v. Wishart* (2), at pp. 42-44. This system is maintained throughout the 1925 Act: see especially sect. 21. (iii) Special and appropriate protection was given by the Workmen's Compensation Acts to both parties which rendered unnecessary any assistance from the Statutes of Limitation. Sect. 2 (1) of the 1897 and 1906 Acts imposed a double D E F G H

condition precedent to the workmen's right, but also constituted a double limitation upon the remedy; and just and reasonable qualifications to its rigours were added by the proviso, similar to, though not identical with, the qualifications of the bar of the Limitation Act: see sect. 26. Whether sect. 2 (1) of the 1906 Act is sufficient strictly to satisfy the Limitation Act, 1939, s. 32, may be open to argument, although I incline to the view that it is: but, in any event, it is sufficiently germane to afford a powerful argument, if the construction of the later Act leaves the question in doubt. The Limitation Act is essentially a general Act; the statutory legislation about Workmen's Compensation is essentially special—whether the 1897 or the 1925 Act be looked at. *Generalia specialibus non derogant*, as was held in *Bishop of Gloucester v. Cunnington* (13), where this court decided that the general Rent Restriction Acts did not override or qualify the special legislation about parsonage houses. (iv) If the Limitation Act, 1939, applies to any Workmen's Compensation Act it must apply to all. The first Workmen's Compensation Act was tentative, in that it only applied to workmen in certain occupations; the present statutory system of workmen's compensation insurance applies to the vast majority of the population. It has become a system of social insurance against accident and several widely spread industrial diseases; and as such is treated by Sir William Beveridge in his recent report. By it statutory machinery has been brought into permanent operation in the United Kingdom under which a categorical obligation is imposed on the employer, where the accident or disease is within the Act, to pay compensation on a fixed scale not only for death but also for total or partial incapacity; and that latter obligation continues as long as the incapacity continues and varies in amount with it. The permanent power of either party to obtain a review, of the kind described in the earlier part of this judgment, and the simple procedure under rr. 8, 9 and 10 for either party to apply on any matter, afford in themselves great protection against the sort of risk, against which the Statutes of Limitations are intended to provide. When it is remembered that almost universally all claims under the Act come necessarily to the knowledge of the employer at once; and that he always has the power of requiring the workman to submit to medical examination, it is difficult to see how he can fail to know what the claims are which are on his books, and which it is his duty to include in his returns under sect. 42: see also sects. 10 (v) and 15 (3) of the 1925 Act. The principal regulations (No. 1092 of 1913) made under sect. 42 provide for the keeping by employers of books containing records of all cases of temporary or permanent disablement: and no case should go off the books until it has been disposed of in accordance with the Acts in force. On such termination particulars have to be returned each year—see Pt. IIb of the Forms of Return. The effect of these statutory provisions is that no employer ought ever to be in ignorance of what cases he has on his books: information is always available to him, or ought to be if his books are properly kept in accordance with the Acts and regulations. The chief object of the Limitation Acts is thus already achieved under the Workmen's Compensation code. Where the employer stops payment without a review and an order for termination, he has only himself to thank if the claim is allowed through the ignorance or mistake of the workman to drop for a time, and then gets revived and appears to the employer to be stale. (v) The option given by the Acts to employers and workmen to contract out of their direct operation by substituting an agreed and certified scheme—in other words, to avoid the veto on contracting out (an option conferred by sect. 3 of the 1906 Act and now by sect. 31 of the 1925 Act) shows how little comparable the statutory system is to an ordinary action or contentious arbitration, whether under an "arbitration agreement" or a statute, to which the Limitation Act is directed. (6) The system of international arrangements for reciprocity in workmen's compensation also shows how self-contained and thus special the legislation is. The Workmen's Compensation (Transfer of Funds) Act, 1927, (printed in WILLIS, 34th Edn., p. 1142) passed pursuant to the resolution passed at the Imperial Conference of 1926 for reciprocity within the Empire, as appears from its preamble, and the two conventions with France and Denmark entered into by Great Britain (WILLIS, pp. 996-1000), all illustrate the same feature.

For these reasons I am of opinion that, if I am wrong in thinking that the language of the Limitation Act is sufficiently clear to show an intention not to include the Workmen's Compensation Acts, then the ambiguity of its language

should be resolved by so construing it either on the principle of *generalia specialibus non derogant*, or on the ground that those Acts are not within the mischief aimed at by the Limitation Acts.

Since writing this judgment I have read the judgment of GODDARD, L.J. As he differs on the applicability of the Limitation Act to Workmen's Compensation, I am obviously wrong in thinking that its language clearly excludes such application; but I still think the ambiguity ought to be resolved in the way I have said, both for the specific reasons I have given in regard to the character of our legislation about workmen's compensation; and on one or other of the two general grounds I mentioned just now.

The county court judge was, I think, right in his conclusions on all questions except the Limitation Act, 1939, although I do not express any final opinion upon the meaning of the word "specialty" in sect. 2 (3) of that Act. In view of my general conclusion, I think that the appeal should be dismissed, whatever the correct interpretation of the word "specialty" in the Act may be, because the cross-appeal should, in my opinion, be allowed.

GODDARD, L.J. (read by MACKINNON, L.J.): The principal question raised in this appeal is whether the Limitation Act, 1939, applies to proceedings under the Workmen's Compensation Acts; and, if so, what is the appropriate period of limitation. I need not set out the facts in detail; suffice it to say that in 1913 the applicant, who was then 17 years of age, was injured and was paid compensation till about the year 1921. There was no award, nor any recorded agreement. Payments ceased at least 20 years ago; there seems, not unnaturally, to be some doubt as to the precise date, and there was no evidence as to why they ceased. Various descriptions of light work were found for the applicant; and he never applied for compensation; and very likely did not know that he was entitled to do so. It would also not be surprising if the appellants are now unable to say why the compensation was discontinued: but presumably they thought at the time either that he had recovered or was earning as much as he would have done if no accident had happened. In Oct., 1940, his health broke down and he became unable to work, admittedly because of the accident. On Feb. 12, 1942, he started these proceedings. In substance he sought to have compensation for partial incapacity up to Aug., 1941, assessed on the basis of what he would have been earning as an adult had he not met with the accident; and thereafter on the basis of total incapacity. The Limitation Act, 1939, was raised by the respondents. The county court judge has held that the Act applies; but he has held that the proceedings were a review; and this he regards as a proceeding on a specialty. If it is, the appropriate limitation is 12 years. The county court judge has awarded compensation since Feb., 1932, which is in substance, going back only 10 years; and it is not clear why he took that period. The applicant has cross-appealed and submits that the Limitation Act does not apply at all, but if it does apply, he contends that 6 years is not the right period of limitation. In the county court it seems to have been accepted that the proceeding was a review. I have considerable doubt whether it was such a review as is contemplated by Sched. I, para. 12 of the 1906 Act, or sect. 11 (2) of the present Act; and, in any case, if the workman was relying on an unrecorded agreement, the proper course for him to take in the first place was to apply to record it—as per SCRUTTON, L.J., in *Guest, Keen v. Williams* (5), and the recent case in this court of *Birch v. Pease and Partners, Ltd.* (1). Still whatever was the true nature of the proceedings—and I will assume it was a review—the object was to recover a sum of money (and the applicant did recover a considerable sum) and also to obtain a weekly sum in the future.

The first point to be considered is whether the Limitation Act applies to workmen's compensation proceedings at all. It is said that the Act contains its own period of limitation; and so is excluded from the provision of the 1939 Act, sect. 32. By sect. 2 of the 1906 Act, now replaced by sect. 14 of the 1925 Act, it is provided that proceedings for compensation shall not be maintainable unless notice of the accident is given as soon as practicable; and unless the claim for compensation is made within 6 months from the date of the accident. It is settled beyond all question that in speaking of the claim for compensation, the Act does not mean bringing proceedings for compensation. Assuming for this purpose that the proceedings in question are either an action as defined

in the Limitation Act, or an arbitration to which that Act applies, in my opinion, the words in sect. 2 of the 1906 Act, to which I have referred, cannot be regarded as imposing a period of limitation. I think they impose a condition precedent to the bringing of proceedings; but they do not limit the time within which proceedings can be taken. If the claim referred to in sect. 2 is not the same as "proceedings", the Limitation Act, 1939, s. 2, has no bearing upon it; what the Act affects are the proceedings brought after the claim. Many instances are to be found where a statute has provided that notice of claim should be given, and at the same time imposed a period within which the action must be brought. The Employers' Liability Act, for instance, requires that notice of injury should be given within 6 weeks and the action brought within 6 months, or in case of death within 12 months. It appears to me that the former requirement is in the nature of a condition precedent; the latter is a limitation. Then it was quite common to find similar provisions in Acts relating to public bodies before the Public Authorities Protection Act repealed them and substituted a uniform period of limitation. This is now replaced by sect. 21 of the 1939 Act. Take, for instance, the Highway Act, 1835, s. 109. No action lay for anything done in pursuance of the Act unless 21 days' notice of claim was given to the proposed defendant, to give the latter an opportunity of tendering amends; and the action had to be brought within 3 months of the cause of action. It is true that in workmen's compensation cases the employer has power to apply for arbitration as soon as he receives notice of claim, and so can protect himself against undue delay, *M'Cafferty v. MacAndrews* (14), but when matters of positive law have to be considered, matters of hardship or convenience do not come into question; all that has to be done is to construe the Act; and, in my opinion, it is wrong to regard sect. 2 of the 1906 Act as prescribing a period of limitation for proceedings, though it does impose a condition precedent to taking proceedings for enforcing the claim, and this, I think, was the opinion both of LORD WARRINGTON and LORD THANKERTON in the last cited case.

We have, therefore, to consider the Limitation Act, 1939, s. 2. It can, I imagine, hardly be doubted that workmen's compensation is money recoverable under an enactment, every bit as much as, for instance, money recoverable by a workman under the Truck Acts—see *Pratt v. Cook, Son & Co.* (15), *Kenyon v. Darwin, etc., Co.* (16).

By sect. 31 the word "action" is made to include any proceeding in a court of law. It is objected that proceedings under the Workmen's Compensation Act are an arbitration; and that if any section of the Act is relevant it must be sect. 27, which I will consider later. It is true that the Workmen's Compensation Acts provide for questions to be settled by arbitration, but it is arbitration of a very special and unique character. For this purpose there is no difference between the Acts of 1906 and 1925; but as the former applies to this case, I shall refer to the provisions of that Act. Sect. 1 (3) provides that, if any question arises in any proceedings under the Acts as to liability to pay compensation, or as to its amount or duration, the question, if not settled by agreement, shall be settled by arbitration in accordance with Sched. II. By that Schedule, unless there is a committee with power to settle matters under the Act and neither party objects to going before it, the matter is to go to a single arbitrator agreed on by the parties, or, in the absence of agreement, to the county court judge according to the procedure prescribed by rules of court. The judge can, with the authority of the Lord Chancellor, appoint another person to act as arbitrator, who will then have all the powers of the judge. It is provided that the Arbitration Act, 1889, shall not apply; but provision is made for a committee or an arbitrator, that is the single arbitrator referred to in para. 2 of the schedule, to submit a question of law for the decision of the county court judge; and the decision of the county court judge, whether on a case submitted, or where he himself settles the matter, is open to appeal to the Court of Appeal. When the judge himself has dealt with the application, the appeal does not come before this court as one on a special case, but as an ordinary appeal, to which all the provisions of the County Court Acts relating to appeals apply. The judge or an arbitrator appointed by him, but not a committee or an arbitrator appointed by the parties, are to have the same powers of procuring witnesses and production of documents as if the proceedings were an action. Presumably an arbitrator appointed by

the judge could do so ; because, as already stated, he has all the powers of the judge, though it is curious that para. 4 expressly mentions that arbitrator when dealing with the power of procuring witnesses and documents and para. 5 does not. The judge can, by para. 5, summon a medical referee to sit with him ; but, neither a committee nor an arbitrator appointed by the parties seems to have this power, though under para. 15 they can submit a question to a medical referee for report. Para. 6 says that rules of court may make provision for the appearance in any arbitration under the Act of any party by some other person. Para. 7 deals with costs ; whereas they are in the discretion of a committee or an agreed arbitrator, in the case of a judge, or arbitrator appointed by him, they are in his discretion subject to rules of court ; which means, in effect, according to county court scales ; and they are to be taxed accordingly. Para. 9 is important as it provides that a memorandum is to be recorded of any matter decided or agreed and that the memorandum is to be enforceable for all purposes as a county court judgment. Para. 11 deals with the county court district in which proceedings are to be taken ; and para. 12 makes the duty of the judge under the Act part of the duties of the county court and the officers of the court are to act accordingly ; and provides for the making of rules by the committee of judges under the County Court Act, 1888, s. 164. These, I think, are the material provisions of the Schedule bearing on the question we have to decide. It seems to me difficult to say that, when a matter under the Act is brought before the county court judge and is heard by him, it is not a "proceeding in a court of law," although it is not an action in the ordinary sense. It has often been recalled that the framers of the original Act hoped and believed that litigation would be avoided, and that the Act in that respect would have results more beneficial than the Employers' Liability Act, which had provided so many problems for the courts. Hence, no doubt, the provision that disputes might go to a committee representative of employer and workmen, which, however, would only be likely to be set up in large undertakings. So there was also a provision for an arbitrator to be agreed on by the parties. Whether there has ever been a reference to such an arbitrator I do not know, but it is common knowledge that at least the vast majority of disputes that arise go to the county court, where they are heard, not behind closed doors as are arbitrations, but in open court. The result is embodied in an award, which, like any other award, can be enforced as a judgment. But, nevertheless, I do not think, because the Act creates the machinery or procedure of an award, that of itself deprives that which leads up to it from being a proceeding in a court of law. There are quite a number of proceedings in a court of law that are not judgments, but under which sums of money can be recovered ; for instance, an order of the divorce division for costs (*Ivimey v. Ivimey* (17)), or for alimony, whether interlocutory or final (*Bailey v. Bailey* (18)).

Counsel for the respondent relied in support of his argument on *George Gibson & Co. v. Wishart* (2). That case emphasised the difference between an award under the Act and an ordinary judgment, and decided that, having made an award, the judge was not *functus officio*, and that he had power on a review to direct termination of payments due before the date of filing the application ; but I do not find that it assists me in the present case. More in point, in my opinion, is *Hunter v. Simner* (19). This court had sent a case under the Act back for rehearing ; but in the order the expression "new trial" had been used. The case had originally been heard by the deputy county court judge ; and the judge of the court declined to rehear it on the ground that he could not rehear an arbitration which had been heard by another arbitrator. The court, while agreeing that the word "rehearing" ought to be used, and not "retial," directed the judge to rehear the case. LORD STERNDALE, M.R., said at p. 174 :

... that the matter goes to the judge not as an individual arbitrator, but in his capacity as county court judge, and I think it is the judge of the county court who is acting, and not the person who may at the time fill that office : in short a hearing by the deputy county court judge is the same thing as a hearing by the judge himself.

It is worth noticing that the deputy judge had not been appointed an arbitrator by the judge with the consent of the Lord Chancellor under para. 3 of the Schedule ; he had sat as an ordinary deputy judge. In my opinion this case supports the view that a matter under this Act is a proceeding in a county court, which is a court of law, and accordingly is within the Limitation Act, 1939, s. 2. Now

consider the case where the workman is injured and an agreement to pay compensation is recorded. If the employer fails to pay the weekly sum, the workman can apply to enforce the agreement as a county court judgment. Suppose the employer ceases to pay, for whatever reason, and the workman does nothing as in this case, for some 20 years. If he then applies for the enforcement of the agreement as a judgment, it seems to me impossible to say that he can enforce it for a longer period than that allowed by the Limitation Act, 1939, namely, 6 years. As I said earlier in this judgment, if the payment has been made originally under an unrecorded agreement, it has been laid down in this court that, if he desires a review, his proper course is first to record the agreement, and then apply to enforce it. If that be so, then it seems to me that he ought not to be able to avoid the Statute of Limitations, or to get the advantage of a longer period of limitation by initiating proceedings for review without recording the agreement. An award, like an agreement, can be enforced as a judgment or order of the court—see r. 30—and this, I think, clearly covers awards made either on an original application or on a review. In my opinion the combined effect of the Limitation Act, 1939, ss. 2 and 31, is to make proceedings in a court of law to enforce an award subject to 6 years' limitation.

The county court judge has held that the statute does apply, but that a review is not a proceeding to recover a sum recoverable by virtue of an enactment under sect. 2 (1) (d), but is an action on a specialty. With all respect to his opinion, I cannot follow this reasoning. Historically the doctrine with regard to the period of limitation for a debt recoverable by virtue of an enactment, to use the words of the 1939 Act, seems to be this: the Statute of James, as far as debts were concerned, applied to debts arising only out of simple contracts. Accordingly, very early in the history of the Act, it was held that it did not apply to a debt recoverable by virtue of a statute (*Talory v. Jackson* (20); *Jones v. Pope* (21)). Debts due under any bond or other specialty were first made subject to a period of limitation by the Civil Procedure Act, 1833. Thereafter the courts regarded statutory debts as specialty debts and as subject to the same period of limitation. I think the first case in which this was expressly laid down is *Cork and Bandon Ry. v. Goode* (22). The Act of 1939 has, however, effected a material change in the law in this respect. Debts recoverable by virtue of an enactment are now subject to the same period of limitation as those arising from simple contracts, while a different period is prescribed for specialties. In my opinion, therefore, "specialties" must now be confined to deeds or contracts under seal. As in these proceedings the applicant, whether by review or otherwise, seeks to recover a sum of money, that is the aggregate of weekly payments which he alleges ought to have been paid to him in the past, and which are recoverable only by virtue of an enactment, in my opinion 6 years is the appropriate period of limitation.

The appellants contended that, if the proceedings are to be regarded not as proceedings to recover a sum recoverable by virtue of an enactment but as an arbitration, the same considerations apply by reason of sect. 27 of the 1939 Act. The Act is to apply to arbitrations as it applies to actions. By sect. 27 (6) this provision is applied to arbitrations under an Act of Parliament; and subsect. 7 says that "arbitration," "arbitration agreement" and "award" have the same meaning as in the Arbitration Acts, 1889-1934. The only one of these expressions to which a meaning is attached by the Acts is "arbitration agreement," which is defined by sect. 21 of the 1934 Act. By sect. 16 (1) of that Act it was expressly provided that the Statutes of Limitations should apply to arbitrations: and that subsection is repealed by the 1939 Act, as it was no longer necessary in view of sect. 27. But the Arbitration Acts do not apply to proceedings under the Workmen's Compensation Act; and the only conclusion at which I can arrive is that the provisions of sect. 27 do not apply to Workmen's Compensation proceedings.

Upon the other points raised by the appellants, I agree with both the county court judge and SCOTT, L.J., and need add nothing. But I would allow this appeal so as to confine the amount recoverable by the workman to weekly payments for 6 years from the time when he filed his application for review.

DU PARCQ, L.J.: The main question argued on this appeal is that of the applicability of the Limitation Act, 1939, to a claim made under the Workmen's Compensation Act, 1906.

It is provided by the Limitation Act, 1939, s. 32, that the Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment. I do not think that it can be doubted that if one finds in an Act "a time limited for taking proceedings," that Act is an enactment by which a period of limitation is prescribed for those proceedings. If this be granted, the question whether the Workmen's Compensation Act, 1906, is such an enactment seems to me to answer itself, or rather, to have been answered for us by the legislature; because sect. 1 (4) of the Act contains the words :

If, within the time hereinafter in this Act limited for taking proceedings, an action is brought . . .

The reference, of course, is to sect. 2 (1); so that the legislature, at any rate, had no doubt that the effect of sect. 2 (1) was to limit the time for taking proceedings. It is true that the notice which the workman has to give, and the claim which he is required to make, may be informal in character; and it is true also that the claim is properly to be regarded as a necessary prelude or condition precedent to proceedings than as the initiation of proceedings. But in an Act which, in the words of the EARL OF HALSBURY (in a decision to which SCOTT, L.J., has referred) "deliberately and designedly avoided anything like technology," it is not, I think, surprising to find the legislature drawing no distinction between a claim which is the first step in proceedings and a claim which must be made before proceedings can be brought. In language which is plainly intelligible, Parliament has effectively prescribed a period of limitation. It has not used technical language, or language which a lawyer might have been expected to choose, and I do not overlook the fact that in *M'Cafferty v. MacAndrews & Co.* (14), both LORD WARRINGTON (at p. 623), and LORD THANKERTON (at p. 627), say that the section in the 1925 Act which reproduces sect. 2 (1) of the 1906 Act (I am quoting from the opinion of LORD THANKERTON) :

. . . does not limit the time within which the proceedings under the Act are to be brought, but it lays down two conditions precedent to such proceedings . . .

These observations (if I may respectfully say so) are, of course, a correct statement of the effect of the section in precise legal language. They do not, however, in my opinion, detract from the force of the argument that the language used by the legislature clearly indicates that it intended the Workmen's Compensation Act to be regarded as an enactment prescribing a period of limitation. For present purposes, the true answer to the question raised by sect. 1 (4): "What is the time hereinafter in this Act limited for taking proceedings" cannot be, in my opinion, "No time for taking proceedings is limited."

It is true that the limitation applies only to "taking proceedings" in the sense of initiating them, and that there are not separate periods of limitation for all subsequent applications for a review; but such applications are consequential upon the original claim for arbitration and are affected by the prescribed period of limitation in the sense that, unless the first step is taken within that period, none of the later steps will be permissible.

For these reasons, I am of opinion that the Limitation Act, 1939, has no application to the present case. I agree with SCOTT, L.J., that the Workmen's Compensation Act, 1906, constituted, as does the 1925 Act, "a self-contained code"; and that it was never the intention of Parliament that the Limitation Act, 1939, should apply to proceedings under it.

On the other points which were argued before us, I am content to express my agreement with the views of SCOTT, L.J., and of the county court judge. It follows that, in my opinion, the order of this court should be that proposed by SCOTT, L.J.

Appeal dismissed. Cross-appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker Rhodes, Cockburn & Co.*, Rotherham (for the appellants); *Taylor, Jelf & Co.*, agents for *Hopkin & Son, Mansfield*, (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

Re WHITE'S MORTGAGE, PUBLIC TRUSTEE v. WHITE.[CHANCERY DIVISION (Uthwatt, J.), **February 16, 23, 1943.**]

Emergency Legislation—Mortgage—Appointment of receiver—Appointment of new receiver to succeed deceased receiver—Lapse of time between death of original receiver and new appointment—Whether leave of court necessary—Law of Property Act, 1925 (c. 20), s. 109 (5)—Courts (Emergency Powers) Act, 1939 (s. 67), s. 1 (2) (a) (ii).

On Aug. 8, 1939, the mortgagees of certain property, in exercise of the power contained in the Law of Property Act, 1925, s. 109, appointed a receiver who died in June, 1941. In Aug., 1942, the mortgagees desired to appoint a new receiver. The question before the court was whether it was necessary for the mortgagees to obtain leave, under the Courts (Emergency Powers) Act, 1939, before appointing a new person to succeed the receiver who had died before the Act:—

HELD: where mortgagees appoint a new receiver on the death of the original receiver in order to keep the office continuous, no leave is necessary; but where, as in this case, the interval of time between the death of the original receiver and the appointment of his successor is so great that the appointment is, in effect, a new transaction, leave under the Courts (Emergency Powers) Acts is necessary.

[EDITORIAL NOTE.] It is here decided that a receivership commenced before the Emergency Legislation came into force, can be continued by the appointment of a new receiver on the death of the one appointed before the Acts, but the receivership must be continuous. If the office is left vacant for a considerable time—in this case just over a year—an application to the court for leave to appoint a new receiver is necessary.

AS TO APPOINTMENT OF RECEIVER OUT OF COURT, see HALSBURY, Halsham Edn., Vol. 23, pp. 447-449, paras. 658, 659.

APPLICATION under the Courts (Emergency Powers) Act, 1939, for leave to appoint a receiver. All the facts are set out in the judgment.

J. A. Wolfe for the applicants.

UTHWATT, J.: The question raised in this case is a short one. On Aug. 8, 1939, the mortgagees of certain property appointed a receiver in exercise of the power contained in the Law of Property Act, 1925, s. 109, which power was implied in a mortgage to them. Since that appointment one of the mortgagees has died: but that fact, in my opinion, is immaterial, because the surviving mortgagees held the mortgage in the same right as the original mortgagees. The event which has given rise to this question is the death on June 16, 1941, of the receiver appointed in August, 1939. The question to be decided is whether it is necessary for the mortgagees to obtain leave, under the Courts (Emergency Powers) Act, 1939, before appointing a new receiver in his place.

The Law of Property Act, 1925, provides that, in certain events which I need not specify, the mortgagee becomes entitled to appoint a receiver. Subsect. (5) provides that the receiver may be removed and a new receiver may be appointed "from time to time by the mortgagee by writing under his hand." It is accepted practice and good law that, if a receiver appointed under that Act dies, the mortgagee can appoint a new receiver to act in the office created by the original appointment.

The provision in the Courts (Emergency Powers) Act, 1939, which I have to construe is contained in sect. 1 (2) (a) (ii):

Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (a) to proceed to exercise any remedy which is available to him by way of (ii) . . . the appointment of a receiver of any property.

I am unable to gather from any of the other provisions of this Act any considerations which are of any use in determining the point which now falls for decision, which is, whether the appointment of the receiver, the necessity for which arises by the death of the receiver appointed before the Act, is an exercise of a remedy which is available by way of "the appointment of a receiver." In my opinion, it is not.

The substance of the matter is this. The determination to appoint a receiver and to exercise the remedy were made when the original receiver was appointed. In an ordinary case, the circumstance to be taken into account by reason of the

death of a receiver is not whether the events have happened which justify the appointment of a new receiver, but whether the *status quo* should be maintained. All that the mortgagee is doing, by making a new appointment, is to fill in the machinery which is necessary to keep going the remedy which he has already exercised.

In this case, however, the receiver died on June 16, 1941, and it was not until August, 1942, that any steps were taken with regard to the receivership. In my view, the proper inference to draw from these facts is that a new transaction was being entered upon, and not merely a continuance of the old one. It appears to me, in the circumstances, that leave will be necessary in this case. Where it is merely a matter of replacing one receiver by another, in the sense of keeping the office filled, then, in my view, there is no need to obtain leave of the court before appointing a new person receiver. But where the interval of time between the lapse of the appointment of one person as receiver and the appointing of a new receiver is so great that in substance the matter is really a new transaction whereby a new receivership is set up, in my opinion, leave is necessary under the Courts (Emergency Powers) Acts.

Direction that leave under the Act is necessary.

Solicitor: *Harold E. Blaiberg* (for the applicants).

[Reported by *IRENE G. R. MOSES, Barrister-at-Law.*]

Re AN APPLICATION BY RYSTA, LTD., Re THE OPPOSITION OF ARISTOC, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.),
January 25, 26, 27, 28, 29, February 1, March 9, 1943.]

Trade Marks—Registration—Use of mark on repaired stockings—Application to register mark for use on manufactured stockings—Opposition by manufacturers who own another mark on ground of similarity—Trade Marks Act, 1938 (c. 22), ss. 4 (1), 11, 12, 17 (1), 62, 68.

The appellants were repairers of stockings and had attached the mark "Rysta" to stockings sent to them to be repaired. They made application to register the mark in respect of stockings and re-weaving repairs effected thereto. Subsequently the words "and re-weaving repairs effected thereto" were struck out and the application was solely one in respect of stockings. The A. company, who were manufacturers of stockings and the owners of the mark "Aristoc," opposed the application on the grounds (a) that the appellants' mark could not be registered since the only use which had been established was one in relation to repaired stockings and the appellants were proposing to continue the use of the mark in connection with repaired stockings; (b) the continued use of the mark in connection with repaired stockings together with the use of the mark in connection with stockings of the appellants' manufacture would destroy its distinctiveness and result in the deception of the public; (c) that the mark "Rysta" so nearly resembled the respondents' mark "Aristoc" as to be likely to deceive or cause confusion:—

HELD: (i) the intention to use the mark as a trade mark was sufficiently alleged and, in the absence of evidence to the contrary, was sufficiently established.

(ii) purchasers of new stockings were of a class different from the class of persons who sent stockings to be repaired and no deception or confusion would arise from the use of the mark both on new goods and also on repaired goods.

(iii) [*LUXMOORE, L.J., dissenting*] the two marks do not so nearly resemble each other that deception or confusion would result from the use of the mark "Rysta."

[EDITORIAL NOTE.] The argument in this case raised the question whether a trade mark could be registered for use on repaired goods. It was argued that this was not a legitimate trade mark use within the Act. The matter is discussed to some extent in the judgments but is not decided by the court, since they find that the applicants in their application sufficiently alleged an intention to use the mark in respect of manu-

factured goods. The decision so far as it turns on deception and confusion is both interesting and important, but, there not being sufficient evidence to make it a pure question of fact, it is at most a question of opinion rather than law.

AS TO DECEPTION AND CONFUSION, see HALSBURY, Hailsham Edn., Vol. 32, pp. 563-570, paras. 872, 873; and FOR CASES, see DIGEST, Vol. 43, pp. 158-175, Nos. 167-288.]

Cases referred to:

- A (1) *McDowell v. Standard Oil Co. (New Jersey)*, [1927] A.C. 632; 43 Digest 169, 248; 96 L.J.Ch. 386; 137 L.T. 734; 44 R.P.C. 335; *affg.* 43 R.P.C. 313.
- (2) *Re Hack's Application* (1940), 58 R.P.C. 91.
- (3) *Seixo v. Provezende* (1866), 1 Ch. App. 192; 43 Digest 217, 616; 14 L.T. 314.
- (4) *Eno v. Dunn* (1890), 15 App. Cas. 252; 43 Digest 160, 180; 63 L.T. 6; 7 R.P.C. 311; *revisg.* S.C. *sub nom.* *Re Dunn Trade Marks* (1889), 41 Ch.D. 439.

APPEAL of the applicants from an order of FARWELL, J., dated May 15, 1942.

B The facts are fully set out in the judgments.

Robert Burrell, K.C., and *G. H. Lloyd-Jacob* for the appellants.

Kenneth R. Swan, K.C., and *James Mould* for the respondents.

The Solicitor-General (Sir D. Maxwell Fyfe, K.C.), and *H. O. Danckwerts* for the Registrar of Trade Marks.

C LORD GREENE, M.R.: Of the various points which have been discussed before us, one, the most interesting, does not, in my opinion, call for decision on this appeal.

The assistant comptroller took the view that the use by the appellants of their "Rysta" mark in connection with their existing business of repairers of stockings was a use of the kind described in the definition of trade mark which is contained in the Trade Marks Act, 1938, s. 68 (1), with the result that the mark as so used falls within that definition. FARWELL, J., felt doubts as to the correctness of this opinion, but upon the view which he took of the case it was not necessary for him to decide the point.

We heard a full argument upon it by counsel for the respondents, but, as the discussion proceeded, it appeared to us that no decision would be called for and, accordingly, we did not hear counsel for the appellants in reply upon this question.

E In these circumstances, I express no opinion one way or the other. It must not be taken that I agree or disagree with the view taken by the assistant comptroller or that I share or do not share the doubts which were felt by FARWELL, J. So far as this court is concerned, the question is entirely open. For the purposes of this judgment, however, I assume, where it is relevant to do so, that use in relation to repaired stockings is not a trade mark use. Acting on this assumption, counsel for the respondents argued that the appellants' "Rysta" mark could not be registered, since the only use or proposed use which had been established was one in relation to repaired stockings.

F The answer to this argument is, in my view, free from doubt. The official form of application as amended applies for registration in respect of "stockings" which, of course, includes or contemplates use in connection with stockings manufactured or sold by the applicants. It is true that the appellants state in the form that the mark is "used" by them, a statement based no doubt upon the view that their existing use of the mark in connection with repaired stockings was a true trade mark use; but I cannot find in the form as filled in anything inconsistent with an intention to use the mark in any way (for example, in connection with goods manufactured or sold) which would be a true trade mark use.

G There is nothing in the trade mark rules applicable to such a case as this which requires an applicant to specify the particular kind of use which he proposes to adopt, nor is it the practice to require him so to do.

H In the notice of opposition, para. 4, it is alleged that the appellants do not intend to use their mark as a trade mark. No evidence was produced in support of this allegation.

In the counterstatement, para. 3, the appellants say that they intend to offer for sale stockings bearing the brand name "Rysta" and such a use of the mark would, of course, be a good trade mark use whether or not the stockings were manufactured by them.

The only reference to the point now under consideration which appears in the decision of the assistant comptroller is where he says, parenthetically,

in reference to the use of the mark in connection with stockings sold by the appellants: "Their expressed intention to this end appears to me to be a sufficient compliance with sect. 17 (1) of the Act." Sect. 17 (1) provides for the making of an application for registration by a person:

... claiming to be the proprietor of a trade mark used or proposed to be used by him ...

The argument that no intention to use the mark as a trade mark had been established is not referred to in the judgment of FARWELL, J. In my opinion, there is no substance in the argument, and I agree that the intention to use the mark as a trade mark is sufficiently alleged and, in the absence of evidence to the contrary, must be regarded as established. A

I now turn to the argument which was presented by counsel for the respondents on the assumption that he was wrong (as I hold that he was) on the point which I have just discussed. He said that, as the appellants are in any event proposing to continue to use their mark in connection with stockings repaired by them and that, as such use will be "illegitimate," registration ought to be refused. One class of "illegitimate" use he defined as use incompatible with the continued validity of the registration (a) through loss of distinctiveness, or (b) because of false representation. B

These two suggested grounds of "incompatibility" are based on different legal conceptions, but rest upon what, on analysis, appears to be the same inference of fact as to the effect of the use alleged to be "illegitimate." That inference is that the use of the mark in connection with stockings repaired by the appellants as well as stockings manufactured or sold by them will or may lead to the belief that the former are of the manufacture or merchandise of the appellants and so will be calculated to lead to deception or confusion. C

The result, counsel for the respondents said, will be: (i) that the mark will lose the distinctiveness as indicating that the goods are of the manufacture or merchandise of the appellants; (ii) that the public will be deceived or confused. D If the inference is not one which ought to be drawn, the whole argument breaks down. The first task, therefore, is to consider whether or not the inference is a proper one.

Counsel for the respondents invited us to assume that the method of using the mark which the appellants would adopt in future in connection with repaired stockings would be by weaving the mark into the fabric of the stocking or stamping it permanently upon the stocking in the same way as they would naturally mark stockings which they manufactured or sold and that confusion would result. No such assumption can be made. The appellants would have no right to treat a stocking sent to them for repair in such a way without the consent of the customer. The most that they would be entitled to do would be to affix in a harmless way some detachable label bearing their mark. If such a label when used in the future bears upon its face, as has the label used in the past, the information that the stocking has been repaired by Rysta, no possibility of confusion could arise. E

Counsel for the respondents, however, asked us to test his proposition on the assumption that the label might contain the word "Rysta" and nothing else. I am content to make the assumption, but it does not, in my opinion, assist the argument in the least. The question whether or not the use of a mark is calculated to lead to deception or confusion must be considered in relation to the circumstances in which the mark will come to the notice of the person in whose mind deception or confusion is said to be probable. F

In the present case, the only persons to whose notice the mark will normally come in connection with the repaired stocking will be the owner of the stocking and the laundry proprietor or cleaner through whose agency it is sent to the appellants for repair. When a stocking sent to the appellants for repair is returned by them with the mark "Rysta" attached, it is, to my mind, quite impossible to suppose that either the owner of the stocking or the laundry proprietor or cleaner will be led to think that the mark so attached is intended to indicate that the appellants have any other connection with the goods than that of repairers; but, said counsel for the respondents, some other person, for example, a friend of the owner of the repaired stocking, may happen to see the Rysta label before it is removed by the owner and may think that the stocking is one manufactured or sold by Rysta. Anything, of course, is possible, but G H

possibilities such as that suggested cannot, in my view, be taken into serious consideration. Another possibility suggested by counsel for the respondents was that a dealer in second-hand clothes might buy damaged stockings, send them for repair to the appellants and then sell them without removing the Rysta label, thus leading a purchaser to believe that the stockings were manufactured or sold by the appellants. Here, again, I find the suggestion far-fetched and in any event there is no evidence of the existence of any practice among second-hand clothes dealers of buying damaged stockings and having them repaired with a view to sale.

The fact is that in the ordinary course of business the class of person to whose notice the mark will come in connection with stockings manufactured or sold by the appellants will be quite different from the class to whose notice the mark will come in connection with stockings repaired by the appellants. The former class will be purchasers of new stockings; the latter class will be the owners of used stockings who send them for repair, and the significance of the mark to the persons concerned will be quite different in the two cases. As, in my opinion, the argument based on loss of distinctiveness or the possibility of deception or confusion breaks down at the outset, there is no necessity to say more.

I may, however, in passing refer to two matters. The first is that my conclusion as to the probability of deception or confusion is not in any way based on the Trade Marks Act, 1938, s. 62, since I am assuming that use in connection with repaired stockings is not a true trade mark use. The other matter is that I must not be taken as disputing the proposition that a mark may in certain circumstances be so used as to destroy its distinctiveness. All that I am deciding is that the use of this mark in connection with repaired stockings is not in the circumstances of this case calculated to destroy the distinctiveness of the mark as used in connection with stockings of the appellants' manufacture or merchandise.

The decision of FARWELL, J., was based upon the view that, as he said, "a person seeing a stocking with the mark 'Rysta' on it will not know whether the stocking has been manufactured or only repaired by the applicants and confusion will result." With all respect to FARWELL, J., he appears to me to have overlooked the fact (to which I have already referred) that the mark when used in connection with repaired stockings will not be brought to the attention of purchasers of stockings and that the owner of a stocking sent for repair could not possibly be confused by the use of the mark. It is to be noted that this argument which found favour with FARWELL, J., was not put forward before the assistant comptroller, so that we have not the advantage of knowing his views upon it.

The other class of "illegitimate" user, as defined by counsel for the respondents, consisted of "taking advantage of the protection and immunity from infringement which registration confers under sect. 4 (1) in respect of a manner of use not contemplated or sanctioned by the 1938 Act." I do not follow this. Presumably it means that by registration of the mark the appellants would become entitled to restrain its use by anyone else in connection with repaired stockings and would thus be obtaining for their mark, when used in connection with stockings which they repair, a protection to which the mark as so used is *ex hypothesi* not entitled; but if, as I am assuming to be the case, the use of the mark in connection with repaired stockings is not a good trade mark use, I cannot see how its use by another person in connection with stockings repaired by that person could be restrained as an infringement of the appellants' registered trade mark, since such use, not being a trade mark use, would not satisfy either sect. 4 (1) (a) or (b).

I now come to the last question, namely, whether the mark "Rysta" so nearly resembles the respondents' mark "Aristoc" as to be likely to deceive or cause confusion. The assistant comptroller after a most careful and exhaustive examination answered this question in favour of the appellants. FARWELL, J., although not sure that he would have come to the same conclusion, did not feel justified in reversing the decision on that ground. The decision on this question is not an exercise of discretion, but a finding of fact. Nevertheless, it is a finding by an official with great and specialised experience and must not be lightly overruled.

In *Re McDowell's Application* (1) the registrar had held that, in view of the

existence of the opponents' mark "Nujol," the registration of "Nuvol" would create deception as to the origin of the goods. ASTBURY, J., disagreed with this view, but the decision of the registrar was restored by the Court of Appeal and its judgment was confirmed by the House of Lords. That case, like the present, was concerned, not with the exercise of the discretion of the registrar, but with his inference of fact as to the probability of deception. LORD DUNEDIN said this, at p. 342 :

I do not conceal that to me it is a very narrow case, and I think it is just when it is a very narrow case that real weight ought to be given to the original determination of the registrar.

I would affirm the view of the assistant comptroller on this ground alone, but in fact I agree with it.

It is true that there was some evidence before FARWELL, J., which was not before the assistant comptroller, but it carries the matter no further, since it does no more than verify certain assumptions which he made. I do not find any justification for the suggestion that the assistant comptroller approached the question in too artificial a way or that he did not take into account the possibility of deception or confusion through imperfect recollection. In my opinion, the assistant comptroller came to the right conclusion. It is not suggested that any possibility of deception or confusion exists in respect of the written word. Assuming, as I do, that in pronouncing the word "Rysta" the first syllable will normally be given a short quantity and that in pronouncing the word "Aristoc" the accent will (contrary to normal English usage) be placed on the penultimate syllable in a substantial number of cases, there remain four marked features of the word "Aristoc" which, in my opinion, make the suggestion of deception or confusion far-fetched : (i) "Aristoc" is a word of three syllables ; (ii) it suggests a connection with the word "Aristocrat," a connection which the respondents have been at pains to point out ; (iii) the last four letters suggest a connection with the word "Stocking" ; (iv) the termination "oc" is brusque and emphatic and the mark in that respect resembles marks of a favourite class which, by the sharpness of their consonantal ending, are intended to impress the memory : compare "Shavex," "Kodak". These four features are calculated to give to the mark a special distinctiveness which is not likely to be forgotten by anyone who hears the word pronounced with ordinary clearness.

It is true that the possibility of imperfect recollection must be taken into account ; but, with all respect to those who think otherwise, I cannot attach any real weight to this possibility in view of the distinctive features to which I have referred. The doctrine of imperfect recollection must not be carried too far. In considering its application, not only must the class of person likely to be affected be considered, but no more than ordinary possibilities of bad elocution, careless hearing or defective memory ought to be assumed. Women in general are credibly supposed to take some interest in dress and would normally pay reasonable attention to the name of an article of dress described or recommended to them ; but, quite apart from this, it would, I am convinced, require more than ordinary carelessness or defect of memory to make anyone, even a man, forget the distinctive features of the word "Aristoc" and confuse it with the featureless word "Rysta" or forget the word "Rysta" and confuse it with "Aristoc."

I would allow the appeal.

MACKINNON, L.J. : This was an application by a company called Rysta, Ltd., to be allowed to register the invented word "Rysta" as a trade mark in respect of stockings. They described themselves in the application as "manufacturers." The application was opposed by a company called Aristoc, Ltd. The assistant comptroller, after a careful hearing, allowed the application in an elaborate and detailed decision. Aristoc, Ltd., appealed to FARWELL, J. He allowed the appeal and vacated the order for registration. Rysta, Ltd., appealed to this court.

Prima facie, there is no reason why Rysta, Ltd., if they desire to carry on, or even to embark on, the business of manufacturers of stockings, should not be allowed to register the word "Rysta" as a trade mark in respect of such goods. Before us the opposition of Aristoc, Ltd., was based upon two wholly different grounds. The first of these had reference to the previous business activities of Rysta, Ltd. That company has carried on a business of repairing damaged

silk stockings, chiefly through the agency of laundries and cleaners who collected the damaged stockings from their customers and sent them to Rysta, Ltd., for repair. In connection with this business Rysta, Ltd., have used the word "Rysta" upon labels, billheads and like documents, as a *quasi* trade mark. In fact on their original application to register this trade mark they referred to this, their past activity, by adding the words "and re-weaving repairs effected thereto" after the words "in respect of stockings," but these words were deleted from the application in the form as it came before the comptroller.

Counsel for Aristoc, Ltd., argued that the use of a trade mark in relation to such a business of repairing stockings, the property of the owners of such stockings, was not within the definition of trade mark in the Trade Marks Act, 1938, s. 68, as indicating in the course of trade a connection between goods and the proprietor of the mark. There must be, according to counsel for the respondents, a connection between such a proprietor and the goods to which he affixes the mark as vendible goods in some capacity; the connection of repairers of other people's stockings is not such a one; therefore, having regard to the nature of the business in regard to stockings which the applicants have hitherto alone exercised, they ought not to be registered as proprietors of this trade mark.

I cannot accept this conclusion. As I have said before, *prima facie* the applicants are entitled to apply to be registered as proprietors of "Rysta" as a trade mark for stockings of which they propose to be the manufacturers; that is, to have a connection with stockings as "vendible" goods. It may be that if, after such a registration, they took proceedings under the Trade Marks Act against someone for using that registered mark, the person so sued might allege that they were not using, and never had used, the trade mark in connection with stockings within the provisions of the Act; that, therefore, they could not claim the protection of the Act, and, possibly, that their registration of the mark should be expunged from the register. I cannot see why such a possibility should debar the applicants from the grant of a registered trade mark as "manufacturers of stockings." Even if they were a newly formed company which had never before had anything whatever to do with stockings, *prima facie* their application would be legitimate. I cannot see why it is the less legitimate because they have had a previous connection with stockings, and, if that sort of connection remains their only connection in the future, it may be said to be one that is not properly a connection in the course of trade with stockings, within the definition of the Trade Marks Act. The argument of counsel for the respondents, therefore, fails.

If the argument in this form was developed before FARWELL, J., he does not seem to deal with it in his judgment; but he does refer to the previous use by the applicants of the word "Rysta" in connection with their repair business. He says that, having regard to that previous use, if they are now allowed to have "Rysta" as a registered trade mark as manufacturers of stockings, members of the public acquainted with their previous activities and this previous use of the word in connection with them will not know which type of business is involved in regard to any particular stockings; there will, therefore, be confusion and possible deception; therefore, the registration of the mark should not be allowed.

I do not think that this conclusion is justified by anything in the Trade Marks Act, 1938, or by any principles of law hitherto applied to that and the similar Acts that preceded it. The prohibition in sect. 11 of registering any mark "the use of which would, by reason of its being likely to deceive or cause confusion or otherwise" refers, I think, only to such use as would, by similarity or competition with another mark or other marks or names, be likely to deceive or cause confusion.

In this part of the argument there is no question as to any other mark; it concerns only the proposed use of the mark "Rysta." I do not think the previous use of the word by the applicants is a matter that can be said to be likely to deceive or cause confusion, either within the actual wording of sect. 11 or within the principles hitherto applied in trade mark legislation which that section reflects.

The second ground on which the registration of this mark "Rysta" was opposed by Aristoc, Ltd., was based on sect. 12. Aristoc, Ltd., are manufacturers of stockings and in respect of stockings they have long had "Aristoc"

as a registered trade mark; and they suggest that there is such similarity between "Rysta" and "Aristoc" that sect. 12 can be invoked to prevent the registration of "Rysta." The suggested similarity must clearly be a phonetic or oral one, not a visual one. Visually there can be no confusion between the two words. Phonetically there is only the syllable "rist" which is common to the two.

The question whether confusion between the two was likely or possible was examined with immense care and detail by the assistant comptroller, and he concluded that it was neither likely nor possible. FARWELL, J., seems to have agreed with him. I also entirely agree with him. Besides agreeing with his conclusion, I have in mind several utterances in the House of Lords, notably by LORD DUNEDIN, to the effect that on such a question great weight should be attached to the conclusion reached by the comptroller, who is particularly equipped by the nature of his duties for the decision of such a question. The passages I refer to are conveniently quoted by MORTON, J., in *Re Hack's Application* (2). I should, therefore, be slow to differ from the decision of the assistant comptroller on this point, as was FARWELL, J.; but, as I have said, I need not put it only on that ground, since I come to the same conclusion for myself.

In the result, I think this appeal should be allowed with costs, and the decision of the assistant comptroller permitting the applicants' registration of the trade mark "Rysta" be restored.

LUXMOORE, L.J.: In my judgment, this appeal should be dismissed.

The ground on which I base my conclusion is that the word "Rysta" is likely to cause confusion, having regard to the existence of the respondents' trade mark "Aristoc." Obviously there is but little resemblance when the two marks are considered and contrasted visually, but the case is different when the consideration is with reference to the ear.

The applicants' mark "Rysta" has, according to the evidence, been used since the year 1930 in connection with a process for repairing ladies' stockings, but there has been no user in connection with the manufacture or sale of stockings. It is said that the word "Rysta" resulted from the combination of the initial syllables of Rydall and Stanley, the christian names of the two persons originally concerned in the development of the process. On this footing, it would seem that the expected pronunciation of the word would be Rista, with a long first syllable. Indeed, we were told that in the proceedings before the assistant comptroller the word was so pronounced by the applicants' counsel; but the evidence leaves no room for doubt that both by the applicants and generally the word is pronounced Rista, with a short "i."

The original application was for registration in Pt. A of the register of the word "Rysta" in class 25 in respect of "stockings and re-weaving repairs effected thereto," but subsequently the application was amended by striking out the later words; so that we have to consider the application solely as one for stockings. The opponents are the proprietors of a number of registered trade marks which consist either solely of the word "Aristoc" or of which that word constitutes the most important or prominent feature. These trade marks are registered in class 25 for stockings and are admittedly well-known. The evidence proves that, although the opponents' word is more usually pronounced Aristoc, it is by a considerable number of persons (estimated by one of the witnesses at 25 per cent. of the whole) pronounced as *Aristoc*. It is in connection with the latter pronunciation that it is urged that the sound resemblance between "Rysta" and "Aristoc" is so near as to be likely to deceive or cause confusion.

It is not possible to discover from the decided cases any standard as to the amount of resemblance which will suffice to cause the rejection of a mark; as LORD CRANWORTH, L.C., said in *Seixo v. Provezende* (3), at p. 196:

What degree of resemblance is necessary from the nature of things is a matter incapable of definition *a priori* . . .

but it is instructive to consider the list of contrasted words set out on pp. 300-304 of KERLEY ON TRADE MARKS, 6th Edn., and the extra list in BRAY and UNDERHAY'S TRADE MARKS ACT, 1938, p. 61. It is now well-settled that the onus of proving that there is no reasonable probability of deception is cast on the applicant.

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of the Trade Marks Act, 1938, s. 12, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word and has perhaps an imperfect recollection of it who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words letter by letter and syllable by syllable pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

The feature of the applicants' word "Rysta" is plainly the syllable "rist," while the same syllable is a prominent part of the opponents' trade mark when pronounced "Aristoc." The tendency to slur a word beginning with "a" is, generally speaking, very common and the similarity between "Rysta" and "Ristoc" would, I think, be fairly obvious. It would not be surprising to learn that a person asking for "Aristoc" stockings from a shop assistant who only knew of "Rysta" stockings had been supplied with the latter and *vice versa*. It is true that the assistant comptroller has attempted to cover a number of cases and has contrasted hypothetical orders, but, to my mind, he has failed to take into full account the effect of careless and slurred pronunciation, imperfect recollection and the limitation of the knowledge of the customer and the shop assistant to one only of the word marks and that being the one of which the other is ignorant.

In the course of the argument it was suggested that the assistant comptroller, in coming to his decision on this point, had exercised a discretion; but this is not, I think, the proper view of the law. What has to be done under sect. 12 of the 1938 Act is to ascertain whether there is a resemblance between two marks such as would be likely to deceive or cause confusion. If the answer to the question to be put is in the affirmative, registration of the mark sought to be registered must be refused. The answer to the question: Is there sufficient resemblance? may be a question of fact if there is evidence that deception or confusion has in fact arisen; but, if there is no such evidence available, owing to the fact that the word sought to be registered has never been used for goods in the class applicable, then the answer must depend on opinion alone.

The assistant comptroller expressed his opinion that there was no reasonable chance of deception or confusion. FARWELL, J., obviously felt some doubt on this point, for he said that he was not sure that he would have reached the same conclusion as the assistant comptroller on this point. Notwithstanding the views expressed by LORD GREENE, M.R., and MACKINNON, L.J., and the assistant comptroller, I feel strongly that the two words are likely to deceive and also to cause confusion and, that being so, it is my duty to express my opinion to that effect, for, if I am right, the applicants have not discharged the onus which is on them of proving that there is no reasonable probability of deception or confusion (see *Eno v. Dunn* (4), at pp. 257 and 261).

With regard to each of the remaining questions raised on this appeal I find myself in complete agreement with the judgment of LORD GREENE, M.R., and I do not desire to add anything to what he has said about them. It is only on the question under sect. 12 that I have felt bound to disagree.

For the reasons I have stated, I would dismiss the appeal, with the usual consequences.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Timbrell, Deighton & Nichols* (for the appellants); *Peacock & Goddard*, agents for *Browne, Jacobson & Hallam*, Nottingham (for the respondents); *Solicitor to the Board of Trade* (for the Registrar of Trade Marks).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

THE POMONA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.),
December 10, 1942.]

Prize Law—Anticipatory embargo—Arrest of enemy merchant ship before outbreak of war—Whether immune from confiscation—Hague Convention VI, arts. 1, 2.

The claimants are the owners of the German motor-vessel Pomona which, in August, 1939, was in the Port of London under time charter to an English company. On Aug. 25 her master, wishing to obey an order by wireless to return to Germany, gave notice cancelling the charterparty, but the charterers refused to accept the cancellation and instituted proceedings *in rem* with the result that the vessel was arrested by the Admiralty Marshal on Aug. 26. On Sept. 2, on the orders of the military authorities, an armed guard was detailed to watch the ship in order to prevent possible acts of sabotage or breaches of the peace with the dock workers, and shortly after the outbreak of war on Sept. 3, the vessel was seized in prize. The claimants contended (i) that, according to Convention VI of the Hague Conference which, although denounced by this country, was, they alleged, obligatory as being declaratory of existing international law, the vessel, having been prevented by *force majeure* from departing at the outbreak of war, either immediately or on the expiry of a sufficient term of grace, was immune from confiscation; (ii) that the provision of the military guard operated as an anticipatory embargo and that the vessel should, therefore, be treated as having been free to depart before war broke out:—

HELD: there is no rule of international law that an enemy merchant ship in the port of a belligerent at the outbreak of war is entitled to depart freely within a given time. The provision of a military guard did not amount to an embargo and the Pomona was, therefore, liable to condemnation as good and lawful prize.

[EDITORIAL NOTE. The Hague Convention provided for days of grace whereby ships were given time to leave an enemy country on the outbreak of war. This part of the Convention was denounced by the British Government, but it was here contended that there is a principle of the general international law to the same effect. This contention is rejected. The other part of the case turns upon what is in truth a question of fact, namely, whether an embargo was placed upon the departure of the vessel.

AS TO CAPTURE OF ENEMY SHIPS IN BRITISH PORTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 225, para. 516; and FOR CASES, see DIGEST, Vol. 37, pp. 643, 644, Nos. 952-961.]

Cases referred to:

- (1) *The Hakan*, [1918] A.C. 148; 37 Digest 630, 792; 87 L.J.P. 1; 117 L.T. 619; 2 P. Cas. 479.
- (2) *The Vesta, etc.*, [1921] 1 A.C. 774; 37 Digest 586, 219; 90 L.J.P. 250; 125 L.T. 261; 3 P. Cas. 909.
- (3) *The Zamora*, [1916] 2 A.C. 77; 37 Digest 652, 1071; 85 L.J.P. 89; 114 L.T. 626; 2 P. Cas. 1; *reversg.*, [1916] P. 27.
- (4) *The Marie Leonhardt*, [1921] P. 1; 37 Digest 644, 960; 90 L.J.P. 113; 3 P. Cas. 761.
- (5) *The Blonde*, [1922] 1 A.C. 313; 37 Digest 688, 1563; 91 L.J.P. 91; 126 L.T. 769; 3 P. Cas. 1031.
- (6) *Lindo v. Rodney* (1782), 2 Doug. K.B. 613, n.; 37 Digest 647, 994.

MOTION for the condemnation of an enemy ship. The facts are fully stated in the judgment.

C. T. Le Quesne, K.C., and *C. J. Colombos* for the claimants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Hon. H. L. Parker* for the respondents.

LORD MERRIMAN, P.: In this case the Procurator-General seeks condemnation on behalf of the Crown of the German motor-vessel Pomona, which was lying in the Port of London at the outbreak of war, and was seized there very shortly after the formal announcement that this country was at war with Germany on Sept. 3, 1939. The writ in this cause was issued by His Majesty's Procurator-General on Sept. 14, 1939, and on Dec. 6, 1939, the owners, who had already entered an appearance, made their claim:

... for an order that the said ship be detained by the Marshal or alternatively that the undertaking by the proper officer of the Crown to pay into court the appraised value of the said ship be not discharged until further order is issued by the court and that all questions of costs be reserved, with liberty to apply.

The value of the vessel was said to be about £180,000.

Before dealing with the merits of the case, I must say a word with regard to the status of the owners before the court. Although they are not able to rely on any international agreement (see LORD PARKER in *The Hakan* (1), at p. 482), the Attorney-General raised no objection to their being heard, and submitted the matter to the discretion of the court. I came to the conclusion that the circumstances on which the claimants relied as "giving the vessel immunity from capture" (see *The Vesta* (2), at p. 909, *per* LORD SUMNER), though falling short of any treaty obligation, justified me in hearing them upon their claim. In the result I have been greatly assisted by having the benefit of admirable arguments on both sides of the question. From the form of words already quoted from the claim it will be seen that no claim is made for immediate release. Nor, indeed, could any such claim have been made, for the reason that at the opening sitting of the Prize Court on Nov. 2, 1939 (see LLOYDS REPORTS OF PRIZE CASES, 2nd Series, p. 1), the Crown obtained an order for the requisition of this vessel in accordance with the principles laid down in *The Zamora* (3), and the owners, who were represented on that occasion, did not oppose the making of the order. Counsel for the claimants, therefore, confined himself to arguing that the circumstances were such as to give immunity from capture with the implication that, in due course, the vessel, or her value, would be restored to the owners.

At the material time *The Pomona*, registered at the Port of Hamburg, was under time charter, of which a considerable period was unexpired, to an English company named *The Jamaica Banana Producers' Association, Ltd.* On Aug. 23 she had finished discharging her cargo, and on Aug. 24 had started to load a general cargo for the outward voyage to Jamaica. It was intended that she should sail on Aug. 26; but on Aug. 25 her master, purporting to act on behalf of, and by authority of, the owners, gave notice cancelling the charterparty and demanding that the charterers should discharge the ship as quickly as possible and arrange for her despatch on the evening tide of that date. It appears from his affidavit that all German ships had already been ordered by wireless to return to Germany at once. The charterers refused to accept this cancellation and instituted proceedings *in rem*, and, accordingly, the vessel was arrested by the Admiralty Marshal about noon on Saturday, Aug. 26. It is admitted that this arrest continued up to the moment of seizure on Sept. 3. Affidavits and correspondence have been read to show that the claimants instructed their master to withdraw the notice of cancellation and that negotiations were in progress for the release of the vessel as late as Saturday, Sept. 2. Although a letter written by solicitors for the claimants on that date makes it clear that no agreement had been reached, I have had evidence from a representative of the solicitors for the charterers to the effect that he was under the impression that release might be effected on Monday, Sept. 4; but he stated, with considerable emphasis, that the charterers certainly would not have agreed to release the vessel unless the undertakings demanded on behalf of the charterers, or substantially similar undertakings, had been given, and that nothing of the sort had been offered before the end of office hours on Sept. 2, by telephone or otherwise. I do not feel called upon to speculate on the question whether, if international affairs had not come to a climax on Sept. 3, the charterers would have received some assurance which would have induced them to consent to the release of the vessel. The fact is that war broke out between this country and Germany at 11 a.m. on Sept. 3, and that, within an hour or two thereafter the vessel was seized in prize; and it is plainly my duty to decide this question on that basis and not upon any hypothesis as to what might have happened had events turned out otherwise.

I am deliberately refraining for the moment from setting out the facts in connection with the arrival of an armed guard alongside the vessel, as it will be more convenient to deal with this point later in this judgment.

The question of immunity from confiscation of enemy merchant ships in a belligerent port at the outbreak of war, and the practical mitigation of the rigours of international law by the grant of days of grace within which they might depart freely, is dealt with in the preamble and in the Hague Convention, VI, arts. 1 and 2, the material provisions of which are as follows:

Preamble—Anxious to ensure the security of international commerce against the

surprises of war and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities; the high contracting parties have resolved to conclude a convention to this effect . . . Art. 1: When a merchant ship of one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a sufficient term of grace, and to proceed direct, after being furnished with a passport, to its port of destination, or such other port as shall be named for it . . . Art. 2: A merchant ship which, owing to circumstances of *force majeure*, may have been unable to leave the enemy port during the period contemplated in the preceding article, or which may not have been allowed to leave, may not be confiscated. The belligerent may only detain it, under an obligation of restoring it after the war, without indemnity, or he may requisition it on condition of paying an indemnity.

But this convention was denounced by this country on Nov. 14, 1925, and it is not open, therefore, to the claimants to rely upon these provisions. Counsel for the claimants, however, argued that they were merely declaratory of principles of international law already recognised before the last war. Accordingly, he maintained, first, that the seizure, in so far as it was directed to confiscation, was illegal, and, secondly, that as *The Pomona* was in fact prevented from departing by *force majeure*, she was entitled to days of grace for her departure and the Crown was not entitled to take advantage of an arrest at the instance of a private litigant to deny her this right, as in accordance with the ordinary procedure of the Admiralty Court the vessel would normally be released as soon as bail was provided to meet the claim. The two questions are not the same, since the question of immunity from confiscation is independent of the fact of arrest, while it would obviously be more difficult to apply to the case of a vessel already in arrest a provision for granting days of grace which might, in any case, have expired before she could be freed from arrest. But, as either point, if established, is sufficient for the claimant's case, it will be convenient to take them together. It is conceded that unless the principles contended for had become embodied in international law before the last war, there has been no subsequent development of that law of which the claimants could avail themselves.

In support of his argument, counsel for the claimants cited extracts from writers of acknowledged authority on international law.

I must not be taken to be throwing any doubt on the assistance which a Prize Court may derive from such sources as to the state of international law, with regard to any question which has not been the subject of judicial decision, if I suggest that the effect of these citations may not unfairly be summarised by saying that those passages which assist the claimants and are of earlier date than the two decisions to which I am about to refer formed the basis of arguments which were rejected expressly or by implication in those cases, while those of later date correctly record the effect of the two decisions and do not assist the claimants. I do not, therefore, propose to examine them in detail.

The two decisions to which I refer are *The Marie Leonhardt* (4) and *The Blonde* (5). In *The Marie Leonhardt* (4), SIR HENRY DUKE, P., held that, in the absence of a reciprocal agreement and apart from the provisions of the Hague Convention, VI, there was no rule of international law whereby an enemy merchant ship found in the port of a belligerent at the outbreak of war is entitled to depart freely from such port either immediately or after a reasonable number of days of grace, and that the ship is subject to detention and confiscation. It may be that in process of arriving at this decision SIR HENRY DUKE, P., as appears from the decision in *The Blonde* (5), underrated the obligatory character of the Hague Convention, VI, arts. 1 and 2 the combined effect of which was stated by LORD SUMNER in *The Blonde* (5) to be as follows, at pp. 328, 329:

Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned, if they are not allowed to leave, or if they unavoidably out-stay their days of grace, but it would be better that they should always be allowed to leave, with or without days of grace.

The judgment of the Privy Council was delivered by LORD SUMNER, who added that, in effect, while art. 1 is only optional, art. 2 is obligatory and said that their Lordships rejected a construction which made the prohibition of confiscation depend upon a prior election to do what art. 1 desiderates, but does not require. Accordingly, the argument of counsel for the claimants may most forcibly be stated as follows: It was decided in *The Blonde* (5) that the combined effect

of the Hague Convention, VI, arts. 1 and 2, is obligatory ; the preamble says that the Convention expresses the anxiety of the contracting parties to ensure the security of international commerce against the surprises of war, and their desire "in accordance with modern practice" to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities. From this it appears to follow that arts. 1 and 2 are merely declaratory of existing international law. It seems to me that there are two

- A answers to this argument. First, the natural construction of the reference to modern practice in the preamble is to treat it as referring to the tendency, which undoubtedly occurred in the latter half of the nineteenth century, for belligerents to make concessions of uncertain and variable extent outside the recognised law, for which the relevant articles substituted an agreement binding on the contracting parties, to the effect set out in the passage already quoted. Secondly, to hold otherwise would be to ignore completely the passage in the
- B opinion of LORD SUMNER, which reads as follows, at pp. 326, 327 :

Turning to the Hague Convention, VI, arts. 1 and 2, it is important to remember that, before its date, and since its date whenever it is not in force, the law of nations permitted and entitled a belligerent to make prize of an enemy merchantman found within his port at the outbreak of war (*Lindo v. Rodney* (6)). It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognised by the law of nations should be mitigated or not. It is not surprising that the negotiators of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the power entitled to capture, was a thing desirable indeed, but not obligatory.

- C This passage is in complete accord with the actual decision in *The Marie Leonhardt* (4). Counsel for the claimants argues that it was *obiter*. On the
- D contrary, it seems to me to be the key to the whole judgment ; it was precisely because it was recognised that international law was settled in this sense that their Lordships based their advice to His Majesty solely on the terms of what they held to be a binding agreement. The form in which their advice is expressed is quite inconsistent with a state of international law such as that for which counsel for the claimants contends, or even with there being any doubt about the law. Even if, as is not the case, I thought otherwise, I should consider
- E myself bound by these decisions to reject the claimant's contention.

- Assuming, however, that this principle of international law is established, where the belligerent power, in whose port a vessel was found at the outbreak of war, had itself imposed no restriction on her movements, counsel for the claimants argued that different considerations would apply if that power had imposed an anticipatory embargo upon the vessel before the outbreak of war, with the object of effecting seizure in the event of war. This, he argued, had been done in this case, and had been done in purported exercise of a right now obsolete in international law ; and, that being so, the embargo must be taken to have superseded the civil arrest, with the consequence that, as it was illegally imposed, the vessel should be treated as having been free to depart before war broke out, and the Attorney-General should not be heard to argue that the civil arrest was still an effective cause of her detention. The facts upon which
- G this contention was based are that shortly after 12.30 p.m. on Sept. 2, on the orders of the general officer commanding the London district, Major Morley-Fletcher, who was then staff-captain of the 2nd (London) Infantry Brigade, the brigade in charge of the London Docks area, ordered the 2nd battalion of the London Scottish Regiment to provide a guard of one officer and ten other ranks, to whom he gave orders personally that they were to prevent unauthorised access to the ship, though the crew were free to come and go ; and
- H that in the event of her preparing to cast off they were to rush her and take her over, a course which he also authorised if the commander of the guard thought that the safety of the dock was endangered in any other way by any action of, or from, the ship. The guard came on duty alongside the ship about 1 p.m. on the same day and remained on duty until after the outbreak of war. The reason for this precaution, as clearly appears from the affidavits of Major Morley-Fletcher and Thomas MacDonnell, a detective inspector of the Port of London Authority Police, which I accept, was that there were rumours that the ship intended to attempt to ram the dock gates, and that her berth had been changed

a day or two previously for this reason : it was also feared that there might possibly be trouble between the crew and the dockers, or that some other form of sabotage might be attempted. In fact at some unspecified time on Sept. 2, inspector MacDonnell noticed that the stern draught marks had been obliterated, and suspected, the engine room being situated aft, that this had been done so that the early stages, at any rate, of her sinking by the stern should be less noticeable. As will appear, this suspicion was fully justified. Major Morley-Fletcher himself visited the master of The Pomona and told him that the guard was being placed on the quay in order to secure the safety of the ship and to prevent any possible trouble arising from high feeling among the dockers and, in answer to a statement by the master that all his crew were aboard and would not be going on shore, advised him that this was a wise precaution in view of a possible display of local feeling, with which the master agreed. In his affidavit the master says that the officer who came on board told him that they must not move the vessel or move from the berth and that her officers and crew were to remain on board. So far as the latter allegation is concerned, I am satisfied that no such order was given to the officers and crew of the vessel, nor, indeed, would it have been practicable to give any such order, for the reasons set out in inspector MacDonnell's affidavit. It is easy to understand, however, that what was tendered as advice may have been misinterpreted as an order. It is in effect common ground, whether it was put into words or not, that any movement of the vessel was forbidden.

No trouble, in fact, occurred until at 11.25 a.m. on Sept. 3, immediately after the speech of the Prime Minister. Major Morley-Fletcher with inspector MacDonnell and several Port of London police boarded the vessel and informed the master that, in view of the proclamation of war, he must place him and his crew in custody ; and he ordered the guard to search the ship in company with the Admiralty Marshal's representative, who was still on board, for possible sabotage of any kind, starting with the engine room. It was at once discovered that the ship's cocks were turned on and that she was rapidly filling with water. The dock authority's engineers did not know their way about the ship and could not find the cocks. Major Morley-Fletcher spoke to the master, who told him that he was acting under orders from his government ; but after discussion between the master and his engineers, two of the latter at length agreed to turn off the majority of the cocks, and the rest seem to have been dealt with by the engineer of the charterers, who had been sent for meanwhile. It is clear that but for this prompt action, the ship would have sunk in the dock, with all the attendant inconvenience and loss of dock space which would inevitably have resulted.

The question is whether these facts raise any question of anticipatory embargo. It is conceded that embargo is usually the subject of a general proclamation. I will assume, however, for the purposes of the argument, that an individual ship may be the subject of embargo. Even so, I do not think that there is any evidence that anything of the sort was imposed in this case. The armed guard was ordered to stand by alongside not with the object of rendering a ship, otherwise free to depart, available for seizure on the outbreak of war, but because there was reasonable ground for apprehension that those in charge of this particular ship, which, to the knowledge of the military authorities was by law bound to remain until her civil arrest was lawfully terminated, might commit acts of sabotage, or might become involved in a breach of the peace with the dock workers, amongst whom feeling was running high, or even by making an attempt to break the arrest. There is nothing in the provision of a guard in these circumstances which can fairly be called an embargo and, therefore, as anything I might say on the subject would be *obiter dictum*, I accept the Attorney-General's invitation to postpone to a more suitable occasion consideration of the interesting questions whether anticipatory embargo is still recognised in international law and, if so, whether it would attach to a ship already lawfully detained on other grounds.

For these reasons I am of opinion that The Pomona is liable to condemnation as good and lawful prize, and I give judgment accordingly.

Judgment accordingly.

Solicitors : *Bentleys, Stokes & Lowless* (for the claimants) ; *Treasury Solicitor* (for the respondent *His Majesty's Procurator-General*).

[*Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.*]

ERNEST TURNER ELECTRICAL INSTRUMENTS, LTD.

v. PERFORMING RIGHT SOCIETY, LTD.

PERFORMING RIGHT SOCIETY, LTD. v. GILLETTE
INDUSTRIES, LTD.[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.J.J.),
March 15, 16, 17, 1943.]*Copyright—Performance in public—Diffusion of broadcast programme in factories—
Diffusion of gramophone records—Copyright Act, 1911 (c. 46), s. 1 (2).*

In these two appeals each of the appellant companies had had a wireless receiving set installed in its factory together with a number of loudspeakers by which it had diffused to the various departments in the factory music which was broadcast by the B.B.C. in their programme of "Music while you work," such broadcasts being for the purpose of diffusion in factories. The first appellant company had similarly performed gramophone records. The respondents were the owners of the performing rights of a number of the pieces of music so diffused, and claimed that the performances were an infringement of their copyright therein. It was contended for the appellants that the performances were not in public:—

HELD: such performances constituted performances in public and were, therefore, an infringement of the respondents' rights.

D *cision* of BENNETT, J. ([1943] 1 All E.R. 228) *affi m'd.*

[EDITORIAL NOTE.] It seems safe to say that the Court of Appeal were here bound to follow the decision in *Jennings v. Stephens* (1). The performances here were clearly not performances to which the public had any right of admission upon terms of payment. In that sense it seems fairly clear that these were private performances, but that is not the criterion which the courts have adopted. The relationship of the audience to the owner of the copyright is the matter to be considered, and in this connection the test is whether the performance is one within the monopoly granted by the Act. The owner of the copyright is given a monopoly as a recompense for his work, taste and imagination in composing the artistic work and it is important that this monopoly should not be whittled down so as to become illusory. On this view the performance of these works for the benefit of the audiences here in question is held to be a performance in public. It will be noted that the plaintiffs in these actions were assignees of the copyright and not the original composer of the music.

AS TO PERFORMANCE IN PUBLIC, see HALSBURY, Hailsham Edn., Vol. 7, p. 572, para. 888; and FOR CASES, see DIGEST, Vol. 13, pp. 214, 215, Nos. 501-510.]

Cases referred to:

- (1) *Jennings v. Stephens*, [1936] Ch. 469; [1936] 1 All E.R. 409; Digest Supp.; 105 L.J.Ch. 353; 154 L.T. 479.
- (2) *Caird v. Sime* (1887), 12 App. Cas. 326; 13 Digest 173, 95; 57 L.J.P.C. 2; 57 L.T. 634.
- (3) *Duck v. Bates* (1884), 13 Q.B.D. 843; 13 Digest 214, 507; 53 L.J.Q.B. 338; 50 L.T. 778.
- (4) *Glenville v. Selig Polyscope Co.* (1911), 27 T.L.R. 554; 13 Digest 215, 508.
- (5) *Harms Incorporated and Chappell & Co. v. Martans Club*, [1927] 1 Ch. 526; Digest Supp.; *sub nom.* *Harms Incorporated v. Embassy Club, Ltd.*, 96 L.J.Ch. 84; 136 L.T. 362.
- (6) *Performing Right Society, Ltd. v. Hawthorns Hotel (Bournemouth), Ltd.*, [1933] Ch. 855; Digest Supp.; 102 L.J.Ch. 330; 149 L.T. 425.
- (7) *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, [1934] Ch. 121; Digest Supp.; 103 L.J.Ch. 210; 150 L.T. 119.

APPEAL by the plaintiff company in the first appeal from an order of BENNETT, J., dated Jan. 29, 1943, and an appeal by the defendant company in the second appeal from an order of BENNETT, J., dated Jan. 26, 1943. In both cases the appellants had diffused broadcasting programmes in their factories and the first appellant had also performed gramophone records. The proceedings in the second appeal before BENNETT, J., are reported [1943] 1 All E.R. 228, where the facts are fully set out.

Richard O'Sullivan, K.C., and *M. Gravenor Hewins* for the appellants in the first appeal.

R. F. Roxburgh, K.C., and *G. S. W. Marlow* for the appellants in the second appeal.

Charles Harman, K.C., K. E. Shelley, K.C., and F. E. Skone James for the respondents.

O'Sullivan, K.C. : In the present case the public were excluded because the performances were in a protected place. There was no audience in the proper sense of the word. The people were there by reason of their work and not by reason of a desire to see or hear a performance. It was not suggested that any visitor had heard any of the performances in question. What united the audience was a common employment and not a desire to hear a performance. In *Caird v. Sime* (2), it was held that a course of lectures delivered by a professor at a university were not delivered in public. In order that a performance may be a public performance, the public must be invited or have access. In the present case no member of the public was invited or had access in any way and, therefore, the performances were not public performances. In *Duck v. Bates* (3), the performance was given to a portion of the workers in a hospital and it was held that the defendants were not liable to penalties under the Acts of 1833 and 1842. The present case is stronger than *Duck v. Bates* (3), since there the people were present for the express purpose of seeing and hearing the performance. In interpreting the word "performance," on the authority of *Duck v. Bates* (3), one must have regard to the social habits of the time. [Counsel referred to *Glenville v. Selig Polyscope Co.* (4), *Harms Incorporated and Chappell & Co. v. Martans Club* (5), *Performing Right Society, Ltd. v. Hawthorns Hotel (Bournemouth), Ltd.* (6), *Jennings v. Stephens* (1), and *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.* (7).]

Hewins followed on the same side.

Roxburgh, K.C. : I am not asking the court to lay down any principle as to the construction of the words "in public." If Parliament had wished that to be done, it would itself have done it. The authorities have laid down no principle hitherto and no principle can be laid down. One must have regard to the character of the audience as was stated in *Jennings v. Stephens* (1). In that case the court regarded the character of the audience in relation to the person who gave the performance. The test as to whether or not a particular performance was in public cannot have a different result according to whether the author was the owner of the copyright or whether it had vested in another by assignment. It is difficult to fit in the view that one has to regard the author's public with the statutory definition of owner. There are five factors which support the proposition that in the present case the performance was not in public. The performance was given by the management to the staff. It was given in their common place of business. It was given during business hours and in the course of the staff's employment. It was given as an amenity to improve the conditions of labour. Lastly, there were no visitors. The circumstance which is of paramount importance in considering whether or not the performance was in public is the fact that those present were all members of a community organised for work and not for the purposes of entertainment. If one uses the word entertainment in connection with the performance, one is not using it in the sense of entertainment during leisure hours. There is no direct loss to the owner of the copyright because this performance is given during the course of employment and the employees could not be attending any other performance at the time. [Counsel referred to *Duck v. Bates* (3).]

Marlow followed on the same side.

Counsel for the respondents were not called upon.

LORD GREENE, M.R. : In all material respects the facts in these two appeals are the same. They are set out very fully in the judgments of **BENNETT, J.**, and I do not propose to repeat them. There is one small point to which, perhaps, I should refer, and that is that in the *Ernest Turner Electrical Instruments* case there have been performances of gramophone records. That apparently has not taken place in the *Gilletto* case, and counsel for the appellants in the second appeal quite naturally reserved all his rights in that respect. Upon the view of the case which I take, there is no difference at all between the performance of gramophone records and the diffusion of broadcast programmes, in so far, that is, as the performing rights in gramophone records belong to the *Performing Right Society*.

There are some matters which have been referred to in argument which, in my opinion, are quite irrelevant. I mention them to get them out of the way.

The first is that the factories in question are what are called protected places. The second is that they are subject to the essential works orders. The third is that, at any rate in one case—I am not sure whether it is the same in the other—it is possible to switch off the performance in individual parts of the factory. Those matters appear to me to have no bearing whatsoever upon the questions which we have to decide. In so far as it may be relevant to consider whether or not the employer who gives the performance is doing so for his own profit, the view taken by BENNETT, J., appears to me to be unquestionably right. It is in the interest of every employer to keep his workpeople happy and contented and to see that the quality of their work is not impaired by feelings of boredom. It is perfectly true that, at any rate in the Ernest Turner case, there seems to have been a difference of opinion on the board as to whether or not these performances assisted in that respect. That seems to me to be neither here nor there. The object of giving these performances is to improve production or to prevent production declining. On that matter it is irrelevant, in my opinion, that the companies in question are subject to the provisions of the law relating to excess profits tax. The position would be precisely the same if that tax did not exist; nor does it seem to me to be of the slightest importance for present purposes that the increase of output is a thing which is in the national interest. The owner of the copyright is entitled to be paid for the use of his property unless and until the legislature otherwise determines, and he is entitled to be paid for it even if the use that is made of it is a use which concerns the public welfare to a very considerable extent.

We have been referred to a number of authorities, but I propose to base my judgment upon the latest authority in this court in which the previous cases were considered and reviewed. That authority is *Jennings v. Stephens*. (1), and I refer to two short sentences in the judgments of LORD WRIGHT, M.R., and of ROMER, L.J. LORD WRIGHT, M.R., at p. 479 ([1936] 1 All E.R., at p. 414) says:

The true criterion seems to be the character of the audience.

At p. 482 ([1936] 1 All E.R., at p. 416) ROMER, L.J., says:

The question whether an entertainment is given in public or in private depends, in my opinion, solely upon the character of the audience.

That, of course, does not mean that any element is to be excluded from consideration which throws light upon that matter.

In the present case the nature of the audience, when properly understood, in my opinion, puts the matter beyond doubt. In each case the audience constitutes a substantial part of the working population of the district. It is collected from different households in the district. It is an audience which obviously is fond of music. In one case—I am not sure whether it is proved in the evidence in the other, because we were not referred to the evidence in the Gillette case—but in the Ernest Turner case, I think I am right in saying that that is the case, the practice of performing music in the way in which it has been performed was initiated at the request of the workpeople themselves. From time to time groups of workpeople or individual workmen or women asked for a particular song to be played by the gramophone record. It is quite obvious, therefore, that the whole object of these performances is to supply to the workpeople something which they like. So far as regards the music, the workpeople are an audience. The fact that it assists their work appears to me to be entirely irrelevant. While the performances are being given and the workpeople are doing their work, they are doing two things at once. They are working and they are enjoying music, which normally is a thing they would enjoy in their leisure hours. Instead of having the music in their leisure hours, they have it while they are working. None the less they are, so far as the music is concerned, an audience listening to music, and the fact that they are working at the same time does not alter that, any more than it alters the fact that a housewife who turns on her radio set while she is doing her housework is listening to the music at the same time as she is doing that work.

The matter, I think, can be tested by considering this case. Suppose that the proprietors of these businesses decided that it would help to keep their workpeople in good heart and good temper if from time to time they gave them broadcast performances or gramophone performances after their work is over.

The object would be the same and the results in substance would be the same, because they would keep the workpeople happy, and, therefore, improve their state of mind and their attitude towards the place where they work. It seems to me that precisely the same principles would be applicable if these concerts were given in the factory to the workpeople after they had laid down their tools. The fact that they are given while they still have their tools in their hands appears to me to make no difference whatsoever. Indeed, counsel for the appellants in the first appeal, when the point was put to him in the course of his argument, at once, and in my opinion, rightly, took the view that the position would be precisely the same in the two cases. When those considerations are borne in mind, the answer to the present question appears to me to be beyond doubt. These questions, which are sometimes called questions of fact, are questions which depend upon the facts of each individual case. When those facts are ascertained, the question whether they satisfy the language of the statute, which speaks of "performances in public," is no doubt a question of law, but in answering that question of law the chief guide to the court, in my opinion, is the guide of common sense. Some cases fall on one side of the line and some on the other. The particular side on which they fall has to be determined largely by the application of common sense.

In the present case, having regard to the character of the audience and all the relevant facts which bear upon that matter, I have no doubt that these performances were performances in public. In *Jennings v. Stephens* (1) to which I have referred, I ventured to suggest that in considering the character of the audience the primary matter to consider was the relationship of the audience to the owner of the copyright, rather than the relationship of the audience to the performers. I am confirmed in that view by a consideration of the present cases. When the legislature under the Copyright Act conferred upon the owner of copyright a monopoly, it no doubt intended that that monopoly should be a real and not an illusory right of property, and it is, therefore, in my opinion, important to consider whether a particular performance, the character of which is in question, is of a kind calculated to whittle down that monopoly to any substantial extent. To take a case at one end of the scale, a purely domestic performance, or what is sometimes called a *quasi*-domestic performance, is not a thing which is calculated to whittle down the value of the monopoly. It is a thing which can have no substantial effect in depriving the owner of the copyright of the public from whom he receives the value of the work of his brain and his imagination. If you take the other end of the scale, where there is a performance unquestionably in public, such as at a public theatre or a public concert hall, obviously if that were permitted that would whittle down the value of the monopoly. The monopoly is, of course, confined to performances in public, but in considering whether a performance is in public its effect upon the value to the owner of the copyright of his statutory monopoly is, I venture to think, a consideration to which at any rate great importance should be given. I say that by way of further explanation of the observations which I ventured to make in *Jennings v. Stephens* (1).

In the present case counsel for the appellants in the second appeal did what he was perfectly entitled to do; he criticised the view which I had expressed and invited us to pay regard not to any relationship of the audience to the owner of the copyright, but to the relationship of the audience to the performer in the present case. The performer, of course, is the proprietor of the factory who performs the music by turning on the broadcast or setting the gramophone in operation. Whatever may be the value of a consideration of the relationship of the performer to the audience in other cases, it seems to me that in the present case it affords an entirely misleading guide. It could make not the slightest difference, in my opinion, if in the present case the performances had been given not by diffusion through the factory by means of loudspeakers operated by the management, but by a neighbour who set up a system of diffusion with loudspeakers which could be heard through the factory. The relationship of the performer to the audience in such a case would not have been the same as the relationship of the performer to the audience in the present case. The difference in the relationship could not, it seems to me, affect in the slightest degree the question whether the performance was or was not a performance in public.

Counsel for the appellants in the second appeal said that the parties in this

case were all members of a community organised for work. I have already dealt to a certain extent with the work element in this case, but it seems to me impossible to do what counsel for the appellants in the second appeal asks us to do and regard everything that takes place inside the factory in regard to this music as a purely domestic concern of those taking part in it, whether as performer or as audience. The test of the relationship of the audience to the performer seems to me to break down completely in this case, whereas the

A test which I venture to suggest would, at any rate in a great many cases, and certainly in the present, be the most helpful one, that is, the relationship of the audience to the composer and the effect that the performance has upon his monopoly, is a consideration which does seem to me in the present case to throw a good deal of light upon the situation.

It was said that it was not legitimate to consider what the effect would be of a decision in favour of the appellants having regard to the circumstance that there

B are thousands of factories in the country employing, no doubt, hundreds of thousands, indeed, millions, of workpeople. If these performances can be given without infringement of copyright in these two cases, they can be given in every case. It is perfectly true, of course, to say that two rights do not make a wrong; but for the purpose of discovering the real nature of the audience and the effect on the monopoly of treating these performances as private performances, it does seem to me to be relevant to consider what the result would

C be if performances of this kind were given in all the other factories in the country. The result would be that the employers of millions of workpeople would be giving to their workpeople without payment the fruit of the brains, skill, imagination and taste of the author, if the author be the owner of the copyright, or the property of his successors in title, without any remuneration to him or them, and would be getting the advantage of that work, taste and skill, in obtaining

D increased or improved output. When you consider such a state of affairs throughout the country as a whole, if it be right to say that in all those cases the performance would not be in public, the effect would be to destroy to a large extent the value of the statutory monopoly by depriving the owner of the copyright of the exclusive right to sell his goods to the public. I think it is legitimate to take those matters into consideration, not, as I say, for the purpose of turning a rightful act into a wrongful act in these two cases, but for the purpose of seeing

E what is this audience, what is the nature of this audience that is having the benefit of this music.

When the question is looked at in that way it confirms me in my view that the audience, in the case of each factory, must be regarded as a section of the public. The legitimacy of taking these matters into consideration is quite clearly recognised by LORD WRIGHT, M.R., in his judgment to which I have already referred, because at p. 480 of the report ([1936] 1 All E.R., at p. 415) he says this, in

F reference to the case before him :

If that were not a performance in public, and might be repeated indefinitely all over the country, the performing right would not be of much value.

There I venture to think LORD WRIGHT, M.R., was regarding the question very much from the same angle as I am regarding it myself, namely, he is regarding

G the extent to which the value of the statutory monopoly will be whittled down as at any rate a very material factor in dealing with these questions.

In my opinion, BENNETT, J., came to the only possible conclusions in these cases and, for the reasons which I have given by way of supplement to his judgment, the appeals must be dismissed with costs.

LUXMOORE, L.J. : I agree that both appeals must fail and that there is no

H ground for any material distinction between the facts in the two cases. BENNETT, J., in his judgment in the Gillette Industries case, said, at p. 232 :

I find it impossible to find any real distinction between the facts of the present case and the facts which in *Jennings v. Stephens* (1) the Court of Appeal held to be a performance in public; and, as I say, without attempting to define what is meant by "in public," regarding the case as one in which the antithesis to "in public" is in private, I have come to the clear conclusion on the facts that these defendants when every day they broadcast these half-hourly performances of "Music while you work" are giving performances in public, and that any item of music included in the programme is, therefore, being performed in public.

I find myself in agreement with what BENNETT, J., has said, whether the cases be reviewed from the angle of LORD WRIGHT, M.R., and ROMER, L.J., in *Jennings v. Stephens* (1) or from that of LORD GREENE, M.R., in the same case, though, speaking for myself, I find the latter point of view the more satisfying. Indeed, I think that LORD WRIGHT, M.R., himself was really inclined to the same view when he said, in the passage which LORD GREENE, M.R., has just read, that, if the performance in *Jennings v. Stephens* (1) were not a performance in public and might be repeated indefinitely all over the country, the performing right would not be of much value. It certainly seems to me that those words are equally applicable to the present cases, when one realises the number of factories there are in the country at the present time and their size. I have no doubt whatever that both these appeals should fail and should be dismissed with the usual consequences.

GODDARD, L.J.: I agree. I can think of no more satisfying guide as to what is a performance in public for the purpose of the Copyright Act than that suggested by LORD GREENE, M.R., in his judgment in *Jennings v. Stephens* (1). In that case LORD WRIGHT, M.R., said that the criterion was the character of the audience, and the passage in the judgment of LORD GREENE, M.R., to which I have referred enables one to test the character. Is the audience one which the owner of the copyright could fairly consider a part of his public? If it be objected that guests in a private house would be a part of that public, the answer, I think, is that in selling a piece of music or a gramophone record the owner of the copyright contemplates that it will be played and consents to its being played by the purchaser and neither expects nor desires that it should be enjoyed in solitude, but that it may be heard by members of the purchaser's household and his guests. If an action for damages or penalties were tried by a jury, and this direction were given to them, they could, I think, without difficulty and by applying their common sense decide whether the audience in any particular case exceeded what could fairly be described as a private or domestic audience; and exactly the same considerations apply to broadcasting. The principal object of the Act is to safeguard the property of authors or their transferees in their copyright, and if employers of labour were entitled to cause compositions to be performed before their employees merely by buying a piece of music or a record, or paying the ordinary licence for a broadcasting set, an author would very soon have his public seriously diminished, and the protection of the Act would be to a great extent illusory.

I entirely agree with BENNETT, J., that in both of these cases the performance was in public and, therefore, that the appeals should be dismissed.

Appeals dismissed with costs.

Solicitors: *C. Grobel, Son & Co.*, and *Bell, Brodrick & Gray* (for the respective appellants); *Syrett & Sons* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

SCHERING, LTD. v. STOCKHOLMS ENSKILDA BANK AKTIEBOLAG AND OTHERS.

[CHANCERY DIVISION (Simonds, J.), **March 10, 1943.**]

Contract—Illegality—Contract involving intercourse with alien enemy—Contract with neutral for benefit of enemy—Dissolution on outbreak of war.

By a contract called a "contract of debt" made in February, 1936, the defendants, a Swedish bank, agreed to advance to a German company reichsmarks to the value of £84,000 sterling at the official rate of exchange, in respect of which the German company agreed to be indebted to them for the sum of £50,400 sterling without interest to be repaid in 8 years. The plaintiffs, an English company (now in liquidation), and an Indian company (both of whom were controlled by the German company), constituted themselves jointly and severally guarantors of that debt, and they further agreed to purchase the Swedish bank's claim (£50,400) against the German company by instalments of varying amounts to be paid over a number of years. In April, 1936, the terms of the contract

were varied, *inter alia*, by the plaintiffs and the Indian company undertaking to pay the instalments as principals and not as guarantors, and the payment of such instalments was to be a *pro tanto* satisfaction of their liability under the guarantee. It was also agreed that the contract between the Swedish bank and the plaintiffs should be governed by English law. Instalments were paid under the contract until the outbreak of war in 1939, and in 1941 the Court of Appeal held that it would be an offence under the Trading with the Enemy Act, to pay the instalment then due. The plaintiffs contended that the April contract was dissolved on the outbreak of war on the ground, *inter alia*, that its continued existence would inure for the benefit of the German company to the detriment of the plaintiffs and would involve intercourse with the enemy:—

HELD: since the continued existence of the contract would involve intercourse with and confer benefit on the enemy, it was dissolved at the outbreak of war.

[EDITORIAL NOTE.] It is said in POLLOCK, PRINCIPLES OF CONTRACT, 11th Edn., pp. 299, 300: "On the whole the cases in which suspension as distinct from total abrogation of the contract is allowable must now be considered exceptions." It is at least clear that where the continued existence of the contract involves intercourse with the enemy, it is abrogated at the commencement of the war as being against public policy and from that moment the contract ceases to exist. It would seem that the true basis of this view is that the contract has become illegal and not that its performance has been frustrated. Where there is no illegality but mere impossibility of performance, suspension still seems a possibility, but the tendency appears to be in favour of total abrogation even where there is no illegality.

AS TO IMPOSSIBILITY OF PERFORMANCE DUE TO STATE OF WAR, see HALSBURY, Halsbury's Laws of England, Vol. 7, pp. 218, 219, para. 297; and FOR CASES, see DIGEST, Vol. 12, pp. 392-395, Nos. 3204-3212.]

Cases referred to:

- (1) *Ertel Bieber & Co. v. Rio Tinto Co.*, *Dynamit Act. v. Same*, *Vereinigte Königs und Laurahütte Act. v. Same*, [1918] A.C. 260; 12 Digest 395, 3211; 87 L.J.K.B. 531; 118 L.T. 181.
- (2) *Re Badische Co., etc.*, [1921] 2 Ch. 331; 12 Digest 397, 3219; 91 L.J.Ch. 133; 126 L.T. 466.
- (3) *Esposito v. Bowden* (1857), 7 E. & B. 763; 12 Digest 388, 3185; 27 L.J.Q.B. 17; 29 L.T.O.S. 295.
- (4) *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; 118 L.T. 442; *affd.*, [1918] 2 K.B. 486; 12 Digest 395, 3212.

ACTION for a declaration that a contract between the plaintiffs and the defendants was dissolved on the outbreak of war. All the facts are set out in the judgment.

N. L. C. Macaskie, K.C., and *J. A. Wolfe* (for *Maurice Berkeley* on war service) for the plaintiffs.

D. A. Scott Cairns and *I. J. Lindner* for the first defendants, the Stockholms Enskilda Bank Aktiebolag.

J. Pennyquick for the second defendants, Edwards and Morris.

SIMONDS, J.: The plaintiffs, an English limited company now in voluntary liquidation, claim against the defendant, Stockholms Enskilda Bank Aktiebolag, a company registered under the laws of Sweden and carrying on the business of banking in that country, a declaration that a contract which was made between them on Apr. 16, 1936 (and is referred to as the April contract) is no longer enforceable against them; and they claim against the personal defendants, Edwards and Morris, certain relief in respect of a sum of £25,000 which those defendants held as security for the performance by the plaintiffs of their contractual obligations.

The claim is based upon the allegations (a) that the performance of the April contract has become impossible or has been frustrated; and, by an amendment of the statement of claim, (b) that the April contract is a contract the continued existence of which would inure for the benefit of the German company and to the detriment of the plaintiffs, or would involve intercourse between the plaintiffs and the German company and which, accordingly, on the outbreak of the present war between this country and Germany was dissolved. The claim relates to the so-called April contract, but I find it impossible to consider its meaning and effect without first stating and examining an earlier contract

made in February of the same year. At that time the Swedish bank was possessed of a sum of German reichsmarks of the value of £84,000 sterling at the official rate of exchange.

A German company Schering-Kahlbaum Aktiengesellschaft, which was the parent company of the plaintiffs owning or controlling directly or indirectly all its shares, was anxious to acquire this sum of reichsmarks. The German company controlled also a company registered in India and known as Schering-Kahlbaum (India), Ltd. In February a contract described in the translation from the German original as a "contract of debt" was expressed to be made between the Swedish company as creditor of the one part, the German company as debtor of the other part, and also between the plaintiffs and the Indian company as sureties. It was dated Feb. 24 and 28, 1936, and provided by cl. 1 that the Swedish company would within 1 month place at the disposal of the German company an amount in reichsmarks equivalent to £84,000 sterling; by cl. 2 that in consideration of this sum of reichsmarks being placed at their disposal the German company would be indebted to the Swedish company in the sum of £50,400 free of interest and that the debt should fall due on the expiry of 8 years from the date of paying out and should then be repaid without further notice subject to certain exceptions which I need not mention; by cl. 3 that the sureties—that is, the plaintiffs—and the Indian company constituted themselves "surety jointly and severally as principals" to the amount of £50,400 with the proviso that against the liability as sureties all payments must be set off which the Swedish company had received from the sureties or one of the sureties or from the German company or from third persons for account of any of them in respect of the loan.

Cl. 4 contains a curious and unusual provision. It provides that the sureties shall acquire from the Swedish company its claims against the German company by instalments. The principal debtor is indebted in a principal sum of £50,400 payable after 8 years without interest, but by this clause the sureties are to pay to the Swedish company by half-yearly instalments of which the first was to be paid 1½ years after the loan—a date which is agreed to be Oct. 28, 1937—and the 14th and last on Apr. 28, 1944. The instalments are of varying amounts, the first four being of £6,300 each, the next two of £3,360 each, the next two of £2,940 each, the next two of £2,520 each, the next two of £2,100 each and the last two of £1,680 each. The same clause provides that if and to the extent to which the sureties do not acquire the claims at the dates specified—that is, do not make the prescribed payments to the Swedish company—the principal debtor will lose the advantage of the discount in the ratio of £84,000 to £50,400 at which he is purchasing the reichsmarks. The advantage to the German company of the plaintiffs and the Indian company making the prescribed payments is clear. Cl. 6 provides for the sending by the German company and the sureties to the Swedish company of their annual reports and certain other publications. Cl. 7 authorises the Swedish company to call in the debt immediately if the German company or one of the sureties becomes bankrupt or takes steps towards an arrangement with creditors. Cl. 8 provides that the contract of debt is to be governed by German law but that to the legal relationship between the sureties and the Swedish company English law is to apply.

It is not very clear to me why it should have been so, but the February contract appears not to have been completely satisfactory to the Swedish company, and in April they obtained from the plaintiffs and the Indian company a further document. This is the document which, though not expressed to be *inter partes*, is referred to as the April contract. It is in the form of a letter dated Apr. 16, 1936, and is addressed to the Swedish company by the plaintiffs and the Indian company, who thereby state that in consideration of the Swedish company making on their joint and several requests an advance of £84,000 to be made available in spermarks (a kind of reichsmarks) to the German company, they jointly and severally guaranteed the payment in sterling by the German company of the amount therein mentioned, that is, the sum of £50,400, and that the guarantee is to be considered a continuing guarantee (subject always to the limit therein mentioned) and shall not be withdrawn.

The document contains further provisions in regard to the granting of time or other indulgence to the German company and to the existence of any collateral security and to payments made in respect thereof and other matters. It is

made an express condition that the amount recoverable thereunder shall in no case exceed £50,400 with the proviso that all payments received by the Swedish company from the sureties or on account of the said advance from the German company or from third parties on account of any of them are to be taken in reduction of their liability. Then the sureties jointly and severally undertook as principals, not as guarantors, to make the payments therein set out in consideration of the assignment by the Swedish company to them on the occasion of each such payment of a like sterling amount of their claim against the German company. The payments are set out in the same way as in the February contract ; and it is provided further that each such payment shall be a satisfaction *pro tanto* of their liability under the guarantee, and that they shall not be liable to make such payment in so far as the amount in question has been paid by the German company or any other person or company ; and further that the default in payment of any one instalment should not accelerate the date for payment of any other instalment, provided that this provision should not prejudice the rights of the Swedish company of proof in the liquidation of the sureties. Finally, it was provided that the guarantee and agreement were made in accordance with the laws of England.

On the same day a further document, which has been referred to as the " April letter," was signed by the plaintiffs alone. Addressed to the Swedish company, it stated that the plaintiffs confirmed that, in consideration of the Swedish company at their request granting to the German company an advance of £84,000 sterling (to be made available in *sperrmarks*) they had pledged certain goods to the Swedish company as security for their liability, whether as guarantors or as principals under the April contract. The letter stated, as the fact was, that the plaintiffs had warehoused at the warehouse of a third party marketable goods to the value of £25,200 at least, and contained elaborate provisions for maintaining their security which I do not think it necessary to state. It is sufficient to say that when this action was brought the goods were represented by the sum of £25,000 sterling standing in the names of the defendants, Edwards and Morris, against whom an order is claimed for release of this sum to the plaintiffs.

On Oct. 28, 1937, Apr. 28 and Oct. 28, 1938, and Apr. 28, 1939, instalments of £6,300 became due and were paid by one or other of the sureties, the plaintiffs or the Indian company, and an assignment was in each case made of the sum of £6,300 " out of the claim of the Swedish company against the German company." It is significant that this transaction entailed communication between the plaintiffs and the German company ; it is, indeed, difficult to see how it could be otherwise. On Sept. 3, 1939, war broke out between the United Kingdom and Germany, ten instalments of the guaranteed debt being then unpaid. On Oct. 28, the first of those unpaid instalments, a sum of £3,360 became due ; and the plaintiffs declining to pay it, the Swedish company sued them in the King's Bench Division of this court.

The plaintiffs defended the action upon the single ground that the German company being an enemy within the meaning of the Trading with the Enemy Act, 1939, they would be guilty of the offence of trading with the enemy within the meaning of sect. 1 of that Act if they made such payments. They did not raise the defence that the April contract was dissolved by the outbreak of war. The Court of Appeal, affirming the decision of the late HAWKE, J., upheld their defence, holding that the payment of the instalment in question would be an offence under the Act as it would result in the plaintiffs (1) having financial dealings for the benefit of an enemy within sect. 1 (2) (a) of the Act ; (2) making a payment for the benefit of an enemy under sect. 1 (2) (a) (ii) ; and (3) discharging an obligation of an enemy within sect. 1 (2) (a) (iii). That judgment was given on Jan. 29, 1941, and the plaintiffs, having allowed exactly 1 year to elapse, issued their writ in this action. It is easily intelligible that the company, having gone into liquidation in June, 1941, wished to escape the embarrassment of a claim hanging over them for an unknown period of time and were anxious too to remove goods or the proceeds of goods to the value of £25,000 from the sterilising security of the April letter.

As I stated at the opening of this judgment, the plaintiffs put forward two contentions, of which I propose to consider first that which was second in their argument, namely, that by the outbreak of war on Sept. 3, 1939, the April

contract was dissolved. From many judgments delivered during and after the last war upon the question of the dissolution of contracts at common law by the outbreak of war, I take two passages of high authority. In *Ertel Bieber & Co. v. Rio Tinto Co.* (1), LORD DUNEDIN said, at p. 274 :

From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.

There LORD DUNEDIN was expressly dealing with a case where the parties to a contract became enemies. Here I have to deal with a case where, though the contract on which the claim is founded was between an English company, an Indian company and a neutral Swede, yet that contract is bound up with the earlier contract to which the German company was a party, and, in fact, it was the German company for whose benefit and at whose instance the whole transaction was carried out.

I take then as my guide a passage from the judgment of RUSSELL, J. (as he then was) in *Re Badische Co.* (2), at pp. 373, 374 :

But assume a contract between British subjects, but of such a nature that either its further performance involves intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit. Does such a contract become void on the ground of illegality upon the outbreak of war? The illegality being based upon considerations of public policy, I can see no reason why a contract of such a nature should not become void on the outbreak of war, irrespective of any question whether the parties thereto are enemies or friends. The test should be, in my opinion, not whether one of the parties to the contract is an enemy, but whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy.

I turn back to the April contract to see whether either of these vitiating conditions is inherent in it. Would its performance involve intercourse with the enemy? Would its performance or its continued existence confer an immediate or future benefit on the enemy? It appears to me that both these questions must be answered in the affirmative. It would be sufficient to dissolve the contract if one of them was so answered. The test of intercourse, if I may so call it, is not whether its performance must necessarily involve communication, not whether it could perchance be carried out without communication with the enemy, but whether, having regard to ordinary commercial practice, it is of such a kind that, if it was carried out in the normal way, some communication with the enemy might reasonably be expected. Adopting this test, I cannot doubt that the plaintiffs would not perform their contractual obligations either in respect of their payment of the half-yearly instalments against assignments of a proportionate part of the Swedish company's claim against the German company or in respect of their guarantee of the principal debt without inquiring of the principal debtor what was the position in regard to the principal debt. It would surely be the normal procedure for any surety who was called upon to pay the principal debt to make such an inquiry. In the present case both the elaborate and peculiar nature of the transaction and the intimate association between surety and principal debtor would make it extremely unlikely that any departure would be made from the normal procedure. The second test, that of benefit to the enemy, admits, I think, of a clear answer. The whole transaction from beginning to end was for the benefit of the German company. I must ignore for this purpose the Trading with the Enemy Act, 1939. The contract was dissolved or not dissolved at common law on Sept. 3, 1939, and the provisions of an Act passed on Sept. 5, 1939, cannot affect that legal consequence. It is, therefore, irrelevant that the Act made it an offence (as the Court of Appeal held) for the plaintiffs to make any payments to the Swedish company.

The simple question is whether the performance or continued existence of this contract after Sept. 3, 1939, would benefit the enemy. For this purpose a benefit is regarded as accruing to the enemy if either his resources are increased or those of His Majesty's subjects are crippled. It is, in my judgment, plain that the performance of this contract or any part of it by the plaintiffs must benefit the enemy. Every payment made by way of purchase of the Swedish company's

claim or in order to implement the guarantee would by so much relieve the German company from its obligation to the Swedish company and by so much reduce the resources of the plaintiffs. It is surely irrelevant that the result might be at the same time to establish a claim by the plaintiffs against the German company.

But then it is suggested that, though the performance of the contract during the war might be prohibited, yet the contract may remain in existence, its performance being deferred until the war has ended. That is why I introduced into my test question the words "continued existence," for it seems to me that this is just the argument that was put forward and long ago rejected in *Esposito v. Bowden* (3) : see also *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft* (4) and the *Ertel Bieber* case (1). It may be that there is a class of contract the performance of which is suspended and not abrogated by the outbreak of war ; but I cannot myself think of an example unless the contractual right is (as LORD DUNEDIN suggested in *Ertel Bieber* (1) a concomitant of a proprietary right as, for example, a covenant to pay rent may be a concomitant of a leasehold interest, or unless the right is an "accrued right" at the outbreak of war in the sense of a right accrued by reason of a breach of contract. The right to performance of the contract during war must in every other case which I can formulate in my mind be for ever abrogated and not merely suspended. It is clear from the *Ertel Bieber* case (1) that a suspensory clause in the contract itself would not be effective to prevent abrogation of the contract ; it would be strange if by an artifice of the law a result was reached which, if expressed by the parties, the law would reject.

It was pressed upon me that, when this contract was under the consideration of the Court of Appeal, LORD GREENE, M.R., used words which suggested that, in his view, the rights of the Swedish company would revive when the war was over ; but he was considering only the effect of the Trading with the Enemy Act, and had not present to his mind the considerations which must determine the present case. I therefore decide in favour of the plaintiffs that the April contract was abrogated by the outbreak of war on Sept. 3, 1939. Coming to this conclusion I must further decide in their favour that they are entitled to have released to them the security provided by the April letter. It is the security for the performance of a contractual obligation which has no longer to be performed and there is, therefore, no ground for its maintenance.

It becomes unnecessary to determine the second question raised by the plaintiffs, namely, whether assuming that the contract was not abrogated by the outbreak of war, it was frustrated by the fact that, during the war—that is, for a period of indefinite and unpredictable duration—its performance was rendered impossible ; in other words, was it an implied term of the contract between the parties that, in the event of war and the consequent postponement of performance, the contract should be determined ? Was it a foundation of the contract, the disappearance of which put an end to it, that war should not defer its performance ? Has the intervention of war made the contract impossible of performance in the sense that the postponement of performance would make the contract as performed something radically different from the contract as expressed ?

I pose these questions but I do not answer them. They are not easy to answer, partly, perhaps, because they are based upon an assumption, which, in my judgment, the law does not admit, that the April contract was not abrogated but only suspended in its operation.

That being my judgment, the defendant bank must pay the plaintiffs' costs of action, and the defendants, Edwards and Morris, will take their costs out of their security. There will be a declaration that the contract was abrogated at the outbreak of war and an order, subject to their retention of their costs thereout, that the defendants, Edwards and Morris, pay the plaintiffs the sum of £25,000.

Declaration accordingly

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiffs and the second defendants) ; *Slaughter & May* (for the first defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

G.H.R. Co. v. COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Macnaghten, J.), February 1, 1943.]

Revenue—Stamp duty—Assent—Assent giving effect to sale—Chargeable with ad valorem duty as conveyance on sale—Stamp Act, 1891 (c. 39), s. 54—Administration of Estates Act, 1925 (c. 23), s. 36 (1), (4), (11).

By an agreement, dated Jan. 31, 1940, for the sale of certain freehold properties, the vendor undertook on payment of the purchase money to execute the necessary conveyances which would vest the legal estate in the appellants who were the purchasers. The purchase money was duly paid on Mar. 24, 1940, but the vendor died on June 2, 1940, without having executed any conveyance. His executors, in exercise of the powers conferred on them by the Administration of Estates Act, 1925, s. 36, gave their assent in writing to the vesting in the appellants of the freehold properties comprised in the agreement. The appellants contended that the assent was exempt from stamp duty:—

HELD: the freehold properties to which the assent related were vested in the appellants by the assent and not by the will, and the assent was chargeable with *ad valorem* conveyance on sale duty.

[EDITORIAL NOTE. Although the question of the stamp duty attracted by assents has in many respects been the subject of some doubt, it has been the general view that an assent giving effect to a sale attracts *ad valorem* duty in the same way as a conveyance. This decision, therefore, merely confirms the general view and is not concerned with any of the more doubtful points arising on the stamping of assents.

AS TO STAMP DUTY ON ASSENTS, see HALSBURY, Hailsham Edn., Vol. 14, p. 347, para. 650; and FOR CASE, see Digest, Vol. 39, p. 285, No. 672.]

Case referred to:

- (1) *Kemp v. Inland Revenue Comrs.*, [1905] 1 K.B. 581; 39 Digest 285, 672; 74 L.J.K.B. 112; 92 L.T. 92.

CASE STATED by Commissioners of Inland Revenue under the Stamp Act, 1891 (c. 39), s. 13, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully stated in the judgment.

Cyril King, K.C., and *Norman Armitage* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and *J. H. Stamp* for the respondents.

MACNAGHTEN, J.: By an agreement dated Jan. 31, 1940, the Hon. Gustavus Lascelles Hamilton-Russell, in exercise of the powers conferred upon him by the Settled Land Act, 1925, agreed to sell to the appellants (G.H.R. Co., a private company incorporated under the Companies Act, 1929, with unlimited liability) the freehold properties mentioned in the schedule thereto subject to a mortgage for £75,000 at the price of £340,361 5s. 4d., and by cl. 6 of the agreement the vendor undertook on payment of the purchase money to execute such conveyances as should be reasonably required for vesting the legal estate in the appellants or their nominees. The purchase money was duly paid on Mar. 24, 1940; but the vendor died on June 2, 1940, without having executed any conveyance. On Jan. 24, 1941, probate of his will was granted to the two executors named therein. The Administration of Estates Act, 1925, s. 36 (1), (4) empowers the personal representative of a deceased person to assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, of the legal estate in real property to which the deceased was entitled and that the assent shall operate to vest in the person named therein the legal estate to which it relates. On Apr. 3, 1941, the vendor's executors assented in writing to the vesting in the appellants of the freehold properties comprised in the agreement of Jan. 31, 1940.

This is a case stated by the Commissioners of Inland Revenue under the Stamp Act, 1891, s. 13, for the opinion of the court as to the stamp duty chargeable on the assent. The commissioners being of the opinion that the assent was a "conveyance on sale" within the meaning of the Stamp Act, 1891, s. 54, assessed the duty at £3,855, being the *ad valorem* conveyance on sale duty upon £385,500, the agreed value of the freehold properties to which it relates. The questions submitted for the opinion of the court are: (1) Whether the assent is liable to the *ad valorem* duty assessed by the commissioners; and (2), if not, with what, if any, duty it is chargeable.

The Stamp Act, 1891, s. 54, provides that :

For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

A The appellant having purchased and paid for the freehold properties to which the assent relates, was a person entitled to the legal estate in those properties otherwise than by devise, bequest, devolution or appropriation. It would seem, therefore, that, since the assent operated to vest the legal estate in the appellant, it was chargeable with the *ad valorem* duty as a "conveyance on sale." But it was urged by counsel for the appellants that *Kemp v. Inland Revenue Comrs.* (1) established that such an instrument is exempt from stamp duty. In that case a testatrix by her will devised certain hereditaments to her nephew, Kemp. Her executor under the provisions of the Land Transfer Act, 1897, s. 3, gave his assent in writing to the devise. The commissioners were of opinion that the assent was an instrument whereby the property was transferred to or vested in the devisee within the meaning of the Stamp Act, 1891, s. 62, which provides :

Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property.

C They accordingly assessed the instrument as chargeable with the fixed duty of 10s. The case came before PHILLIMORE, J., who decided that the assent was not liable to any stamp duty. He held that the assent by an executor to a devise of real estate under the Land Transfer Act, 1897, s. 3, is merely evidence that he has no longer any claim upon the property and that it does not operate to vest it in a devisee. In his opinion the property became vested in the devisee by the will of the testatrix. In the present case, however, the freehold properties to which the assent relates became vested in the appellant by the assent and not by the will, and, therefore, the reason given by PHILLIMORE, J., for his decision in *Kemp's* case (1) is inapplicable. He went on to say that, even if the assent did vest the property in the devisee, he thought that the Stamp Act, 1891, s. 62, should be read *reddendo singula singulis*, and that the verb "transferred" related to the noun "instrument," and that the verb "vested" related to "decree or order of any court or of any commissioners." In the present case the legal estate in the freehold properties in question had devolved upon the vendor's executors and was transferred by them to the appellants by the assent.

It was also suggested that the Administration of Estates Act, 1925, s. 36 (11), which provides that :

F This section shall not operate to impose any stamp duty in respect of an assent . . . exempted assents from stamp duty ; but the section does not say so ; it merely says that nothing in the section shall "operate to impose any stamp duty." The reason for the insertion of that subsection is not very clear, since there is nothing in the section which appears to have that effect : but it may be that since the section requires that an assent must be in writing whereas formerly an assent might be by word of mouth or even implied by conduct, this subsection was inserted for the purpose of indicating that the alteration in the law was not to affect the decision in *Kemp's* case (1) that an assent to a devise is exempt from any stamp duty.

G In my opinion, the assent in this case is chargeable with the *ad valorem* duty payable on a conveyance on sale, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

H Solicitors : *Gregory, Rowcliffe & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

BAGGS v. LONDON GRAVING DOCK CO., LTD.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.J.J.), January 26, 1943.]

Workmen's Compensation—Partial incapacity—Workman conscripted for military service—Army pay and allowances would have been higher but for injury—Inability to obtain suitable employment—Workmen's Compensation Act, 1925 (c. 84), s. 9 (3)—National Service (Armed Forces) Act, 1939 (c. 81).

Evidence—Admissibility—Documents—Letters written by serving officer stationed at a distance—Evidence Act, 1938 (c. 28), s. 1 (1) (2).

The applicant, having met with an accident in the course of his employment by the appellants, which resulted in the amputation of his index finger, on Nov. 28, 1941, applied for compensation on the grounds of his total incapacity for work. On Dec. 17 he was conscripted under the National Service (Armed Forces) Acts, and the county court judge, who heard his application on Jan. 12, 1942, awarded him full compensation until Dec. 18, 1941, but made no award of compensation thereafter. On Oct. 1, 1942, the workman applied for a review, alleging that, but for his injury, he would have been placed in a higher medical category and would have earned more than he was at present being paid in the army. In support of this allegation, the applicant put in letters from his commanding officer who was stationed in Perthshire, which letters were admitted in evidence under the Evidence Act, 1938. It was objected for the appellants that these letters ought not to have been admitted in evidence. The county court judge, in reviewing the position, decided that the applicant was still partially incapacitated, and assessed his compensation on the basis that his army pay and allowances were equivalent to earnings. It was contended for the applicant that, since he was debarred from finding work by reason of his conscription, he was entitled to claim full compensation on the ground that he was unable to earn anything "in some suitable employment or business after the accident":—

HELD: (i) in determining the amount of compensation to be awarded, the court must disregard the applicant's pay and allowances in the army.

(ii) although his army pay and allowances must be disregarded, he was not entitled to compensation on the footing that he was earning nothing, since this inability to earn was not due to the accident. He was only partially incapacitated by the accident and the compensation must be based on what he was physically capable of earning in some suitable employment.

(iii) the letters from the applicant's commanding officer were admissible in evidence under the Evidence Act, 1938, since undue delay and expense would have been caused in calling him as a witness.

[EDITORIAL NOTE.] It was decided in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1), that army pay and allowances are not earnings within the meaning of the Workmen's Compensation Act. It follows that an injured workman who is called up is prevented from earning anything and it is here sought to be said that he was, therefore, totally incapacitated. But a man totally prevented from earning whether by enlistment, imprisonment or the state of the labour market but whose injury is such that in normal times he would be earning something is not totally incapacitated by reason of the injury and his incapacity cannot, therefore, be treated as total, but must be treated as partial. The arbitrator must fix the amount which the workman would be earning in his usual employment in normal circumstances and upon that the amount of the compensation payable must be based.

AS TO EARNINGS DURING INCAPACITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914, 915, paras. 1258, 1259; and FOR CASES, see DIGEST, Vol. 34, pp. 416, 417, Nos. 3378-3384.]

Cases referred to:

- (1) *Jones v. Amalgamated Anthracite Collieries, Ltd.*, [1942] 2 All E.R. 600; Digest Supp.; 168 L.T. 49.
- (2) *Harwood v. Wyken Colliery Co.*, [1913] 2 K.B. 158; 34 Digest 348, 2803; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225.
- (3) *McNally v. Furness, Withy & Co., Ltd.*, [1913] 3 K.B. 605; 34 Digest 352, 2839; 82 L.J.K.B. 1310; 109 L.T. 270; 6 B.W.C.C. 664.
- (4) *Bevan v. Nixon's Navigation Co., Ltd.*, [1929] A.C. 44; Digest Supp.; 139 L.T. 647; 21 B.W.C.C. 237.

APPEAL by the employers from an award of His Honour JUDGE JARDINE, given at Bow County Court, and dated Nov. 5, 1942. The facts are fully set out in the judgment of GODDARD, L.J.

G. L. Lynskey, K.C., and *W. H. Duckworth* for the appellants.

J. R. Ogilvie Jones and *F. Gottman* for the respondent.

SCOTT, L.J. : As both GODDARD and DU PARCQ, L.JJ., were parties to the decision in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1), a decision which is binding upon this court, and upon a very important point, I am going to ask them to give their judgments first.

GODDARD, L.J. : The facts in this case, which is an appeal from His Honour JUDGE JARDINE, are these. On Dec. 5, 1940, the applicant met with an accident which resulted in the amputation of his index finger. He was paid full compensation until Aug. 24, 1941, when, a medical certificate being produced, compensation was stopped. On Nov. 11, 1941, he attempted to do some work, and found he was not able to carry on. On Nov. 28, 1941, he filed an application for compensation on the basis that he was totally incapacitated for work. On Dec. 17, he was called up under the National Service (Armed Forces) Acts, and was duly enlisted in the Royal Army Service Corps as a conscript and not by way of voluntary enlistment. On Jan. 12, 1942, the application for compensation was heard. In the result the judge awarded him full compensation, 35s. per week until Dec. 18, 1941, and he held that the incapacity had come to an end on that date ; but as the incapacity was loss of a finger he gave him liberty to apply. On Oct. 1, 1942, he applied for a review. In substance his case was this. He said that he was a private in the Royal Army Service Corps receiving the pay and allowances appropriate to that rank, having regard to the fact that he was not treated as a tradesman, and that, but for his injury, he would have joined the Royal Engineers where his pay and allowances would have been higher. It seems quite clear that, whether he joined the Royal Engineers or whether he remained in the Royal Army Service Corps, but for the injury which resulted, apparently, in his being put into a category of Medical Grade 3, he would have been earning more money in the Royal Army Service Corps than he was being paid. He accordingly sought to have his compensation assessed upon the difference between what he was actually receiving in the Royal Army Service Corps and his pre-war wages. The county court judge hearing the case came to the conclusion that his former decision, that the man had wholly recovered, was wrong, that it was shown by subsequent events that the man was still partially incapacitated and, therefore, that it was open to the court to review the existing position ; and it is not suggested that it was not.

I will deal later on in this judgment with the point which has been raised by counsel for the appellants as to the admission of certain evidence under the Evidence Act, 1938. At the time when the case came before the county court judge *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) had been heard in this court, but the judgment had not been given. The county court judge treated as earnings the pay and allowances which the workman was receiving in the Royal Army Service Corps. He came to the conclusion that the man was partially incapacitated, and assessed his compensation, as I have said, on the basis that his earnings were his pay and allowances. It is not open in this court to argue that the pay and allowances of a soldier conscripted under the National Service (Armed Forces) Acts are to be regarded as earnings. The court in that case decided that, for the purpose of considering what a man's earnings were under the Workmen's Compensation Act, 1925, s. 9 (3), the pay and allowances were immaterial, that they should be left out of account altogether. The basis upon which the judge has to award compensation is one half of the difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business after the accident. It has been held beyond controversy in the House of Lords that, if the man is earning money, the amount which he is earning is the actual standard to be taken, subject to one exception, which is this, that if, by his own motion or his own fault, he is earning less than he could earn if he chose, in that state of affairs what he could earn would have to be taken into account. But if he is not earning money, not actually earning wages, then the court has to consider what he is able to earn " in some suitable employ-

ment or business after the accident." Counsel for the respondent has argued before us that, if the man has not been able to find work, or because he is in the Army is debarred from finding work, he is entitled to say that he is able to earn nothing. But that is not a construction which has ever been placed upon this section. "Able to earn" has regard to his physical capacity for earning. The question to which the arbitrator has to apply his mind is this: Here is a partially incapacitated man; if there is suitable work for him, what can he earn in that work having regard to his physical incapacity? That is the only question which he has to decide. He is not concerned with whether the man can find work, or whether the conditions are such that he is actually debarred from finding work, as is shown in the case in which the man who was sent to prison (when, of course, he could not work and could not find work) was nevertheless held entitled to receive compensation—not on the basis of total incapacity on the ground that he could earn nothing, but on the basis of partial incapacity, that is to say, he was physically capable of earning something. That amount was assessed at 12s. per week; and that was the amount which he received while he was in prison.

Here we think, in view of the decision in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) that the county court judge has not taken into account the proper figures. When this case goes back to him, as it must, he must disregard the man's pay and allowances in the Army and consider what he is able to earn in the labour market; it may be more, it may be less, than that which he is awarded; that we do not know. It is a problem to which arbitrators under this Act have to apply their minds every day, and he will have to find out, having regard to the incapacity from which this man is suffering and from which it has now been established he is suffering, what he is able to earn in the sense of what his physical capacity will allow him to earn.

The other point which is raised in the appeal is this. In order to show the change of circumstance, and to show that the incapacity was still present and was a real incapacity debarring this man from being in the position of a workman able to earn full wages, letters were read from the man's commanding officer; and counsel for the appellants took the objection that these letters ought not to have been admitted in evidence, the county court judge having admitted them in evidence under the provisions of the Evidence Act, 1938. That Act allows documents to be admitted under certain conditions. Sect. 1 (1) says:

In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say (i) if the maker of the statement either (a) had personal knowledge of the matters dealt with by the statement; or (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and (ii) if the maker of the statement is called as a witness in the proceedings.

Then there is a certain proviso, which does not apply in this case, dealing with cases where the witness is dead or beyond the seas. Subsect. (2) says:

In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsect. (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence (a) notwithstanding that the maker of the statement is available but is not called as a witness; (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

In this case the man proved that the letters were letters under the hand of his commanding officer. I think it is open to question whether all the statements in the letters were strictly admissible under the Act, but certain of the statements clearly would be admissible under the Act—statements, for instance, that the man was in a certain medical category. The officer commanding a unit must know of his own knowledge in what medical category his men are. With regard to such statements, for instance, as "the man's capacity for work has definitely

A been impaired," the officer commanding can state that because he has the man under his personal observation and can see that his capacity for work is impaired. I need not go through the letters entirely. There were three letters all of which, I think, were admissible, admissible, of course, on the ground that if they were not admitted but the witness had to be called, undue delay or expense would be caused. Not only is the writer of the letters the officer commanding a unit, and whether you could, or when you could, get him as a witness would be quite uncertain, but also he is stationed somewhere in Perthshire. It would be quite unreasonable to expect the workman to be able to bring an officer down from Perthshire with the expense of a return journey, and so forth. In those circumstances we think that the letters were admissible in evidence. The county court judge must use his own discretion as to what weight is to be attached to them, as he no doubt did, and as to what statements he should regard and what he should ignore. In fact he has found that this man is now partially incapacitated, and there is no appeal from that finding.

B The case must, therefore, go back to the county court judge, not for him to rehear it as a whole, but to find what the man is "able to earn in some suitable employment or business after the accident," bearing in mind, as I have said, that that refers to his physical capacity to earn, and to assess the compensation on that basis.

C DU PARCQ, L.J.: I agree.

I wish to say nothing about the question which has been argued under the Evidence Act, 1938, as I have nothing to add to what has just been said by GODDARD, L.J., on that point.

D I have little to add with regard to the other question. I think it is sometimes forgotten that when you are dealing with the Workmen's Compensation Act, 1925, s. 9, you must deal with the section as a whole and pay some regard to the obvious intention of the legislature. The very first words of the section are:

The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained.

E It is quite plain from that that the legislature intends an injured workman to be compensated for the incapacity, whether it be total or partial, which results from the injury and not for any incapacity which results from anything else. Then, having decided, as the county court judge has decided here, that there is partial incapacity, one has to see what the rules are for calculating the amount of compensation for partial incapacity, and one is taken to subsect. (3). If one does not refine too much upon the words, I think now, at any rate, with the assistance that we have from previous decisions of the House of Lords and of this court, the words are quite intelligible. The rules for calculating the weekly payment in the case of partial incapacity are, putting it quite shortly, that the workman is to have a proportion of the difference between his average weekly earnings before the accident and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business after the accident. I think it is plain that the words "after the accident" there mean not merely "after" but also imply some cause or connection—not because the word "after"

G means the same as "because of," for we know it does not, but because in the context that is plainly the intention of the legislature. It seems a simple enough way of deciding what his compensation ought to be to say: "Look at what he was earning before the accident; look at what he was earning after the accident, and you will get a measure." It is not so simple as it looks at first sight, because you have the case where, although he is earning something, it is perfectly plain that what he is earning bears no relation at all to his incapacity; and in that case, and possibly in some other cases, you disregard it. In *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) I thought it was one of the instances where what he was earning could be disregarded, but the majority of the court decided the case on a rather different ground, which went further. The majority of the court said that what he is paid and receives by way of allowances in the army is not money which he is earning at all. I am aware that there are *dicta* and, perhaps, decisions to the effect that in certain cases this court may not consider itself bound by its own previous decisions, but they are most exceptional cases, in so far as they exist, and I am quite clear that it would be wrong in the great

majority of cases for the court to do anything but follow its previous decisions. I think it would be rather shocking if, having come to a clear decision by a majority on Nov. 13, 1942, this court were to come to the precisely opposite conclusion on Jan. 26, 1943. Few things are more important than that the law should be certain, and it is most undesirable that it should be thought possible to re-argue a point of this substance every time that it may be raised in the Court of Appeal with any prospect of succeeding in unsettling the law. The result would be that there was no settled law at all. I have no doubt, therefore, that we are bound to decide here that there are no earnings in this case. A

Then it is said by counsel for the respondent: "Very well, then the man is earning nothing and is unable to earn anything in any suitable employment or business because they will not let him go and do it: the law does not permit him to go and do it." That, when considered in the light of the previous decisions, as GODDARD, L.J., has pointed out, is really quite fallacious. The question is: What was he able to earn physically before the accident; what is he able to earn physically after the accident; to what extent has his earning capacity been reduced by his partial incapacity? If he had had a supervening illness and was totally confined to his bed and unable to earn a penny, you would still have to find how far his earning capacity was reduced by the partial incapacity which he suffered; and in the strange case of the man who was confined in one of His Majesty's prisons it was necessary to see to what extent he was able to earn since the accident; that is to say, what he was capable of earning assuming him to have his liberty. If you were to say in such a case as that: "The man cannot earn anything because he is locked up and cannot go out and seek employment" and were to adopt the argument of counsel for the respondent, you would then be doing exactly what the section tells you not to do; you would be compensating him for total incapacity. Of course, he is subject to total incapacity in one sense, but in the case of the prisoner the total incapacity is due to his imprisonment and has nothing in the world to do with his accident. In the case of a man who is in the army—a very honourable position which one does not wish to compare, except for the purpose of discovering some legal principle, with a very dishonourable position—he also is not able to do other work in the sense of being at liberty to go and take it, but he is physically capable of doing some work; and the task which the county court judge is set is the task of discovering to what extent his ability to do work in suitable employment has been reduced and what compensation he should have for that. I think that when once we have the assistance of the decision in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1), one of the more difficult questions in this appeal disappears. I am bound by that authority, and I think there is no substance, although I have listened to them with the greatest interest, in the arguments of counsel for the respondent. C

SCOTT, L.J.: I agree with both the judgments which have been delivered, and only in deference to the argument addressed to us on behalf of the respondent add this. The effect of the decision in this court in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) is to make it clear that inability to "earn," within the meaning of that word in the Act by reason of conscription in His Majesty's Forces for the purpose of a war is analogous to other causes of such disability or prevention which have been considered by the House of Lords, such as (1) illness wholly unconnected with the accident—that is *Harwood's* case (2); (2) imprisonment—*McNally v. Furness, Withy & Co., Ltd.* (3); and (3) a general state of unemployment which makes it impossible for the workman to earn anything—that is *Bevan's* case (4). F

The appeal will, therefore, be allowed, and the case will go back to the county court judge on the grounds indicated in the judgments of GODDARD and DU PARCQ, L.JJ. G H

Appeal allowed. Case remitted to county court judge.

Solicitors: *Carpenters* (for the appellants); *Cliftons* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND),
LTD. v. KELLY, IMPERIAL TOBACCO CO. (OF GREAT BRITAIN
AND IRELAND), LTD. v. COMMISSIONERS OF INLAND
REVENUE.

[KING'S BENCH DIVISION (Macnaghten, J.), January 25, 1943.]

Income Tax—Computation of trading profits—Compulsory sale of surplus dollars—

A *Income Tax Act, 1918 (c. 40), Sched. D, case I.*

The appellants are tobacco manufacturers who were in the habit of purchasing large quantities of tobacco leaf for cash in the United States of America. As a result of the Treasury's request on Sept. 9, 1939, that the appellants should stop all further purchases of tobacco leaf, they had in hand a large surplus of dollars which they had bought to pay for these purchases. On Sept. 30, 1939, they were required under the Defence

B (Finance) Regulations, to sell the surplus dollars to the Treasury. The appellants contended that the profit arising from this sale should not be included in the computation of the profits of their trade since the purchase of the dollars was in effect a temporary investment in foreign currency:—

C **Held:** the profit made by the appellants on the compulsory sale of their surplus dollars to the Treasury must be included in the computation of the profits of their trade under the Income Tax Act, 1918, Sched. D, case I.

[EDITORIAL NOTE.] There is authority for saying that a profit made on a speculation in foreign currency by a company where that speculation has no connection with the business of the company is not a trading profit. In the present case, the dollars were purchased to be used in the business of the company but, on account of government regulations, they could not be so used and were compulsorily sold to the Treasury at a profit. The transaction obviously has features which differentiate it from dollars bought for and used in the business of the company, but it is held that these differences are not material and the profit made is to be brought into the company's accounts for income tax purposes.

D AS TO COMPUTATION OF TRADING PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 147, 148, paras. 306, 307; and FOR CASES, see DIGEST, Vol. 28, pp. 37-39, Nos. 199-204.]

Cases referred to:

E (1) *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (1927), 12 Tax Cas. 927; Digest Supp.

(2) *McKinlay v. Jenkins (H. T.) & Son, Ltd.* (1926), 10 Tax Cas. 372; Digest Supp.

(3) *Thompson (George) & Co., Ltd. v. Inland Revenue Comrs., Inland Revenue Comrs. v. Thompson (George) & Co., Ltd.* (1927), 12 Tax Cas. 1091; Digest Supp.

APPEAL by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax Acts. The facts are fully set out in the

F judgment.

Millard Tucker, K.C., and F. Heyworth Talbot for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and Reginald P. Hills for the respondents.

G **MACNAGHTEN, J.:** The appellant, the Imperial Tobacco Co. (of Great Britain and Ireland), Ltd., carries on the business of tobacco manufacture, and the question at issue in the first of these two appeals is whether the profit which arose from the sale of United States dollars in the autumn of 1939 ought to be included in the computation of the profits of the company's business under the Income Tax Act, 1918, Sched. D, case I.

H The facts giving rise to this question can be stated very briefly. A large part of the tobacco leaf used in manufacture by the company is purchased in the United States of America and the company maintains a large buying organisation there, with a head office at Richmond, in the State of Virginia. The purchases of tobacco leaf are made for cash by the company's buyers at auction sales which are held at a large number of points in the tobacco growing States of Virginia, North and South Carolina, Georgia and Kentucky. These sales open towards the end of July and the buying season closes in March. The amount of dollar currency required for these purchases varies from year to year according to the size of the American crop and the prices paid at the auction sales. It is supplied by the company's head office at Bristol. The company normally begins to collect its dollar requirements before the opening of the auction sales

in July, and pays for them on delivery. The dollars are remitted from this country to New York and thence to the company's office at Richmond. The company never buys dollars for the purpose of resale by way of speculation; it buys them for the purpose of meeting the requirements of its organisation at Richmond, and for no other purpose. For that purpose between January and August, 1939, the company bought 45,000,000 dollars at rates of exchange varying between 4.63 and 4.68.

On Sept. 3 war with Germany broke out, and on Sept. 9 the British Treasury requested the company to stop all further purchases of tobacco leaf. The company complied with that request at once; and the result was that it had in hand a large surplus of dollars. Of the 45,000,000 dollars bought by the company to enable it to pay for tobacco leaf, no more than 19,245,000 were required for that purpose; the remainder, 25,755,000, became surplus to its requirements. On Sept. 30, 1939, the British Treasury, acting under the Defence (Finance) Regulations, required the company to sell to it these surplus dollars. The company accordingly sold 25,755,000 dollars to the Treasury and, owing to the rise in the dollar exchange which had occurred, the price received from the Treasury was much larger than the price the company had paid for the dollars. The company contended that this profit ought not to be included in the computation of the profits of its trade. The Special Commissioners rejected that contention. Hence these appeals.

The price paid for dollars bought for no other purpose than to pay for tobacco leaf to be used in manufacture by the company is obviously a trade expense which should be included as a debit in the computation of the annual profits of the trade and it would seem to follow that, if in any year the company bought more dollars than were actually required and had to sell the surplus, the price received by the company on any such sale should be credited in the accounts of the trade, with the result that if the surplus dollars were sold at a loss the assessable profits of the trade would, to the extent of that loss, be diminished, and if they were sold at a profit the assessable profits would likewise be increased. If any authority be needed for that proposition, it is to be found in the judgment of LORD CAVE in *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (1).

The company, however, contends that, although the dollars were in fact purchased for the purpose of its trade they ought, in the events that happened, to be regarded as having been purchased for the purpose of making a "temporary investment in foreign currency" and as having, therefore, no connection with its trade. It is said that the decision of ROWLATT, J., in *McKinlay v. H. T. Jenkins & Son, Ltd.* (2), supports that view of the matter. In that case a company carrying on the business of marble, granite and stone merchants at Torquay, made a contract to supply a quantity of marble for erection in a large building at Shanghai and shortly afterwards in anticipation that it would be necessary to buy some of the marble in Italy bought Italian currency, namely, lira. The lira were bought at 103 to the pound. In less than 2 months Italian lira stood at 72 to the pound. In those circumstances the company decided to sell the lira bought at 103 and thereby realised a profit of over £6,000. Subsequently, when the time came to pay for the Italian marble to be supplied under the contract, the company bought a second lot of lira for that purpose. In that case ROWLATT, J., affirming the decision of the Special Commissioners, held that the profit made on the first purchase of lira formed no part of the profits of the contract made for the supply of the marble; he regarded that purchase as a "speculation" unconnected with the company's business as marble merchants.

That this was his view of the matter is made plain by his observations in a case that came before him 18 months later, *Inland Revenue Comrs. v. George Thompson & Co., Ltd.* (3). In that case the company carried on business as shipowners. In 1916 some of the company's ships were requisitioned by the Australian Government and, the company having in consequence of the requisition no immediate use for a quantity of coal to be delivered under a contract already made, transferred the benefit of its coal contract to another company at a premium of so much per ton. The company contended that the premium received on this transaction was not liable to excess profits duty. In his judgment, ROWLATT, J., said, at p. 1102:

On the facts, I think, this is simply a case of a person who is bound to buy a certain

amount of consumable stores, who over-buys and is lucky enough to dispose of those consumable stores which he has got in the way of his business in relief of his business at a profit. There is something put in his pocket for it in the way of his business. I think the whole of it comes in. That is my straightforward view on the facts. I think no other question is involved.

Then, referring to *McKinlay v. H. T. Jenkins & Son, Ltd.* (2), he went on :

A The case which does bear rather an interesting affinity to this case is the marble case, but there the way I looked at it was simply this, that they had some capital lying idle and they embarked upon an exchange speculation. They bought the lira as a speculation, not as consumable stores, or anything of that sort, but they simply bought them as a speculation rather than keep the money in the bank.

B In my opinion, so far from *Jenkins'* case (2) being an authority for the contention put forward by the appellant, the judgment in that case, as in *George Thompson & Co., Ltd. v. Inland Revenue Comrs.* (3), supports the decision of the Special Commissioners that the profits made by the company on the compulsory sale of its surplus dollars to the British Treasury must be included in the computation of the profits of its trade. The appeal will, therefore, be dismissed with costs ; and, since the case states that a number of other matters remain to be settled before the correct figure of liability can be settled, it will be remitted to the Special Commissioners. The same question is raised in the second of these appeals with reference to an assessment to National
C Defence contribution and the same result must follow.

Appeal dismissed with costs.

Solicitors : *Trower, Still and Keeling*, agents for *T. Murray Sowerby*, Bedminster, Bristol (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

D

WILKES v. WILKES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.). November 3, 1942.]

E *Divorce—Desertion—Parties continuing to live in same house during part of material period—Discontinuance of common home.*

F A wife's petition for divorce on the ground of desertion was dated May 29, 1940. The husband did not leave the house which was occupied by his wife until June, 1938, but from Mar., 1937, until that time he slept in a different bedroom, occupied a separate sitting room, took his meals apart, and had no more to do with his wife in any way. Both before and after his departure, the husband rejected all his wife's attempts to effect a reconciliation :—

HELD : the common home had been put an end to by the husband in Mar., 1937, although he did not actually leave the house until over a year later. In these circumstances the wife had proved desertion for the necessary period and was entitled to a decree *nisi*.

G [EDITORIAL NOTE. The authorities make it clear that there can be desertion although the parties remain under the same roof. It must be established that the common home has come to an end. This is a matter of evidence and there is necessarily a number of borderline cases where it is difficult to say that desertion has been established. In the present case, it would appear upon the evidence, that there was no communication at all between the spouses although they continued to live in the same house and, therefore, the common home ceased to exist.

H AS TO WHAT CONSTITUTES DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-656, para. 964, 965 ; and FOR CASES, see DIGEST, Vol. 27, pp. 307, 308, Nos. 2840-2854.]

Cases referred to :

(1) *Jackson v. Jackson*, [1924] P. 19 ; 27 Digest 308, 2852 .

(2) *Diver v. Diver*, unreported.

(3) *Smith v. Smith*, [1940] P. 49 ; [1939] 4 All E.R. 533 ; Digest Supp. ; 109 L.J.P. 100 ; 162 L.T. 333.

(4) *Littlewood v. Littlewood*, [1943] P. 11 ; [1942] 2 All E.R. 515 ; Digest Supp. ; 167 L.T. 388.

PETITION by wife for dissolution of marriage on the ground of the husband's desertion for 3 years immediately preceding the presentation of the petition. The facts are fully set out in the judgment.

B. L. A. O'Malley for the petitioner.

HODSON, J. : This is a petition by the wife for a divorce on the ground of desertion. The petition is dated May 29, 1940. Two years before, in June, 1938, the husband left the house which was occupied by his wife, and where they had been living under the same roof. Since then he has kept away from her, notwithstanding numerous efforts by the wife to get him to return. On one occasion they went to an hotel in Brighton together, but there was no reconciliation at this or any other time.

The point of the case is this : during the 3 years and for over a year preceding the actual physical departure of the husband, the parties were living under the same roof ; so that, during part of the 3 years in which the wife seeks to prove that the desertion was running, they were living in the same house.

In *Jackson v. Jackson* (1), HILL, J., pointed out that there may be desertion although the husband continues to live under the same roof as the wife, but the facts must be very strong. They must show that the husband actually caused the wife to live apart against her will—not only to sleep apart, but to live apart. He referred to an unreported case of *Diver v. Diver* (2), where the only question was whether the separation began a few months sooner than the husband left the house. It appeared that not only did he insist on occupying a separate room but he never spoke to his wife, and if the wife spoke to him he never answered her. Then when she asked why she was being so treated he knocked her down.

In this case, during part of the 3 years in which the husband and wife were living under the same roof, in Mar., 1937, the husband said to his wife that this was the end. From that time onwards he had no more to do with her in any sense. He never slept with her at all and never went into the sitting room which the wife reserved for her own use when she was there. He had a sitting room of his own ; and the only time he went to his wife's sitting room was when she was out, and when she returned she found her papers scattered about the floor or torn up. They never had meals together, and never had any common life at all. The only point on which their lives touched in any way, from March, 1937, to June, 1938, when they lived under the same roof, was this. The home was in the name of the husband. It was a house which had been mortgaged to a building society, and the money was paid by instalments by the wife. The husband did not very often have any meals there, but when he did he actually went to the wife's store, took the food which she had provided and consumed it. The wife was anxious for a reconciliation but he at all times refused it ; and this course of conduct continued during the period in question. In the circumstances I think that the case falls on the same side of the boundary line as *Smith v. Smith* (3), rather than on the other side of the line, on which falls *Littlewood v. Littlewood* (4), a decision of PILCHER, J.

I find that the common home had been put an end to by the husband in Mar., 1937. At that moment the marriage had come to an end ; even although he did not actually leave the house until over a year later. The wife has made out a case of desertion, and there will be a decree *nisi* with costs.

Decree nisi granted.

Solicitors : *Lionel Lazarus & Leighton* (for the petitioner).

[*Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.*]

COMMISSIONERS OF INLAND REVENUE *v.* PRINCE-SMITH.

[KING'S BENCH DIVISION (Macnaghten, J.), **January 18, 1943.**]

Income Tax—Disposition in favour of children—Arrangement—Whether revocable settlement—Payment of dividend for period which could not exceed 6 years—Finance Act, 1922 (c. 17), s. 20 (1) (b)—Finance Act, 1936 (c. 34), s. 21 (3) (8).

The respondent held 49,599 of the 50,000 ordinary shares in the company of Prince-Smith & Son, Ltd. By a deed, dated Mar. 3, 1938, the respondent's

father settled £2,500 on the respondent's children on their attaining 21 or marrying under that age. In accordance with an arrangement made with respondent who had desired that a capital sum should be provided out of his income for the benefit of his children when they should come of age, the trustees of the settlement were authorised to invest the £2,500 in the 50,000 ordinary shares of Prince-Smith & Son, Ltd., which were accordingly transferred to them. By a special resolution of the company passed on Mar. 18, 1938, it was provided *inter alia* that the 50,000 ordinary shares should be converted into preference shares, with a fixed non-cumulative preference dividend of 50 per cent. for the period up to Mar. 31, 1943, and 5 per cent. thereafter. It was contended for the Crown (i) that the deed of Mar. 3, 1938, the purchase of the 50,000 shares, and the special resolution varying the rights attached to the shares constituted an arrangement which was, therefore, a settlement of which the respondent was the settlor, that this settlement was revocable according to the provisions of the Finance Act, 1936, s. 21 (8), and that the preferential dividends were, therefore, deemed to be the income of the respondent; (ii) that the payment of any dividend upon the preference shares in excess of 5 per cent., being payment for a period which could not exceed 6 years, brought the arrangement within the provisions of the Finance Act, 1922, s. 20 (1) (b) :—

HELD : (i) the deed of Mar. 3, 1938, the purchase of the 50,000 shares by the trustees of that settlement, together with the special resolution of Mar. 18, 1938, constituted an arrangement and, therefore, a settlement. This settlement was an irrevocable settlement protected by the Finance Act, 1936, s. 21 (3), and outside the provisions of s. 21 (8) of that Act.

(ii) any payment of dividend on the preference shares which was in excess of 5 per cent. was for a period which could not exceed 6 years, and must, therefore, be treated as income of the respondent under the Finance Act, 1922, s. 20 (1) (b).

[EDITORIAL NOTE.] That the arrangement was a settlement within the Finance Act, 1936, s. 21, does not appear to admit of much argument, but it was argued that it was a revocable settlement since another special resolution altering the rights of the preference shares might have been passed. However, it is held not to be revocable within the terms of sect. 21, since the settlor could not by himself effect this result. The settlement, however, is within the 1922 Act since the payments would be made for a period of less than 6 years and, therefore, the income had to be treated as the income of the settlor.

As to DISPOSITION FOR PERIOD NOT EXCEEDING SIX YEARS, see HALSBURY, Hailsham Edn., Vol. 17, p. 269, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575d-576a.]

F Cases referred to :

(1) *Inland Revenue Comrs. v. Payne* (1940), 110 L.J.K.B. 323; Digest Supp.; 23 Tax Cas. 610.

(2) *Inland Revenue Comrs. v. Morton*, unreported.

APPEAL by the Crown against a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

G *The Solicitor-General (Sir D. Maxwell Fyfe, K.C.), and Reginald P. Hills* for the appellants.

Cyril King, K.C., and F. Heyworth Talbot for the respondent.

MACNAGHTEN, J. : This is an appeal by the Crown against a decision of the Special Commissioners discharging an additional assessment to sur-tax made upon the respondent, Sir William Prince-Smith, Baronet, for the year 1938-39 in the sum of £10,000 and reducing his assessment to sur-tax for the following year, 1939-40, by the sum of £11,000, from £27,716 to £16,716. These sums of £10,000 and £11,000 represented the dividends paid by a company named Prince-Smith & Son, Ltd., on its preference shares during the years in question. Before the Special Commissioners the Crown put forward the contention that these dividends should be treated as part of the income of the respondent, under the provisions of the Finance Act, 1936, s. 21, or, alternatively, the Finance Act, 1938, s. 38; but the Special Commissioners rejected that contention.

Prince-Smith & Son, Ltd., was incorporated on Dec. 17, 1926, under the Companies Act, 1908, as a private company limited by shares, with the object

of acquiring and taking over as a going concern the business theretofore carried on at Keighley, Yorkshire, under the style or firm name of Prince-Smith & Son. The capital of the company was £350,000, divided into 300,000 5 per cent. cumulative preference shares and 50,000 ordinary shares of £1 each. The company carried on the business at Keighley from 1926-1931. In 1931 the business was amalgamated with a business carried on by another company named Hall & Stells, Ltd. For the purpose of the amalgamation a new company was formed named Prince-Smith & Stells, Ltd., with a capital of £400,000, and both businesses were transferred to the new company. Prince-Smith & Son, Ltd., received shares of the new company of a nominal value of somewhat in excess of £250,000, together with some debentures, and these shares gave it control of the new company. Thereafter Prince-Smith & Son, Ltd., ceased to carry on any business at all and became a holding company.

In March, 1938, the respondent was minded to provide a capital sum out of his surplus income for the benefit of his children then living or thereafter to be born when they should come of age. At that time he had two children, one aged 9 and the other aged 6. The respondent held all the preference shares of Prince-Smith & Son, Ltd., and also 49,599 of the 50,000 ordinary shares. Of the remaining 401 ordinary shares 201 were held by his father and 200 by his wife. In order to provide a capital sum for the benefit of the respondent's children the following transactions were effected: by a deed, dated Mar. 3, 1938, the respondent's father settled £2,500 on the respondent's children on their attaining 21 years of age, or marrying before that age. This settlement was irrevocable. The trustees of the settlement were authorised to invest the £2,500 in the shares of Prince-Smith & Son, Ltd., and they accordingly invested it in the 50,000 ordinary shares of Prince-Smith & Son, Ltd., which they acquired at the price of 1s. per share.

At an extraordinary general meeting of the company, held on Mar. 18, 1938, a special resolution was passed whereby (1) all arrears of dividends in respect of the 300,000 preference shares amounting to no less than £150,000 were cancelled, (2) the 300,000 preference shares held by the respondent were converted into ordinary shares, and (3) 50,000 ordinary shares acquired by the trustees of the settlement of Mar. 3, 1928, were converted into preference shares with a right to a fixed non-cumulative preferential dividend for the period up to Mar. 31, 1943, at the rate of 50 per cent., and for the period subsequent to Mar. 31, 1943, at the rate of 5 per cent., per annum, and also with the right, in the event of the company being wound up before that date, to £250,000, and, in the event of it being wound up after that date, to £50,000, the amount which had been paid up or credited as paid up on the shares held by the trustees. The sale of the 50,000 shares to the trustees of the settlement and the variation of the rights appertaining to those shares were, as the commissioners have found, carried out in accordance with an arrangement made between the respondent and his father.

At Mar. 31, 1938, the company had a large debit balance on profit and loss account, owing to losses on trading before 1931, and to the writing down of investments. On that date, Mar. 31, 1938, the investments were revalued and written up by £113,576 9s. 2d., and this sum, together with the income for the year ended Mar. 31, 1938, resulted in cancelling the debit balance on profit and loss account and converting it into a credit balance of £7,964 16s. 1d. This was done in order to enable a dividend on the preference shares to be paid. On July 1, 1938, the company paid a preference dividend of 20 per cent., less tax, amounting to £10,000 gross and to £7,250 net. On June 8, 1939, the company paid a preference dividend of 22 per cent., less tax, amounting to £11,000 gross, the net amount being £7,975.

Before the Special Commissioners the Crown contended that the deed of Mar. 3, 1938, the transfer of the 50,000 ordinary shares in the company to the trustees of that deed for £2,500, and the special resolution of Mar. 18, 1938, constituted an "arrangement" and, therefore, a "settlement" in relation to which the respondent was the "settlor" within the meaning of the Finance Act, 1936, s. 21 (9) (c), and the Finance Act, 1938, s. 41 (4) (b). On that contention the commissioners decided in favour of the Crown.

The Crown further contended that this settlement was revocable under the Finance Act, 1936, s. 21 (8) (a), and that the preference dividends were, therefore, deemed to be the income of the respondent by virtue of the Finance Act,

1936, s. 21 (1), (2) (a). The Special Commissioners held that the settlement was an irrevocable settlement in favour of the respondent's children and that on the facts of the case the terms of the Finance Act, 1936, s. 21 (8), did not apply so that it should be deemed otherwise, and that the settlement was, therefore, protected by subsect. (3) of that section. With regard to the contention that the settlement came within the provisions of the Finance Act, 1938, s. 38, the decision of the Special Commissioners was also adverse to the Crown; and it was admitted that if the Finance Act, 1936, s. 21, did not apply to the settlement the Finance Act, 1938, s. 38, must also be inapplicable.

In my opinion, the decision of the commissioners was correct. That the deed of Mar. 3, 1938, and the purchase of the 50,000 shares by the trustees of that settlement, together with the special resolution of Mar. 18, 1938, constituted an "arrangement" and, therefore, a settlement seems quite plain. If any authority were required in support of that view, the observations of LORD GREENE, M.R., in *Commissioners of Inland Revenue v. Payne* (1), would be amply sufficient. The only question that remained was whether this settlement was revocable or was such that it ought to be deemed to be revocable within the meaning of the relevant Acts. I agree with the Special Commissioners that there are, in this case, no facts which bring it within the provisions of the Finance Act, 1936, s. 21 (8). The case is distinguishable from the unreported case of the *Commissioners of Inland Revenue v. Morton* (2), in the Court of Session in Scotland in that the respondent cannot modify or affect the rights of the holders of the 50,000 preference shares. Therefore, so far as the contentions which were raised before the Special Commissioners are concerned, the appeal should be dismissed.

Before this court, however, the Crown put forward an additional contention, namely, that the payment of any dividend upon the preference shares in excess of a 5 per cent. dividend was a payment for a period which could not exceed 6 years and that the case, therefore, fell within the provisions of the Finance Act, 1922, s. 20 (1) (b). That section provides :

Any income which by virtue or in consequence of any disposition made, directly or indirectly, by any person after May 1, 1922, (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed 6 years, shall . . . be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person, . . . if living, by whom the disposition was made . . . and not to be for those purposes the income of any other person.

Subsect. (5) of that section provides :

The expression "disposition" includes any trust, covenant, agreement or arrangement.

The dividend of 50 per cent. on the preference shares comes to an end on Mar. 31, 1943, and thereafter the dividend is to be at the rate of 5 per cent., and no more.[§] The 50 per cent. dividend is, therefore, for a period which cannot exceed 6 years. In these circumstances, I think that this additional contention put forward by the Crown is well founded and effect must be given to it; and for that purpose the case must go back to the Special Commissioners in order to ascertain what are the correct figures which should be substituted for the assessments for the years in question, treating so much of the dividends as was in excess of £2,500 as the income of the respondent.

Since the respondent has been successful in this court on the only contentions that were raised by the Crown before the Special Commissioners, I think, there should be no order as to costs.

Case remitted to *Special Commissioners*.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Waterhouse & Co.*, agents for *Spencer, Clarkson & Co.*, *Keighley* (for the respondent).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

F.P.H. FINANCE TRUST, LTD. (In Liquidation) *v.* INLAND REVENUE COMMISSIONERS.[COURT OF APPEAL (Scott, Goddard and du Parcq. L.J.J.), **March 12, 1943.**]*Income Tax—Investment company—Company incurring trading loss but still receiving investment income—Finance Act, 1936 (c. 34), s. 20 (1), (6).*

The appellant company, formed in 1913, carried on a general financial business. From 1933 to 1936 its profits from financial trading exceeded its income from investments. In 1937 and the first 3 months of 1938 there was a trading loss in respect of which the company claimed, and was granted, income tax relief, but in that period it still received an income from its investments. On Apr. 1, 1938, the appellant company passed a resolution for winding up. For the year 1938-1939, the year following the commencement of the winding up, a direction was made upon the company under the Finance Act, 1922, s. 21, as amended by the Finance Act, 1936, s. 20, that its income should be deemed the income of the members. It was contended for the appellants (i) that the company, having been an ordinary financial trading company during the greater part of its existence, could not be considered an investment company if a representative period, and not merely the 15 months ending Apr. 1, 1938, were taken into account; (ii) that since, in the year 1938-1939, the trading loss of the company exceeded its income from investments, there was no income to which the section could refer:—

HELD: [SCOTT, L.J., *dissenting*] (i) the Act provided its own definition of an investment company as one whose income consists mainly of investments, and the appellant company came within that definition.

(ii) the word income in the Finance Act, 1936, s. 20 (1), must be taken to mean income as separately assessed and not the aggregate or taxable income, and at the date of liquidation the company was deriving income solely from investments. The direction was, therefore, properly made.

Decision of MACNAGHTEN, J. ([1942] 2 All E.R. 289) affirmed.

[EDITORIAL NOTE.] The assessment here in question is for a year during the winding up of the company. The investment income would still be available to the members during the winding up but would not be liable to sur-tax apart from the special machinery of the section here considered. If, therefore, for any reason the winding up was protracted, a member of the company might, but for these provisions, receive considerable sums not subject to sur-tax, though the income would, of course, be subject to ordinary income tax by deduction at the source. As pointed out by SCOTT, L.J., there is no question here of the members seeking to avoid the incidence of taxation, the whole question being whether the company was an investment company within the meaning of the Finance Act, 1936, s. 20 (1). That subsection speaks of the income of the company being mainly investment income and the whole question here turns upon whether the word "income" meaning the taxable income or whether the subsection is satisfied if the only income of the company is investment income which is in point of fact set off by trading losses.

FOR THE FINANCE ACT, 1936, s. 20, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, pp. 234-236.]

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated May 14, 1942, reported [1942] 2 All E.R. 289. The facts are fully set out in the judgments of SCOTT and GODDARD, L.J.J.

J. Millard Tucker, K.C., and F. Heyworth Talbot for the appellants.

The Solicitor-General (Sir D. Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

SCOTT, L.J.: This appeal is from a decision of MACNAGHTEN, J., dismissing an appeal by way of a special case from the Special Commissioners, who had held that the appellant company, to which the Finance Act, 1922, s. 21, admittedly applied, was also an "investment company" within the Finance Act, 1936, s. 20 (1); with the statutory consequence under subsect. (6) of the same section, that, as the company had on Apr. 1, 1938, passed a resolution for a voluntary winding up, its "actual income from all sources" subsequent to the date of the resolution became liable to a direction by the Special Commissioners that it should "be deemed to be the income of its members." Such a direction was in

fact given; hence this litigation. The issues on the appeal to us turn entirely on the proper interpretation and application of subsect. (1). Subsect. (6) is merely consequential. The year of assessment in question is 1938-9.

A The company was formed as long ago as 1913, and had from that date carried on a trade, the income from which was assessed and charged under Sched. D. Its trade consisted of buying and selling securities, indemnity issues, and other financial business. In addition it had, at any rate during the last 7 or 8 years, accumulated considerable investments from which it derived income. A table ("B") of its financial career during the 8 years since Mar. 31, 1930, as found by the commissioners, is annexed to the special case, and shows that its trade had been conducted up to the end on a large scale. In the first 2 of the 8 years it made, in round figures, trading losses of £9,000 and £11,000; in the next 4½ years (it having evidently towards the end of that period decided to change its accountancy year to make it end on Dec. 31), it earned nearly £1,000,000 profit; but in the 12 months to Dec. 31, 1937, it made a loss of £412,466 (almost wholly due to a fall of market prices) which necessitated a very drastic writing down of stocks; and in the last 3 months of the fiscal year 1937-8, it made a further loss of £72,202. During the first 2 years of this period of 8 years its investment income was negligible; but in the next four accountancy periods (the last being 21 months), it received a gross investment income of £5,000, £9,000, £45,000 and £225,000, in round figures; and in the last two periods of 12 months and 3 months (when the trading business was earning no income, but making immense losses) the gross investment income was respectively £82,145 and £11,668. The case for the Crown in the appeal is that these receipts were "income" of the company, and that the much larger figures of the trading losses must be wholly disregarded.

D There is no suggestion whatsoever that the company had been formed, or that its business had at any time been conducted, or its accounts framed for the purpose of enabling its "members" (as defined by the various Finance Acts passed for the purpose of preventing evasion by sur-tax payers) to avoid super tax or sur-tax, or in any way to offend against the spirit of the preamble to sect. 21 of the 1922 Act. The commissioners find that the trading losses in the last 15 months were in fact incurred, and annex all necessary accounts. They also record the fact that for the fiscal year 1937-8 the company claimed relief under E the Income Tax Act, 1918, s. 34, by reference to the trading loss of the last 15 months before the winding up, and that its claim was allowed; and they annex a copy of a letter to that effect from the inspector of taxes, dated Sept. 23, 1939, attaching his explanatory figures for the "year 1937-8 as finally agreed." The communication shows that the Commissioners of Inland Revenue reimbursed the company overpaid income tax to the full extent of the company's trading losses, as required by sect. 34.

F Whilst paying due respect to the maxim that hard cases make bad law, I have thought it desirable to preface the inquiry into the proper interpretation of the statute by the preceding statement of the simple facts about the company, whose affairs are the subject of the appeal; for, in my view, it is not a case where the individuals behind and in control of the company are in any sense within the mischief to the remedy to which this compartment of our taxing legislation is addressed. If they are hit, it is not because they are aimed at, G but because they just happen by accident to be within the line of statutory fire. In short, it is important to clear our minds of any subconscious prejudice due to a suspicion that the appellants company is just one more example of the devices for tax evasion against which Parliament has been obliged to provide so many different counter-devices for the protection of the revenue since it passed the Finance Act, 1922, s. 21. The appellants company is admittedly a H private company controlled by less than five individuals, and, therefore, one to which the legislation in question can apply; the only question is whether it does apply. Equally no question of company law or policy about one-man companies comes even remotely into the field of relevance. That topic is in no way germane to the sur-tax question, into which we have to inquire today.

The Finance Act, 1936, s. 20 (1), provides as follows:

The following provisions of this section shall have effect as respects companies (hereafter in this section referred to as "investment companies") the income whereof consists mainly of investment income, that is to say, income which, if the company

were an individual, would not be earned income as defined in the Income Tax Act, 1918, s. 14 (3).

Subject. (6) provides that on a resolution for the winding up of an investment company to which the Finance Act, 1922, s. 21, applies :

(a) the actual income of the company from all sources since the date of the order or resolution shall, for purposes of assessment to sur-tax, be deemed to be the income of the members.

(b) provides for notice from the Special Commissioners to the liquidator that the company's income for sur-tax is to be deemed to be the income of the members ;
(c) contains rules as to procedure. The Special Commissioners who heard the appeal state the contention of the Commissioners of Inland Revenue very shortly in para. 9 of the case :

For the respondents it was contended that on the evidence the appellant company was at the date of liquidation and had been for a period of 15 months prior to Apr. 1, 1938, deriving income solely from investments. These facts were sufficient to bring it within sect. 20 for the year 1938-39.

The Special Commissioners accepted that contention, and, therefore, confirmed the direction already given to the liquidator of the company under subsect. (6) that the company's income was to be deemed the income of the members for the purposes of sur-tax.

Before us two main contentions were urged by counsel on behalf of the appellant company. The first was that the company was not an investment company, because throughout its business life, and, anyhow, during its last 8 years it had obviously been an ordinary financial trading company and could not, or, at any rate on the proved facts did not, change its nature, either because or when its business, though still continuing, became unprofitable and had to be carried on at a loss instead of a profit. Conversely, they put their argument in the positive form of a contention that a substantial length of time must elapse in order to constitute a sufficiently representative period to justify an inference that the company had changed its character. They urged further that, even if the criterion laid down in the subsection by the words "the income whereof consists mainly of investment income" in contrast with "earned income," ought to be regarded as a definition, the word "consists" imports not a momentary phenomenon, but something persistent and habitual. Their second contention was that, even if a mere moment of time has to be regarded, it could not be said of this company at any relevant moment, however chosen, that its "main" income had any particular character, for the simple reason that it had no income at all, its total income having been reduced by its trading losses to less than nothing ; and to speak of its investment income as having a positive existence when its trading loss so far over-balanced it as to cause a minus result, is so absurd as to make it impossible to conclude that Parliament can have intended it.

I confess to a feeling of sympathy with this common-sense argument ; but the answer of the Solicitor-General is formidable. His first criticism is that the appellants' second contention misinterprets the word "income." In income tax legislation that word must be construed in its income tax meaning—that is, as income assessed and charged under one or other of the five schedules ; unless it is expressly qualified as "total income," or "total income from all sources," or "aggregate income." Consequently, as the company's investment "income" had been taxed by deduction at the source, and properly so taxed, it remained and still was income. Further, since by reason of its trade losses the company had no "income" of the Sched. D kind, and no other kind of income was suggested, the investment income was not merely the company's "main" income, but its only income.

The Solicitor-General then proceeded to answer the company's first argument, namely, that the company could not in a moment of time suddenly change its character, or, as I ventured to suggest to counsel for the appellants, change its colour like a chameleon, but that a representative period must be taken, which, on the facts of the present case, would reach back into the company's profitable trading years. The Solicitor-General's answer was in effect that the appellation "investment company" is not a substantive description, but a mere label adopted for drafting convenience in order to facilitate subsequent references ;

and that subsect. (1) says nothing about the character of any company, but merely enacts that if the income of any company is "mainly" derived from investments the statutory consequences will automatically follow, including the appellation "investment company." He then took what he regards as his final step in logic, by pointing to the fact that the company still possessed for purpose of charge its investment income as shown in the assessment which in the absence of appeal had become "final and conclusive."

A The case so presented to us by him appeared powerful; and I confess to having found it difficult to meet, it seemed so faithfully to comply with the language of the section. And yet the result was so much at variance with the object of the legislation in a case like the present, where there is not a single symptom of the mischief against which this network of special legislation has been directed, that I hesitated to accept his argument as sufficient; and on the whole I have come to the conclusion that it is wrong. Counsel for the appellants, in his
B reply, gave us the clue to what I think, though not without doubt, is the true solution. It is to be found in the Finance Act, 1927, s. 42 (4), and the application of that provision to an "adjustment" of income (or of tax on income as per the Finance Act, 1927, s. 40 (1)) under the Income Tax Act, 1918, s. 34. Sect. 42 occurs in the fascicle of sects. 38-47, constituting Pt. III of the 1927 Act, which effected the change from super-tax to sur-tax. Sect. 38 was concerned with
C total income from all sources, just as was the Income Tax Act, 1918, s. 5. Sect. 42 (1) made sur-tax:

... due and payable as a deferred instalment of income tax on or before Jan. 1 next after the end of the year of assessment for which it is payable . . .

but subsect. (2) is as follows:

D Sur-tax shall be assessed and charged by the Special Commissioners, and, notwithstanding anything in the Income Tax Acts providing for the separate assessment of income arising from different sources, shall be assessed and charged in one sum.

The important subsection, however, is (4):

E Where an assessment to income tax made at the standard rate has under the provisions of the Income Tax Acts become final and conclusive for any year, the assessment shall also be final and conclusive for the purpose of estimating total income for the purpose of sur-tax for that year, and no allowance or adjustment of liability on the ground of diminution of income or loss shall be taken into account in estimating the total income for that purpose, unless that allowance or adjustment has been previously made in respect of the income tax charged at the standard rate on an application under the special provisions of the Income Tax Acts relating thereto.

F That subsection is (save for slight changes of phraseology due to one or two later Finance Acts which are immaterial for present purposes) an exact repetition of sect. 5 (2) of the 1918 Act. Its effect is to make an assessment under one or other of the Schedules A to E, which has become final and conclusive for income tax purposes by reason of there having been no appeal from the general or additional commissioners, also final and conclusive for sur-tax, but subject to the extremely important exception, namely, of an adjustment of liability in respect of income tax made "on an application under the special provisions of the Income Tax Acts relating thereto." The relevant "special provision" in the
G present appeal is the Income Tax Act, 1918, s. 34, under which the repayment was in fact made to the company of the tax deducted at the source on its investment income. The wording of sect. 34 is an application:

... for an adjustment of his liability by reference to the loss and to the aggregate amount of his [the taxpayer's] income for that year estimated according to this Act.

H On such an application being granted sect. 34 (2) makes repayment of income tax obligatory.

If it be said that there remains any ambiguity in sect. 42 (1) of the 1927 Act which adds a further doubt about my solution, I think the general considerations which I stated in the earlier part of this judgment justify a beneficial interpretation of the subsection in favour of the taxpayer. In this context it is worth noting that as the old super tax was an "additional" duty of income tax (sect. 4 of the 1918 Act), so sur-tax is a deferred payment of income tax. In either case whether the Income Tax Act, 1918, s. 5 (2), or the Finance Act, 1927, s. 42 (4), be considered, if the income tax foundation on which the higher

tax rests be removed, the superstructure of super tax or sur-tax cannot be left in the air; it, too, ceases to exist.

For these reasons I am of opinion, though with doubt, that this appeal should succeed, with costs here and below; that the judgment of MACNAGHTEN, J., should be set aside and the case remitted to the Special Commissioners to act accordingly: but GODDARD and DU PARCQ, L.J.J., think otherwise, and the order will be as they direct.

GODDARD, L.J.: The appellant company was at all material times one to which the Finance Act, 1922, s. 21, applies, and the first question in the case is whether it is also an investment company within sect. 20 of the 1936 Act. The second question is whether, assuming it is an investment company, it can be said to have any income at all for the financial year 1938-39. It is an investment company if its income consists mainly of what in the case of an individual would be unearned income. This company carried on a business of buying and selling stocks and shares, and like all companies carrying on such a business, had large holdings of securities from which it derived a dividend income. For the 2 years ending Mar. 31, 1931, and 1932, it traded at a loss; for the next three periods of 12 months and the succeeding 21 months ending Dec. 31, 1936, it traded at a considerable profit; for the 12 months ending Dec. 31, 1937, and the succeeding 3 months it sustained large losses on its trading, far exceeding what it received from its investments. On Apr. 1, 1938, it went into voluntary liquidation. The Special Commissioners have held that for the 15 months before liquidation it was an investment company and have upheld, as has MACNAGHTEN, J., a direction made upon it for the year of assessment 1938-39, under the provisions of the two sections referred to above. It is objected that there was no evidence upon which the commissioners could find that this was an investment company because, it is said, they must look not only at that period of 15 months, but must take what was called a representative period, by which I understand is meant that they ought to survey some period anterior to that in which the company made a loss, and if they find, as they must have done, that the company was then in receipt of a trading income in excess of its investment income, they must find that it was not an investment company. One difficulty in accepting this argument is that no one could suggest any test as to what is a representative period. But the overriding difficulty, in my opinion, is that to do so would be to substitute a different test for ascertaining what is an investment company for that which the Act provides. The test is not whether the company had been carrying on or was continuing to carry on a business, but simply whether its income consists mainly of a particular class of income. Therefore a company can be an investment company at one time and not at another. In my opinion, all that has to be regarded is the income during the financial year in question. Whether the test is satisfactory or whether it works hardship in a particular case is not a matter which can be taken into account. Suppose the figures showed that for the 3 or 4 years this company's income had been mainly investment income and then for a particular year there had been a change and its income was mainly earned; I do not suppose the company would have contended that it remained for that year an investment company. On this point I am of opinion that the decision, both of the Special Commissioners and MACNAGHTEN, J., was right.

The second question is more difficult, but I agree with the Special Commissioners and MACNAGHTEN, J. The case is concerned with the period after the date of liquidation. It seems to me that the company had an income in the year 1937-38, though not a taxable income. An individual often has an earned and unearned income. If the former ceases because he makes a loss, but he receives money from his investments, in my opinion, he still has an income, though he will not have to pay tax upon it if the loss exceeds the income. Sur-tax is an additional duty of income tax, so no one can have an income subject to sur-tax if he has not one upon which income tax is chargeable. But a company does not pay sur-tax, and we have not to consider, therefore, whether its income is liable to sur-tax or even to income tax, but simply whether it has an income of a particular description. If it has such an income, for sur-tax purposes it is to be regarded not as the income of the company but of its members.

In my opinion, therefore, the company was at the date of the liquidation an

investment company, and consequently the direction against which the appeal is brought was validly given.

A DU PARCQ, L.J.: The question in this case is not whether the appellant company would normally be described as an "investment company," but whether it falls within the class of companies to which the label "investment companies" is applied by the Finance Act, 1936, s. 20 (1). If one reads into that section the material words from the Income Tax Act, 1918, s. 14 (3), the question assumes the following form: Can it be predicated of this company that its income consists mainly of income which, if it were an individual, would not be charged under Sched. D or the rules applicable to Sched. D? (I omit for the sake of simplicity the words which provide that income, to be "earned income" must be derived from the exercise of a trade, profession or vocation.) If it is proper to look only at the period of 15 months to Apr. 1, 1938, for the purpose of ascertaining the status of the company, I think that there can be no doubt that the Sched. D income was nil. The company in fact made a large trading loss.

B The next question is whether the company had any income other than Sched. D income. If the answer to that question is "Yes," then it follows that its income "consists mainly" of non-Sched. D income. The Crown says that the answer is "Yes," because the company received in dividends from its investments £82,145 in the 12 months ending Dec. 31, 1937, and £11,668 in the 3 months ending Apr. 1, 1938. For the appellant company it is contended that the answer is "No," because although it received dividends they were not truly income. The company, it is said, had no income, because its trading loss swallowed up its "unearned" profits and left it with nothing. It is pointed out that, for the purposes of taxation, an application could be, and was, made D to the company which properly resulted in its paying no tax on its dividends: the tax deducted at source was returned to it.

E In my opinion, the contention of the Crown is right. The subject who "sustains a loss" in trade may apply to the commissioners "for an adjustment of his liability by reference to the loss and to the aggregate amount of his income" for the year "estimated according to the Act." It is, I think, true to say that the "aggregate amount" of the company's income over the 15 months was nil. But, in my opinion, the Finance Act, 1936, s. 20 (1), requires us to look not at the aggregate income, but at two categories of income, (1) earned and (2) everything that is not earned, and to compare them. If under category (1) we find a loss, and under category (2) a profit, that is for this purpose immaterial, the object of the section being to classify a company according to the character of its income from various sources, and not to arrive at the true aggregate of its income. If the company had made a profit of £5 or £10 by trading activities, F and of many thousands in the form of "investment income," there could be no question that it would fall within sect. 20 (1). It appears to me that it is no less clearly within the subsection when we find that instead of making a small profit it has incurred a heavy loss by its trading activities.

G I have had the advantage of reading, and have carefully considered, the judgment of SCOTT, L.J. I am unable, however, to agree with the view that the Finance Act, 1927, s. 42 (4), concludes the question. That subsection relieves the payer of sur-tax, as well as the income tax payer, from liability in so far as an allowance or adjustment has been made on the ground of diminution of income or loss. For that purpose the taxpayer's "total income" has to be ascertained. For the reasons which I have already given I think that we are not here concerned with "total" income. Nor are we concerned with the liability of the company to taxation. Its character has to be ascertained according to the H rule laid down. If it is properly characterised as an "investment company" at the time when it goes into liquidation, from that time on its "actual" income (which, during the winding up presumably will not be diminished by any trading loss) must be "deemed to be the income of the members."

The question remains whether it was proper to treat the 15 months ending Apr. 1, 1938, as the relevant period. If due regard is paid to sect. 20 (6), it is, I think, clear that what has to be ascertained is the status of the company at the date of the winding-up. Was it then a company of the class "referred to as 'investment companies'" in sect. 20 (1)? I find it impossible to say that

this question could not properly be answered by looking at the results of the company's activity during the last financial year and the few months beyond the end of the financial year which ended in liquidation.

I feel the force of all that SCOTT, L.J., has said as to the probable intention of the legislature and the inequitable result which may be thought to follow from the construction which I have adopted. It may be enough to say with regard to these considerations that, where the construction of a taxing Act appears to be reasonably plain (and in the present case I feel no real doubt about it) there is no room for speculation as to the policy of Parliament or the justice or injustice of the result. I would venture to add, however, that it is, I believe, notorious that the legislature does not always succeed in the difficult task of using language at once so comprehensive and so nicely adapted to every possible case as to achieve the ideal result that while no one whom it is intended to tax shall ever escape, yet no one who has a reasonable claim to immunity shall ever be caught.

I agree with GODDARD, L.J., that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by C.ST.J. NICHOLSON, Esq., Barrister-at-Law.]

WILLIS v. NEW HUCKNALL COLLIERY CO., LTD.

[COURT OF APPEAL (Scott, Goddard and du Parcq, L.JJ.), **February 1, 2, 3, March 12, 1943**.]

Workmen's Compensation—Review of compensation—Claim based on a rise of more than 20 per cent. in rates of remuneration—Whether right to review is retrospective—Workmen's Compensation Act, 1925 (c. 84), s. 11 (3).

The respondent was employed at the appellants' colliery and on May 25, 1928, suffered an accident. Compensation was paid for total incapacity from that date until Mar., 1929, when he obtained light work and thereafter was given compensation for partial incapacity, but not on the statutory basis, nor was there any agreement between the respondent and the appellant as to the amount of compensation which the workman should receive. On Jan. 30, 1942, the workman claimed a review under the Workmen's Compensation Act, 1925, s. 11 (3), on the ground that there had been a rise of more than 20 per cent. in the rate of remuneration of the class of employment in which he was employed at the time of the accident. He contended that the arbitrator was entitled to look at the rates of wages prevailing over the whole period since the accident, and that, if in any number of consecutive periods of twelve months there was an increase of 20 per cent. in the rates of remuneration, he was entitled to a review from the end of each such period. He claimed a review on the basis that there had been such increases in the rates of remuneration in 1937, 1940 and 1942, and claimed to receive additional compensation from 1937 :—

HELD: [SCOTT, L.J., *dissenting*] (i) the arbitrator must confine himself to the rates prevailing for the 12 months immediately preceding the date of the application for review.

(ii) under sect. 11 (3) the revised compensation is payable as from the date of the application for review and not retrospectively.

[EDITORIAL NOTE.] This case raises the question whether a review under sect. 11 (3) of the Act of 1925 can have a retrospective operation. The matter is more or less one of first impression and will not often arise since parties do not often sleep on their rights as the applicant in this case has done. The matter is decided as one of the construction of the particular subsection and giving the words their plain and ordinary meaning, the majority of the court have decided that an alteration in the payments of compensation can take effect only from the date of the application for review.

AS TO REVIEW ON FLUCTUATION IN WAGES RATES, see HALSBURY, Hailsham Edn., Vol. 34, p. 955, para. 1306; and FOR CASES, see DIGEST, Vol. 34, pp. 455, 456, Nos. 3735-3737.]

Cases referred to :

- (1) *Leivers v. Barber, Walker & Co., Ltd.*, [1943] 1 All E.R. 386 ; Digest Supp.
- (2) *Gibson (George) & Co. v. Wishart*, [1915] A.C. 18 ; 34 Digest 431, 3511 ; 83 L.J.P.C. 321 ; 111 L.T. 466 ; 7 B.W.C.C. 348.
- (3) *Wolseley Motors, Ltd. v. Sharp* (1925), 133 L.T. 70 ; 34 Digest 452, 3708 ; 18 B.W.C.C. 15.
- (4) *Williams v. Guest, Keen and Nettlefolds, Ltd.* (1925), 133 L.T. 111 ; 34 Digest 453, 3718 ; *sub nom. Guest, Keen and Nettlefolds, Ltd. v. Williams*, 18 B.W.C.C. 68.
- (5) *Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd.*, [1925] 2 K.B. 667 ; 34 Digest 458, 3752 ; 95 L.J.K.B. 275 ; 133 L.T. 409 ; 18 B.W.C.C. 163, 179.
- (6) *Dobson Ship Repairing Co., Ltd. v. Burton*, [1939] A.C. 590 ; [1939] 3 All E.R. 431 ; Digest Supp. ; 108 L.J.K.B. 542 ; 161 L.T. 122 ; 32 B.W.C.C. 151 ; *affg. sub nom. Burton v. Dobson Ship Repairing Co., Ltd.*, [1938] 3 All E.R. 410 ; 31 B.W.C.C. 294.
- (7) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon and Bruce*, [1901] A.C. 79 ; 34 Digest 423, 3433 ; 70 L.J.K.B. 170 ; 84 L.T. 65 ; 3 W.C.C. 1.
- (8) *Williams v. Bullfa and Merthyr Dare Steam Collieries* (1891), *Ltd.*, [1914] 2 K.B. 30 ; 34 Digest 459, 3760 ; 83 L.J.K.B. 442 ; 110 L.T. 561 ; 7 B.W.C.C. 124.
- (9) *Potts v. Pope and Pearson, Ltd.*, [1940] 1 K.B. 868 ; [1940] 2 All E.R. 263 ; Digest Supp. ; 109 L.J.K.B. 449 ; 162 L.T. 290.

APPEAL by the employers from an award of His Honour JUDGE HILDYARD given at the Mansfield County Court on July 17, 1942. The facts are fully set out in the judgment of SCOTT, L.J.

Workmen's Compensation Act, 1925, s. 11 (3), provides as follows :

Where the review takes place more than six months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the twelve months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than twenty per cent. than his average weekly earnings during the twelve months previous to the accident (or if the weekly payment has been previously varied on a review during the twelve months previous to that review or the last of such reviews), the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the twelve months previous to the review had obtained during the twelve months previous to the accident.

For the purposes of this subsection "review" includes a review under the provision of any Act repealed by this Act corresponding to this section.

G. J. Paull, K.C., and *J. B. Herbert* for the appellants.

F. W. Beney for the respondent.

SCOTT, L.J. : This appeal turns on the correct interpretation of the Workmen's Compensation Act, 1925, s. 11 (3), which confers a mutual right of review, at any time more than 6 months after the accident, in respect of weekly compensation for incapacity in the event of a rise or fall of more than 20 per cent. in the rates of remuneration in the same class of employment as that in which the workman was employed at the time of the accident. The appeal is by the employer.

The facts are these. The workman was a contractor in a hand-got stall in the employers' colliery in Nottinghamshire, that is to say, he was employed in a superior position at the coal-face. On May 25, 1928, he suffered an injury which cost him the vision of one eye. His average pre-accident earnings were agreed at £4 9s. 2d. Compensation was paid for total incapacity till March, 1929, when he was given light work. Since then he has been given compensation for partial incapacity, but never on the statutory basis ; to this aspect of the case I will revert. The county court judge has found as a fact that the workman never made any agreement with the employer in regard to the *quantum* of the compensation received for partial incapacity, and, in my opinion, there was evidence to support that finding. It was in these terms :

The applicant when he received his compensation signed the usual forms of receipt, some of which were produced, but I accept his evidence when he says that the question of his rights under sect. 11 (3), was never mentioned, that he did not know that he had any such rights or that they had at any time become enforceable, and that he accepted the varying sums paid to him without knowing how they were made up.

On Jan. 30, 1942, the workman claimed a review under the subsection. The county court judge finds fluctuation in the rates of the comparable wages which

the workman would have been earning had he "remained uninjured and continued in the same class of employment" (as required by the subsection), which, measured by the agreed percentages applied in the coalfield, were as follows: the agreed pre-accident wage of £4 9s. 2d. being based on the then addition of 138 per cent. to the basic rate: (1) the average of the 12 months to Aug. 1, 1937, was 167.9 per cent., making the notional earnings £5 8s. 6d.; (2) the average of the 12 months to Sept. 1, 1940, was 204.71 per cent., equalling £6 12s. 3d.; (3) the average for the 12 months to Feb. 1, 1942, was 247.47 per cent., equalling £7 19s. 10d. The county court judge held that he was free to go back to each of the three periods, and that, as there was in each an average fluctuation upwards of more than 20 per cent., the workman was entitled to have his compensation reviewed and revised three times. A

A question arose about the pre-accident earnings, which I leave over until I have dealt with those issues which call for decision, because, in my view, they arise directly out of, though they are not wholly identical with, the workman's arguments upon the construction of the section. B

The latter issues I will now consider. The first is as to the meaning of the word "review" in the subsection. It was contended for the employer: (1) that in each of the four places in the subsection, where it occurs, the word contemplates the point of time when it takes place, and that that time is the date either of the application for an arbitration by way of review, or of the award; (2) that the only test period permitted is the 12 months before the review; (3) that the review is to be given effect only in the future, and not retrospectively in the past, even to the test period of 12 months itself; (4) (which follows consequentially on the third contention) that the county court judge was acting without jurisdiction in making a review in steps as he did; (5) that if, contrary to the above submissions, separate reviews could have been required for the adjustment of past rates of compensation, they could not be combined in the one proceeding; (6) that even if a retrospective review is permitted under subsects. (1) and (2), the word in subsect. (3) has a different meaning from that which it bears in the other two subsections; and (7) that part of the claim is barred by the Limitation Act, 1939. C D

It is convenient at once to refer to authorities binding on this court where the meaning of the word "review" has already been decided in its context in subsects. (1) and (2). I discussed them at some length in my judgment in *Leivers v. Barber, Walker & Co., Ltd.* (1), and need not repeat myself. The effect of that decision is that the review speaks from the date to which it goes back, without any limitation of time. I only add that the facts of the present case show how important that interpretation is to the workman in a case like the present, where the county court judge has found that the workman always accepted what he was offered without knowing what his rights were, but without any agreement which bound him. E

It suffices here to refer to *Gibson v. Wishart* (2), per VISCOUNT HALDANE, L.C., at pp. 22-24, and LORD ATKINSON, at pp. 27-29; to the three cases of *Wolseley Motors v. Sharp* (3), *Guest, Keen v. Williams* (4), and *Briggs v. Dryden (T.) & Sons, Talbot v. Vickers* (5); and to *Burton v. Dobson Ship Repairing Co., Ltd.* (6), where SLESSER, L.J., spoke of the meaning of the word in relation to all three subsections of sect. 11. He said, at p. 414: F

The date of review . . . is not necessarily the date when the case is heard, or when the award is signed. It is the date whence the alteration operates. G

LORD PORTER, in the same case in the House of Lords, kept the point open. I respectfully agree with SLESSER, L.J., and am of opinion that subsect. (3) does not put a different meaning on the word "review" from that which it bears under subsects. (1) and (2). If that is right, then the county court judge could go back unless he was prevented by one of the other legal grounds to which I have referred. It may well be that the first line of subsect. (3) contemplates the date of application and intends to postpone the right of demanding a review until 6 months after the accident; it may also be that the period of 12 months is contemplated normally as ending either with the application for review, or with the hearing; but the 12 months' period appears to me to have been inserted primarily, not as a condition of any right, but as a procedural requirement for the purpose of ensuring a fair comparable average. That the 12 months is not a condition precedent to the right of review follows from the H

provision for a review as soon as the 6 months after the accident have elapsed, when *ex hypothesi* a 12 months' comparison of the average effect of the fluctuation with the 12 months' pre-accident average is impossible.

A The other contention advanced for the appellants is that the word "review" in subsect. (3) may properly be construed in a different sense from the same word in subsects. (1) and (2), in spite of its being contained in the very same section, since subsect. (3) is a mere re-enactment of what was an independent section (sect. 15) in the 1923 Act. True, but that Act had to be read as one with the 1906 Act (see sect. 31) and when it was passed the authorities to which I have referred had already laid down the retrospective interpretation of the word in para. 16 of Sched. I of the 1906 Act, which was the forerunner of subsects. (1) and (2) of sect. 11 of the 1925 Act, and it is impossible to suppose that Parliament, knowing, as we must assume it did know, the judicial meaning attached to the word "review" in para. 16, would use the same word in a different sense in the new amending section in an Act to be read as one with the Act containing the word in the other context without indicating plainly that its operation was to be different.

B The argument that the county court judge could not "go by steps," as counsel for the appellants put it, because he had no jurisdiction to do so, does not appeal to me. *Ex hypothesi* what the judge could do in a case of dispute, the parties could do by agreement without dispute, and *vice versa*; and no limit can be read into the parties' own jurisdiction in that respect. It is worth bearing in mind that agreement was the primary mode of settlement intended by all the Workmen's Compensation Acts, not litigation. See, for instance, the 1925 Act, s. 21 (1).

C To the contention that there must be a separate proceeding for each arbitration for purpose of review, I reply that such a formality of procedure is obnoxious to the whole tenor of the Workmen's Compensation Acts. If the county court judge could have entertained three applications for review, he could do it all on the same day, and also on one application. Another version of the same argument as to the limited operation of the word "review" in subsect. (3) was that the judge could only direct an increase for the future, either from the date of his award or at earliest from the last day of the 12 months period taken as the basis of the average fluctuation. I see nothing in the language of the subsection which so limits his jurisdiction.

E The county court judge gave a carefully considered judgment in which he dealt with several other points raised on behalf of the employers. I agree with his conclusions, and also broadly with his reasons. There was, for instance, a contention on behalf of the appellants that, because (through a general labour stoppage for 2 weeks at the colliery) the workman had only been in continuous employment under the employer for 12 weeks before the accident and the pre-accident average of earnings had been based on those weeks, the subsection should be construed as requiring that a 12 weeks period before the hearing of the review should also be taken in order to get that average of notional earnings, instead of the 12 months average which was, in fact, available for each of the county court judge's three reviews, or steps, as counsel for the appellants called them.

F Apparently the appellants had not the forensic courage to suggest that a 12 months average before the accident was a condition precedent to the right of review. The suggestion that, although a 12 months period before each review was, in fact, available, it should be replaced by a 12 weeks period, has literally nothing in the subsection to give it plausibility; but the practical necessity which there may often be (as in the present case) of taking for the pre-accident average a shorter period than 12 months, shows very clearly, in my opinion, that the 12 months period was not intended by Parliament to cut down rights.

G I regard as relevant the principle which the House of Lords applied in *Lysons v. Knowles* (7), where it was held that the word "average" in the Schedule to the 1897 Act, was a procedural matter, and afforded no sufficient reason for cutting down the workman's right conferred in sect. 1 of the Act. So here the right to the review should be treated as paramount, not to be cut down by machinery for ascertaining an average.

H The calculations of rates made on behalf of the workman both for pre-accident earnings and for notional earnings before the reviews, included moneys deducted

before payment of wages out of the men's wages funds for his appropriate contributions to the "savings, pensions and allocation funds." The county court judge held that they were properly included, and I agree with him. They were so applied on the workman's behalf and with his consent. He further found that there had been no agreement, oral or implied from conduct, and no estoppel to affect the workman's rights. We considered similar questions in *Leivers'* case (1) and, for the reasons we gave then, I think the decisions of the county court judge in the present case are decisions of fact free from any error of law. The only other point is the contention that the claim must be limited to the 6 years before the workman's application for review on the ground that that claim is barred by the Limitation Act, 1939. In *Leivers'* case (1), in which we delivered judgment this week, the court held (GODDARD, L.J., *dissenting*) that that Act has no application to the remedies afforded to the workman by the Workmen's Compensation Acts.

The appeal should, in my view, be dismissed with costs; but GODDARD and DU PARCQ, L.J.J., differ, and the order will be as they direct.

GODDARD, L.J.: This case is a striking illustration of the unfortunate fate that pursues the Workmen's Compensation Act. There seems to be no end to the new and difficult problems that can arise, and here we are dealing with a question which has never before come up for decision, although the provision we have to consider has been in force for some 20 years.

I need not recite the complicated facts of the case. Counsel for the appellants presented his arguments under six heads. It is, I think, only necessary to consider the first two, which are closely connected with one another. If he is right on those, then the others do not arise. They are: (1) whether, on a review under sect. 11 (3), the arbitrator can alter payments already made, and, if so, to what extent; and (2), if he can, can he alter back payments in steps, so that in effect there are two or more reviews in one proceeding. Apart from the complication that in this case the workman has been paid and has accepted compensation based on some calculation other than that prescribed by the Act, what has happened is that there has been a rise in the rates of remuneration by more than 20 per cent. over those which prevailed at the date of the accident, which happened in 1928. He applied for a review on Jan. 30, 1942. The case was before the court on more than one occasion, and the award was made on July 17.

The county court judge has, as I understand his judgment, found that there was a 20 per cent. increase as far back as 1937, and has increased the compensation from that year up to 1942. The appellants submit that that is wrong, and that the arbitrator must confine himself to the rates prevailing for the 12 months immediately preceding the review, and then make an award which will substitute the average for those 12 months for the average of the earnings during the 12 months preceding the accident, and that he can only award the increase from the time of the review. They contend that "review" means the actual proceeding or hearing before the judge, or, alternatively, the date of the application.

For the workman it is contended that the arbitrator is at liberty to look at the rates of wages prevailing over the whole period since the accident, and that if he can find that in any consecutive period of 12 months there was an increase of 20 per cent., he can review from the end of that period, treating the period of 12 months as that immediately preceding the review.

I confess that, if I were at liberty to regard the construction of this subsection as free from authority, it appears to me reasonably clear that the appellants are right. It has to be borne in mind that the 1925 Act is a consolidating and not an amending Act. Sect. 11 (3) replaces sect. 15 of the 1923 Act. The words are slightly different because the old sect. 15 stood alone, and was the only section in the 1923 Act which dealt with a review of compensation. In the 1925 Act, it is introduced as part of a section which deals comprehensively with the review of weekly payments, subsects. (1) and (2) being taken chiefly from the 1906 Act, so the opening words are altered, but the substance of the section remains.

The opening words of sect. 15 were:

A weekly payment payable in respect of an injury by an accident happening after the commencement of this Act may, at any time after 6 months from the date of the accident, be reviewed at the request either of the workman or of the employer, if it is claimed . . .

and then proceeds exactly as in sect. 11 (3). It was unnecessary to repeat in the 1925 Act the whole of the above passage, having regard to subsect. (1); and so subsect. (3) opens with the words :

Where the review takes place more than 6 months after the accident . . .

A Whether one takes sect. 15 of the 1923 Act, or sect. 11 (3) of the 1925 Act, I think the intention is clear. Compensation has in the first place to be assessed on the average of the weekly earnings during the 12 months preceding the accident. That basis stands for 6 months in any event. Then either side can make a request for a review and obtain one on proof of a fluctuation of more than 20 per cent. up or down during the immediately preceding 12 months. So, if a review were requested directly 6 months from the date of the accident had expired, it would follow that the basis for calculation would be, not the man's average earnings during the 12 months preceding the accident, but the B rates prevailing for 6 months before and 6 months after the accident.

C It may be that no rise or fall to the necessary extent has taken place at the expiration of 6 months, and then either side must wait until it occurs. When it does occur either side can apply. If they let the opportunity pass, that is, if no request is made till there has been a fluctuation for more than 12 months, the arbitrator seems to me, none the less, bound to take into account, not any 12 months, but the 12 months immediately preceding the review, which must, I think, mean the proceeding that takes place in consequence of the request. Then the weekly payment is to be adjusted so as to make it what it would have been if the rates during the 12 months previous to the review had obtained during the 12 months previous to the accident.

D It has more than once been laid down by the highest authority that the Acts are not framed in technical language and are to be construed in a popular sense. I cannot doubt that a layman reading this section would think that it meant that all the arbitrator had to consider was the rates prevailing for 12 months before the matter came before him, and that the increased payment was to begin from that date. Is there any authority, then, which compels us to come to a different conclusion ? I do not think there is.

E *Williams v. Bwlfa and Merthyr Dare Steam Collieries, Ltd.* (8), and *Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd.* (5), were both dealing with a review arising on a different section and for a different reason. They were both cases where the workman was under age at the time of the accident, and his compensation afterwards had to be calculated on what he would have earned as an adult but for the accident. The court, I think, held in those cases that to make the provisions of what is now sect. 11 (2) work, they had to review retrospectively.

F While I am aware that one should give the word " review " the same meaning, if possible, in subsect. (3) as in subsect. (2), it is to be remembered that the history of the two subsections is different, and, in my opinion, the plain words of subsect. (3) can only bear the meaning that I have indicated. The difference between reviews under the two subsections was emphasised in *Potts v. Pope & Pearson, Ltd.* (9).

G That anomalies or even hardships may result is no reason for giving the words of the subsection other than their ordinary meaning. Some period must be taken and must be arbitrarily fixed ; it might be regarded as a hardship if either party lost the right of review because the fluctuation could only be shown to have existed for 11 months and 3 weeks, but the provision would not then apply. The period immediately preceding the review has obviously been fixed at 12 months because that is the period over which the average has to be taken in fixing the original compensation. In my opinion, it is the date of the request, and not the date of the hearing, that is the material date. It is the request H that initiates the review, and that is clear from the opening words of sect. 15 of the 1923 Act.

It could not be intended, in my opinion, that either side should lose the right, if it so happened that, though there had been a rise or fall in operation for 12 months immediately preceding the request, some alteration took place before the matter could be heard in court, or, if the matter was to be settled by agreement, before the parties could meet round a table. I do not think we are doing any violence to the words of the section by treating the review as dating from the request which initiates it.

In my opinion, the matter should be remitted to the arbitrator, for him to ascertain the rates prevailing for 12 months immediately preceding Jan. 30, 1942, and, if they are more than 20 per cent. above the pre-accident earnings, to fix the weekly payments at the higher rate as from that date.

DU PARCQ, L.J. : The judgment which has been delivered by GODDARD, L.J., exactly expresses the view which I take of the effect of sect. 11 (3) of the 1925 Act, and there is little which I can usefully add to it.

In my opinion, the authorities as they stand lead to the inevitable, if regrettable, conclusion that the word "review" is used by the legislature with different meanings in the same section. Thus, in subsect. (1) it seems to me to be clear that in the expression "on such review" the word "review" means in the words of LORD SUMNER in *Gibson v. Wishart* (2), "further arbitration." He said, at p. 37 :

A review is a further arbitration, and, as such, involves a submission which at the same time confers and limits jurisdiction.

This was, I think, the opinion of VISCOUNT HALDANE, L.C., at pp. 23, 24.

The House of Lords did not decide in *Gibson v. Wishart* (2), that "on such review" meant "on the alteration being made." The decision was that the continuation and duration of the incapacity were brought under review (per VISCOUNT HALDANE, L.C., at p. 23).

On the other hand, the expression "at the date of the review" in subsect. (2) has been construed as meaning "at the date when the alteration operates," so that "review" may there be said to mean "alteration as the result of revision."

The question for us, however, is what the word "review" means in subsect. (3), and, to be more precise, what it means in the phrase "the 12 months immediately preceding the review," which occurs in that subsection. I agree with GODDARD, L.J., as to the meaning which, in the context, must be given to those words. While, therefore, I acknowledge the force of the argument which has convinced SCOTT, L.J., I find myself compelled to come to a different view from his on this fundamental question, and it is unnecessary for me to express any opinion on the other points which he has dealt with in his judgment.

I would only add that, in my opinion, support is given to the view taken by the majority of this court in the recently decided case *Leivers v. Barber, Walker & Co., Ltd.* (1), that the Workmen's Compensation Act was a self-contained code and that the Limitation Act had no application to proceedings under it, when one finds that the effect of sect. 11 (3) is to discourage any dilatoriness on the part of applicants for a review.

I concur in the order proposed by GODDARD, L.J.

GODDARD, L.J. : The appeal will be allowed with costs and the matter remitted to the arbitrator for him to ascertain the rates prevailing for 12 months immediately preceding Jan. 30, 1942, and, if they are more than 20 per cent. above pre-accident earnings, to fix the weekly payments at the higher rate as from that date. The cross appeal is dismissed.

Appeal allowed with costs. Cross-appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : Peacock & Goddard, agents for Elliot Smith & Co., Mansfield (for the appellants) ; Taylor, Jelf & Co., agents for Hopkin & Son, Mansfield (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

LARRINAGA STEAMSHIP CO., LTD. v. R.

[KING'S BENCH DIVISION (Atkinson, J.), February 15, 1943.]

Insurance—Marine insurance—War risks—Warlike operation—Ship returning home in ballast after discharging cargo at war base.

Shipping—Charterparty—Master to obey order of charterer "as regards employment"—Ship stranded as consequence of compliance with wrong order—Charterer liable in damages.

A ship was requisitioned by the Government on Sept. 3, 1939, under the conditions of the charterparty T.99A, whereby the master was to act under

the orders of the charterer, who was to be liable for loss arising as a consequence of warlike operations. The ship had carried a cargo of munitions to a war base and on returning from that voyage she was to be released from government service. She finished discharging her cargo on Oct. 13, and on the same evening the chief officer, who was in command owing to the master's illness, was ordered by the charterer's agent to leave the port as soon as discharge was complete because the berth was wanted for another ship. The charterer's agent refused the chief officer's request that the sailing should be deferred until the following morning owing to bad weather and the ship set sail the same night, but in consequence of the storm she stranded and sustained serious damage. The petitioners contended that the damage was sustained while the ship was engaged on a warlike operation, or that it was a consequence of a wrong order given by the charterer :—

HELD : (i) on the discharge of the cargo the warlike operation came to an end and the subsequent stranding was not a consequence of it.

(ii) the dominant cause of the stranding was the compliance with the wrong order of the charterer. The petitioners were, therefore, entitled to succeed on their alternative claim for damages.

[EDITORIAL NOTE. The important point here is whether a ship, which is clearly engaged in a warlike operation on the outward voyage, ceases to be so engaged when she returns home in ballast. The question is whether the homeward voyage is to be considered as part of the warlike operation, or can be separated from the outward voyage so that it is an ordinary marine adventure. Clearly the matter is one where arguments can be adduced to support either view, but the judge has held that the warlike operation ceased with the discharge of the war cargo and that, on the homeward voyage, the vessel was not engaged in a warlike operation.]

As to WARLIKE OPERATION, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316, 317, para. 441; and FOR CASES, see DIGEST, Vol. 29, pp. 229, 230, Nos. 1854-1861.]

Cases referred to:

- (1) *Clan Line Steamers, Ltd. v. Liverpool and London War Risks Insurance Assocn., Ltd.*, [1942] 2 All E.R. 367; Digest Supp.; 168 L.T. 139.
- (2) *Yorkshire Dale S.S. Co. v. Minister of War Transport (The Coxwold)*, [1942] A.C. 691; [1942] 2 All E.R. 6; Digest Supp.; 111 L.J.K.B. 512; 167 L.T. 349.
- (3) *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)*, [1923] A.C. 191; 29 Digest 226, 1838; 92 L.J.K.B. 142.
- (4) *A.-G. v. Adelaide S.S. Co. (The Warilda)*, [1923] A.C. 292; 29 Digest 228, 1850; 92 L.J.K.B. 537; *sub nom. Adelaide S.S. Co. v. R.*, 129 L.T. 161.

PETITION OF RIGHT claiming in respect of the loss of a ship which was chartered to the Ministry of Shipping. The facts are fully set out in the judgment.

F. A. Sellers, K.C., and *Owen L. Bateson* for the suppliants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Patrick Devlin* for the Crown.

ATKINSON, J.: This is a petition of the Larrinaga Steamship Co., Ltd., against the Crown claiming in respect of the loss of a ship which was chartered to the Ministry of Shipping. On Sept. 3, 1939, the S.S. Ramon de Larrinaga was requisitioned by the Government under the conditions of the charterparty T.99A. Cl. 23 of the charterparty incorporated the provisions of form T.773 relating to war risks liability or insurance. Its provisions imposed on the charterers liability for loss arising from the consequence of hostilities or warlike operations. The relevant part of cl. 9 provided as follows:

The master shall prosecute his voyages with the utmost despatch . . . and although appointed by the owners he shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements; and the charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the master or officers signing bills of lading or other documents or complying with such orders.

Cl. 11 provided:

The charterer or his representative shall furnish the master from time to time with all requisite instructions and sailing directions in writing.

Cl. 1, the hiring clause, is a long clause in which these words occur:

. . . to be employed in such lawful trades, between good and safe ports or places as the charterer or his representative shall direct.

On Sept. 5, 1939, notice was given to the owners that the ship would be employed on the conveyance of mechanical transport and she was ordered to

be brought into a fit state of repair and to bunker at Cardiff. On Sept. 14 she was ordered to Newport to load. She was there loaded with mechanical transport and proceeded to Nantes, an English base. She discharged her cargo and returned to Quiberon Bay and thence to Newport, arriving there on Sept. 28.

While loading another similar cargo on Oct. 7, notice was given that after the next voyage, which was to be to St. Nazaire, she would return to Cardiff for a joint off survey, as she was being released from government service. She left Newport on Oct. 9 with a similar cargo and guns and arrived at St. Nazaire on Oct. 11. Without doubt both the voyage to Nantes and this voyage to St. Nazaire were warlike operations.

The ship was discharged during Oct. 12 and 13 and finished about 6 p.m. on Oct. 13. That afternoon the master developed pneumonia and was taken to a hospital. The chief officer, named Brazendale, was then in charge. He received written orders from the charterer's agent, Lieut.-Commander Mackenzie, the dock officer and the sea transport officer, Capt. Brock, of the Royal Navy, to proceed to Quiberon Bay as soon as the cargo was discharged and there join a convoy for the Bristol Channel. This was sometime about 5 p.m., British Summer Time. The weather was bad. It was raining, it was blowing, it was blustery and the glass was falling. The chief officer did not like the look of it. He knew that it would be very dark, that the approach to St. Nazaire was difficult both in the estuary and beyond; that there were many dangerous banks and poor anchorages. Although the channel was lighted, the leading lights of the port were not in use. He told Commander Mackenzie what he thought of the weather and what he feared, mentioning the falling glass, and said that he wanted to stay in port that night and sail in the morning. He was told that he must leave as soon as discharge was complete as the berth was wanted for another ship.

The chief officer said in answer to a question by the Attorney-General that Commander Mackenzie overrode a decision of his own, clearly indicated to Commander Mackenzie, that it was unsafe for the vessel to leave port; and I have not the slightest doubt that that was in substance the fact. Commander Mackenzie's experience was that the wind often fell after sunset. He had to get ships away as soon as possible and he said that masters often made excuses in order to stay there for the night. The chief officer was a diffident sort of man, and no one will accuse Commander Mackenzie of diffidence. I accept Brazendale's evidence without hesitation that his better judgment, expressed in clear language, was overridden by Commander Mackenzie.

There is compulsory pilotage down the channel and outside. They started the voyage home as soon as discharge was complete. They got through the locks all right and proceeded down the channel. At 1.10 a.m. it was blowing a gale and was very squally. The pilot advised anchoring and where to anchor, and they anchored at a place advised by him. The weather got worse; great strain was put on the cable and they started the main engine in order to relieve it. The pilot advised that they should get back to St. Nazaire and on heaving the anchor the cable broke. They could see that to try to get to St. Nazaire would be difficult; they had no guidance and they struck on a bank. Steam was fully on and as far as I can understand they drifted along, pounding all the way on the bank. Between 3 and 4 a.m. the ship got clear with the help of the rising tide, and they got back to their original berth early in the morning, the ship having sustained very serious damage.

The claimants put their claim in two ways. First, they say that the ship was engaged on a warlike operation and that the stranding was a consequence of it. Secondly, they say that it was a consequence of the chief officer complying with an order or direction "as regards employment or other arrangements."

In *Clan Line Steamers, Ltd. v. Liverpool and London War Risks Insurance Assocn., Ltd.* (1) I had to consider, I think, all the decisions bearing on the question when is a merchant vessel engaged on a warlike operation. At p. 374 I express my conclusion in these words:

The conclusion at which I have arrived from a careful examination of the authorities to which I have referred is that a warlike operation is one which forms part of an actual or intended belligerent act or series of acts by combatant forces; that part may be performed preparatory to the actual act or acts of belligerency, or it may be performed after the actual act or acts of belligerency, but there must be a connection sufficiently

close between the act in question and the belligerent act or acts to enable a tribunal to say with at least some modicum of common sense, as LORD DUNEDIN suggests, that it formed part of acts of belligerency. If military equipment is being taken in a ship to a place behind the fighting front from which the forces engaged, or about to be engaged on that front, may be supplied, that ship may beyond question be said to be taking part in a warlike operation. If a ship is bringing home such equipment after it has been employed on a fighting front, or had been lying available for and at the service of a fighting front, again beyond question, in view of the decisions, she is taking part in a military operation.

A I have again read the cases referred to having in mind the precise point which arises here. The point, of course, is whether a ship which has been undoubtedly engaged on a warlike operation to a base in France be said to be still engaged on that warlike operation on the voyage home. I cannot find anywhere any suggestion that a ship having completed the discharge of her cargo at the destined war base can be regarded as still engaged on a warlike operation while returning home in ballast.

B Let me take two illustrations. In *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport* (2), LORD WRIGHT expressed himself in this way at p. 708 ([1942] 2 All E.R., at p. 15) :

In certain circumstances a trading or merchant vessel has been held to be for purposes of the war risk clause engaged in a warlike operation. As illustrative of these circumstances, I may take those of a merchant ship carrying troops, ammunition, guns, tanks, or other military machines or equipment to a theatre of war, or away from a theatre of war as in the evacuation of the British forces from Norway, Greece or Crete, or elsewhere. Such a vessel may be regarded *pro hac vice* as serving the belligerent purposes of the country and as taking her share in hostilities against the enemy.

To go further back to a passage in the opinion of VISCOUNT FINLAY, in *Commonwealth Shipping Representative v. P. & O. Branch Service* (3), he said at p. 204 :

D In the absence of any circumstances tending to put a different colour upon the transaction, the carriage in time of war of ambulance wagons and other Government stores from one war base to another war base is carriage for the purposes of the war. It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, or are being fetched away from a base because the warlike operations conducted from it have ceased. In either case the carriage is part of a military operation.

I have noticed the warning by LORD ATKIN, in *Yorkshire Dale S.S. Co. v. Minister of War Transport* (2), at p. 700 ([1942] 2 All E.R., at p. 11) :

E I will only say that the cases cited by them and the propositions enumerated by LORD PORTER which are firmly established by authority make it useless for any court in these days to seek afresh to reason the matter out. Rightly or wrongly nearly every question that can arise on the controversy between marine and war risk has been settled to the great convenience of the shipping world, if not with the approval of all their advisers.

In my judgment the warlike operation here had been completed, and, therefore, **F** the stranding on the homeward journey was not a consequence of it. I cannot but think that there may be cases where both going and coming will be held to be one operation. For example, the going to and coming from Dunkirk again and again by the same boat. It would seem hard if a ship, having taken military sources and equipment to Oran or Algiers, braving torpedo and bomb, coming back for another similar cargo and braving precisely the same dangers is not to be considered as still engaged on a military operation. But **G** that is not this case. Here the owners knew that the vessel was returning to be released from government service.

The alternative claim is based on cl. 9 of the charterparty—that the stranding was a consequence of the chief officer complying with an order given on behalf of the charterers, an order “as regards employment or other arrangements.” The word “employment” is used in cl. 1 :

H . . . to be employed in such lawful trades, between good and safe ports or places as the charterer or his representative shall direct.

Therefore, it seems to me, that the order to proceed to Quiberon Bay and there to join the convoy was an order relating to “employment.”

On the facts as I believe them to have been there is no doubt that this ship was proceeding on the night of Oct. 13 out of the estuary and beyond solely in compliance with the orders of the agent of the charterers and against the better judgment of the acting master, a judgment which had been clearly expressed to the charterer's agent and as I believe overruled.

Was the stranding a consequence of that compliance? If the stranding had happened on the voyage to St. Nazaire while engaged on the warlike operation, according to the view of the majority in the House of Lords in the *Yorkshire Dale S.S. Co.* case (2), it would have been deemed to be a consequence of the warlike operation although the warlike operation may have had nothing to do with the grounding. It was argued for the petitioners that, if that be so, so here the grounding must be deemed a compliance with the orders received, and no more need be said.

I doubt very much whether their Lordships in expressing that opinion were intending to lay down any general principle. I think that they were dealing simply and solely with what had come to be, as they held, the settled rule in cases of stranding and collision while engaged on a warlike operation.

Dealing with that question, LORD WRIGHT, says at p. 712 ([1942] 2 All E.R., at pp. 17,18):

I have gone through these authorities to show why, in my opinion, it is fallacious to require a connection between the casualty—stranding, collision or the like—and the nature of the cargo being carried or the termini of the voyage. The nature of the cargo is, indeed, material at an earlier stage of the inquiry, the stage when what is being ascertained is whether there was a warlike operation. This, as the cases clearly show, does depend on the nature both of the cargo and the voyage. The theory as to liability which is developed in these authorities may seem arbitrary and artificial, but it is clear and consistent. In my opinion, it completely covers the present case.

His Lordship then goes on to consider the points raised by MACKINNON, L.J., as to what the position would be if there had been a tremendous sea, or fire and the like; and he ends up by saying this:

No one, so far as I know, has suggested so drastic a logic.

I cannot help thinking that all their Lordships were saying was this: Here are certain conclusions which the cases establish, viz.: that, if the ship is engaged on a warlike operation and there is a stranding or collision while so engaged, *prima facie* that can be said to be a consequence of the warlike operation. But I do not feel at all safe in saying—because I do not think it is right—that they were laying down a general principle which can be applied to something which happens while carrying out an order.

I think the best guidance for this case is to be obtained from the opinion of VISCOUNT SIMON, L.C., in the *Yorkshire Dale* case (2), at pp. 696-698 ([1942] 2 All E.R., at pp. 9, 10), where he says:

It has been laid down that a vessel like the *Coxwold*, which was carrying munitions of war from one war base to another, is "engaged in a warlike operation", and this was expressly admitted by the respondent in the present case. This, however, is an entirely different thing from saying that any and every accident which happens to such a ship during her voyage is the consequence of a warlike operation. To suggest the contrary would be just as illogical as to say that if a postman, while engaged in the operation of delivering letters, meets with an accident in the street, this is necessarily the proximate consequence of his delivering letters. Authority is hardly needed for the proposition that you do not prove that an accident is "the consequence of" a warlike operation merely by showing that it happened "during" a warlike operation. For example, if a commercial vessel, while proceeding from one war base to another with munitions on board, is destroyed while at sea by accidental fire, the cause of which is quite unconnected with the nature or method of her journey or the nature of the cargo she carries, I should suppose that it could not be said that her destruction was proximately caused by her warlike operation. . . . LORD SUMNER, in *A.-G. v. Adelaide S.S. Co. (The Warilda)* (4) puts the true test when he asks whether the collision is caused "effectively and proximately" by the warlike operation. . . . The relevant contrast is not, strictly speaking, between marine risks and war risks. The *Coxwold* accidentally stranded, that is to say, she was proceeding through the sea when the water under her bottom became too shallow to keep her afloat and she consequently ran aground. No misfortune could be more marine in its nature than this, but the question here is not whether this was a marine risk, but whether, granting that stranding is a marine risk, this stranding is not to be regarded as "the consequence of warlike operations." That, in my opinion, depends on whether, in the practical sense in which a policy of insurance must be interpreted and applied, the "dominant" or "determining" cause of the disaster was warlike operations. The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for "the cause" involves a selection of the governing explanation in each case. . . . In such a case as the present it is this sort of practical

test which has to be applied . . . It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this : one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be.

My interpretation of that can be best put by two simple examples. If I send a servant on an errand, and while he is so engaged owing to an unheralded and unexpected air raid he is injured by a bomb, that injury is not the consequence of complying with my order. But if I send him out during a raid with the planes overhead and the guns going, and he is hit and injured, I think most people would say to me : "It was your fault for sending him out during the raid." I think in such a case the dominant cause would have been complying with an order which was not altogether free from blame.

In this case the stranding happened not because of the mere issue of sailing orders to Quiberon Bay, leaving the master free to sail when he thought fit, but because of sailing orders to Quiberon Bay to be obeyed forthwith in the dark and in bad weather with a falling glass, and insisted upon after protest. I think that in a practical sense the dominant cause of the stranding in this case was the complying with the charterer's orders. Commander Mackenzie's judgment was at fault—I will not say to blame, but it was at fault. The chief officer's judgment was right. He could see the danger. He pointed it out without avail and the result was, therefore, not so unlikely as to be too remote a consequence of complying with the orders.

I forgot to say, but I think it is worth saying, that, if as contended by the petitioners the view expressed by the majority in the House of Lords in the *Yorkshire Dale* case (2) were applied to a case of complying with orders, it would mean that every collision and every stranding on any voyage would arise from a compliance with an order—because practically always a chartered ship is going from place to place in compliance with orders received from the charterer; and, therefore, I cannot think it would be right to apply the principle which was applied in the warlike operation class of case to a case of compliance with orders.

I hold that the petitioners are entitled to succeed on their alternative claim for damages.

Judgment for the suppliants with costs.

Solicitors : *Lightbounds, Jones & Co.* (for the suppliants) ; *Treasury Solicitor* (for the Crown).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

PAGE v. LONDON, MIDLAND & SCOTTISH RAILWAY CO.

[KING'S BENCH DIVISION (Atkinson, J.), February 2, 1943.]

Railways—Excess luggage—Merchandise—Loss caused through company's negligence—Liability for negligence not excluded by contract or by regulations.

A railway company agreed to carry a passenger's luggage, for which they charged her 17s. 3d. excess payment. On arrival at St. Pancras she approached the luggage van and found that there was no one in control of the luggage, other passengers had access to it, no receipts or tickets were being asked for and no care whatever was being taken of the luggage. A porter took her luggage out of the van and put it on a trolley, when it was discovered that a case containing valuable dress lengths and a fox tie was missing. The company contended that the missing package was not ordinary passenger luggage and that, under the terms and conditions set out in the book of regulations governing the carriage of merchandise, which provided that the company would not be liable for loss of merchandise other than merchandise which passengers are permitted to take with them, unless a declaration of its nature was made at the forwarding station and the appropriate charges paid, they were not liable in respect of the loss :—

HELD : the condition relied upon did not apply to the goods in question and in any event did not exclude liability for negligence. The goods were lost through their negligence and the company were, therefore, liable in damages.

[EDITORIAL NOTE.] It is well-known that an exclusion of liability where negligence is proved can be secured only by a clear and unambiguous condition to that effect. The regulation of the company here excluded liability unless a declaration of the nature of the goods was made and it was contended that, where no such declaration was made, the company was not liable although negligence on the part of its servants was proved. This contention is rejected and it is held that despite the absence of such a declaration, the company is liable where it is shown to have been negligent.

AS TO CONDITIONS OF CARRIAGE OF LUGGAGE, see HALSBURY, Hailsham Edn., Vol. 27, pp. 119, 120, para. 273; and FOR CASES, see DIGEST, Vol. 8, pp. 118-120, Nos. 784-804.]

Cases referred to :

- (1) *Cahill v. London and North Western Ry. Co.* (1862), 13 C.B.N.S. 818; 8 Digest 126, 848; 31 L.J.P.C. 271.
- (2) *Belfast and Ballymena Ry. Co. v. Keys* (1861), 9 H.L. Cas. 556; 8 Digest 119, 790; 4 L.T. 841.
- (3) *Macrow v. Great Western Ry. Co.* (1871), L.R. 6 Q.B. 612; 8 Digest 118, 787; 40 L.J.Q.B. 300; 24 L.T. 618.
- (4) *Gilbey v. Great Northern Ry. Co.* (1920), 36 T.L.R. 562; 8 Digest 119, 799.
- (5) *Talley v. Great Western Ry. Co.* (1870), L.R. 6 C.P. 44; *sub nom.* *Great Western Ry. Co. v. Talley*, 40 L.J.C.P. 9; 23 L.T. 413.
- (6) *Wilkinson v. Lancashire and Yorkshire Ry. Co.*, [1906] 2 K.B. 619; *affd.*, [1907] 2 K.B. 222; 8 Digest 57, 373; 76 L.J.K.B. 801; 97 L.T. 35.

ACTION for the recovery of damages in respect of the loss of luggage accepted by the defendants for carriage. The facts are fully set out in the judgment.

F. H. Lawton for the plaintiff.

R. E. Gething for the defendants.

ATKINSON, J. : This is an action against the London, Midland & Scottish Ry. Co. for damages for the loss of baggage.

The facts are these. The plaintiff is a Polish lady, who came to this country in March, 1931. She carried on a little business as a dress designer and dress-maker from the flat in which she lived in London. In the course of her business she bought materials for making up models and in 1940 she had in her possession a number of dress lengths of French-made materials, which became of greatly increased value as time went on. In April, 1941, in consequence of the bombing of London, most of her customers had left London, and she thought it advisable to let her flat and to take employment. She was engaged by a firm called Helen Wills, Ltd., gown makers, of Rushden, not far from Wellingborough. She took her things there and lived in rooms and worked with Helen Wills, Ltd., during the summer until October of that year. She then had some difference with her employers. Her flat in London became vacant and she thought she would come back to London. In October, 1941, she returned, making the journey by the defendant company's railway. She had thirteen packages altogether. All the luggage was labelled. The plaintiff was told that the luggage weighed 3 cwt. and that there would be excess payments to make. She thereupon went to the office and the booking clerk told her that there was 17s. 3d. to pay for her luggage in addition to her fare.

Looking at POLLOCK ON CONTRACTS, p. 41 :

When a railway passenger asks for a ticket, he is not concluding a contract but at most offering to be carried by the company on the terms to which he knows, or as a reasonable man should know, the company will agree. But it appears on reflection that he is not even making an offer but only opening communications leading to an offer and acceptance. The ticket is issued in regular course only against payment, so that the railway company (or other purveyor of services to the public in a like position, as the case may be) makes an offer by tendering the ticket, and the contract is formed only by acceptance of the ticket immediately after payment of the fare. This is the view taken, though not always explicitly stated, in the line, by this time numerous, of authorities on such cases.

So that the railway company through the booking clerk made an offer to the plaintiff in consideration of the payment of the fare to carry her and to carry

100 lbs. weight of ordinary passenger's luggage free of charge, and for the further payment of 17s. 3d. to carry the rest of her luggage, which was piled up on a trolley. The offer was accepted by the plaintiff there and then paying the sum demanded. It is open to a railway company to make their offer subject to conditions, and the passenger is bound by them if he knows of them, or has reasonable notice that there are conditions. A plain notice on the face of the ticket is usually sufficient. The plaintiff was not asked whether she knew

A there were conditions, or whether she noticed this condition printed on the ticket. It is said that strictly there is no evidence of the words on the tickets alleged. Neither the ticket given to her nor any similar ticket was produced. The station master produced a ticket between other stations and stated that the same words were on all tickets. He gave no evidence as to whether the conditions were legible or not, and objection is taken on behalf of the plaintiff that there is no proof of these conditions being part of the contract; but I

B am going to assume that the plaintiff was bound by the conditions on the ticket, though the point remains open to the plaintiff, if this case goes further.

What was the 17s. 3d. which was demanded by the booking clerk? When she paid her money he gave her an excess luggage ticket. The booking clerk made no attempt to find out how much luggage there was, how many packages; he did not ask and he did not look. He just put down the first figure which came

C into his head, which was a "6," and so he gave her a receipt for 6 packages. Now there is a printed note at the bottom of the ticket:

This ticket must be given up by the passenger when claiming the luggage at the arrival station.

The counterfoil, which was kept by the booking clerk and which was obviously intended to be handed to the guard, has this note at the bottom:

D The guard of the train must see that the entries on this bill correspond with the excess luggage delivered to and given up by him.

When the train arrived at St. Pancras the plaintiff was very quickly on the scene, because she occupied a carriage fairly close to the van. There was no one in control at all. She got into the van to see if she could see her luggage. There were other passengers there. She said there was nothing to prevent her picking up any bag and walking off with it if she wanted it, no care being taken

E whatever, no tickets were being asked for, no receipts were being asked for, but she saw her luggage in the corner of the van and asked a porter to come and collect it. She went away for a minute or two to meet a friend and when she came back again to the van, her luggage was on the trolley. The porter said he was one piece of luggage short. Looking at it she saw that an expanding bag was not there. They looked everywhere for it and they could not find it. She went to the left luggage office and to other places to which she was sent

F and described the loss and gave full particulars. She was there for over 2 hours. No trace of this bag existed; it had obviously been stolen. I am satisfied that the loss of the bag was caused, or materially contributed to, by the negligence of the defendants. The missing bag contained all the dress lengths.

The defence pleaded is this, that:

G . . . if the said dress materials were in the said suitcase and the same was received by the defendants for carriage as alleged or at all (which is not admitted) the said materials were delivered by the plaintiff to the defendants as ordinary passenger luggage and were received by the defendants as such in ignorance of the contents of the said suitcase but the said materials were not ordinary passenger's luggage or personal luggage at all, and the defendants are not liable in respect of the loss.

A mere glance at the luggage was enough to show that it was not all ordinary passenger's luggage. One of the parcels was a wireless instrument. It is clear

H on the evidence that the agent of the railway company had notice that these packages were not all ordinary personal luggage.

The cases which counsel for the defendants relied on in support of this plea were four. There was *Cahill v. London & North Western Ry. Co.* (1), *Belfast and Ballymena Ry. Co. v. Keys* (2), *Macrow v. Great Western Ry. Co.* (3), and *Gilbey v. Great Northern Ry. Co.* (4). All these cases were decided before the Railways Act, 1921. It must be remembered that before 1921, there was no obligation upon railway companies to carry other than personal luggage belonging to a passenger. They were bound to carry a certain weight free, for a third

class passenger 100lbs., and they were entitled to charge for any excess. They were entitled, of course, to carry merchandise for a passenger, but they were under no obligation. All four cases were cases where the plaintiff was seeking to carry free under the description of 100lbs. free passenger luggage something which was not ordinary passenger's luggage. In each case there was a loss and the company was sued. The answer was the same in every case: the only contract made was the contract made on the sale of the railway ticket which was to carry the passenger and 100lbs. of ordinary passenger's luggage. If something else was put into the train, there was no contract relating to it, and further than that there was no obligation upon the railway company to carry goods of that kind. A

Even so, it is interesting to see how guarded the court was in *Macrow v. Great Western Ry. Co.* (3). The court consisted of COCKBURN, C.J., and BLACKBURN and MELLOR, JJ. The judgment of the court was given by COCKBURN, C.J., who said, at p. 617-620: B

By the Act of Parliament by which the company is constituted it is provided that passengers by the railway shall be entitled to have a fixed quantity of ordinary luggage, according to their respective classes, conveyed with them free of charge. The question for our decision is whether the articles of bedding hereinbefore referred to can be considered as ordinary passenger's luggage . . . Besides thus fixing the *quantum* of luggage which the passenger shall be entitled to have carried free of charge, the railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveller. The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of the passenger's luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passenger's luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in *Talley v. Great Western Ry. Co.* (5), in which case other considerations arise. On the other hand the obligation of a railway company, or other carrier of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what property falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely, irrespectively of negligence, attaches. It is necessary to state the proposition with this qualification; for, as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection of the carrier it follows that in either respect it may be waived by the latter; and, consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence . . . It being clear that the contract on the part of a railway company is to carry personal luggage only, it follows that it is only in respect of what can properly be termed personal luggage that a liability in case of loss, in the absence of negligence, arises. C D E F

So that three times over he uses the expression "irrespective of negligence," or "in the absence of negligence," or the like, which seems to indicate that, even with goods being carried as personal luggage which were not personal luggage, there still might, or would be, liability in a case of negligence. All those cases were before the Railways Act, 1921. Just before I come to that Act, it is interesting to refer to three or four lines in HALSBURY, LAWS OF ENGLAND, Hailsham Edn., Vol. 27, p. 120, para. 273: G

Formerly, if a passenger included in his luggage articles other than his personal belongings these were carried at the passenger's risk. Now, however, these must be carried on the standard conditions of carriage by passenger train at company's risk rates. H

The main relevant change made by the Railways Act, 1921, was that an obligation was imposed upon railway companies to carry merchandise as well as personal luggage for a passenger at the company's risk. Sect. 28 defines the functions of the tribunal and gives them power to determine what is passenger's luggage and what is not. Sect. 30 provided for the submission of schedules of charges, and the schedules had to show the rates for the conveyance of merchandise and the fares for the conveyance of passengers and their luggage.

The document to which I have already referred is the document referred to in that section. Sect. 31 provided for the consideration of these schedules by the tribunal and their approval, and sect. 32 imposed an obligation to charge the standard rates which had been approved by the tribunal :

... and no variation either upwards or downwards shall be made from such authorised charges unless by way of an exceptional rate or an exceptional fare continued, granted or fixed under the provisions of this part of this Act.

A Then sect. 42 provided that within 6 months from the passing of the Act the constituent companies should submit to the rates tribunal the terms and conditions on and subject to which merchandise would be carried at ordinary rates. Sect. 43 provides this in the companies' favour, that once these rates and conditions were approved the terms and conditions should be considered just and reasonable. Sect. 44 is perhaps the most important one :

B On and after the date so fixed as aforesaid the terms and conditions upon and subject to which merchandise is apart from special contract to be carried by a railway company shall be company's risk conditions, and those conditions shall apply without any special contract in writing to the carriage of merchandise at ordinary rates.

Then I come to the second of the books which was handed to me, Railway Terms and Conditions of Carriage. The relevant conditions are those lettered "L." The second condition is :

C The company shall, subject to these conditions, be liable for any loss, or misdelivery of or damage to merchandise, occasioned during transit as defined by these conditions, unless the company shall prove that such loss, misdelivery or damage has arisen from . .

and then come the usual exceptions like the act of God, King's enemies, and so on, provided that even so the loss, misdelivery or damage must be proved to have been in no way contributed to by the negligence of the company :

D The company shall not incur liability of any kind in respect of merchandise where there has been fraud on the part of the trader.

At any rate, they are clearly protected from fraud. Condition 4 refers to the goods which have to be specially declared and paid for. It is said that the facts here come under that special condition. Then condition 13 gives the railway company a lien both particular and general on merchandise delivered to them.

E Condition 16 protects the company from liability from indirect or consequential damage. There are also the following conditions :

20. Any merchandise which, by the company's regulations, passengers are permitted to take with them, shall be subject to the limitations of liability contained in these conditions.

21. Merchandise will be carried subject to any conditions of carriage included in the company's book of regulations relating to traffic by passenger train or other similar service, as settled by the Railway Rates Tribunal.

F 24. Subject to these conditions, the rights and liabilities of the trader and the company respectively, whether at common law or under any statute, shall remain unaffected.

The importance of that, I think, is this, that it makes it clear that the Railway and Canal Traffic Act, 1854, s. 7, still remains effective, and, indeed, the schedule to the Railways Act, 1921, preserves this statute, making one slight verbal amendment of sect. 7. In substance sect. 7 provides that a company cannot

G relieve itself from liability for negligence unless the terms which it seeks to impose are just and reasonable, and unless there is a special contract in writing signed by the passenger, the owner of the goods. So that that protection still remains notwithstanding the Railways Act.

The note in HALSBURY'S STATUTES OF ENGLAND, Vol. 14, to that sect. 7 says :

H All traffic (other than passengers) is now carried under the Standard Terms and Conditions of Carriage under the Railways Act, 1921 . . . But this section is still of importance in that it imposes a liability for neglect or default in the carriage of goods, places the onus of proof of value upon the person claiming compensation, and (as amended by the Railways Act, 1921), limits the liability for loss or injury to animals.

By letter a few days before the hearing, the defendants gave notice that they were going to seek to amend the defence by pleading the conditions set out in The Railway Companies' Book of Regulations, p. 9. That amendment was duly made, and the clause relied upon is cl. 17 (g), which provides as follows :

The company will not be liable (i) for loss, damage, or delay of or to any property

(other than (a) passenger's personal luggage not subject to condition (ii) hereof, and (b) merchandise which by the company's regulations passengers are permitted to take with them) unless a declaration of its nature be made to the company at the forwarding station and the proper charges paid for its conveyance.

Two points arise on that clause. There are a number of clauses on p. 9 as to luggage and other goods accompanying passengers and as to the duty to label and the like. There is a clause that, if goods are taken with the passenger into the carriage, there is no liability. It is said that this clause really preserves the company from all liability of any kind. If it be so, there is a very extraordinary omission from the general notice which is hung up in the railway company's booking office, because there is a heading: "Luggage accompanying passengers," which is the same heading as on p. 9 of this book, and then follows the substance of all the other provisions on that page, but this clause with this limitation of liability finds no place whatever in that document. It is a strange omission that the one really important clause is not reproduced in the one and only document which in practice the public have an opportunity of seeing. It gets nicely hidden away in this book of regulations.

The first point which arises is whether this merchandise with which I have to deal is merchandise which, by the company's regulations, passengers are permitted to take with them. If it is, the clause has no reference to it. That has to be ascertained by looking at the following pages. On p. 15 there is a heading:

Merchandise, as defined hereunder, accompanying passengers. Passengers of the descriptions mentioned hereunder may take with them the merchandise of the description and weight specified in columns (b) and (c) respectively, without any charge being made for the carriage but the company shall not in any circumstances be under any responsibility in respect thereof.

The plaintiff's luggage obviously comes under "Definition of Merchandise. Goods for passenger's own use (not for sale) except as shown in column (e)." By an amendment which appears pasted into this book these words "not for sale" are struck out and the present "Definition of Merchandise" is "Goods for passenger's own use, except as shown in column (e)." Then it appears that a passenger would be entitled to take 60lbs. of merchandise free. Column (d) as to any excess says: "At the appropriate charge as for the merchandise when unaccompanied." Then in column (e) follows the list of goods which are not merchandise which a passenger is entitled to take.

Going back to p. 11 one gets a little light thrown upon this. Obviously the point has arisen: "Well, you say a passenger can take 100lbs. of passenger's luggage free, and somewhere else you say he can take 60lbs. of merchandise free," and so one gets this amendment. "Personal luggage, etc., accompanying passengers. The following are the maximum weights of personal luggage and of other merchandise as indicated in this regulation, in total which may be taken by passengers free of charge (e.g., a passenger may not take with him free of charge 100lbs. of personal luggage and 60lbs. of other merchandise for his own use); also the charges for the conveyance of the excess weight over and above the authorised free allowance—such charges are due and should be paid at the forwarding station, but if in any case they are not so paid, payment may be required at any other station on the journey; excess luggage tickets must be produced to the company's servants upon demand and given up at the termination of the journey." Then (a): "Note. Luggage, other than personal luggage, accompanying passengers, will be charged on the gross weight at the ordinary rates applicable to the class of traffic to be conveyed, unless it is labelled or marked 'Owner's Risk' by the passenger, when the appropriate owner's risk rates, if any, will be charged." A further examination shows that if you pay the ordinary rates it is the company's risk; if you want to send them at your own risk the rates are half the standard charges. Therefore, it seems to me you have a perfectly clear condition that merchandise of this sort was merchandise which she was entitled to take with her, and the company were entitled to charge the appropriate rate. That is the view of the station master; he said that in his view this was merchandise she was entitled to take with her. If that is right, it would seem that this condition 17 (g) has no application. Counsel for the defendants argues: "Oh, but what that means is passenger's personal luggage and merchandise which, by the company's regulations, passengers are permitted to take with them free of charge." He says that exception only refers to the

goods which they take free of charge. It does not say so. It would be very much in conflict with the provision on p. 15 that what is taken free of charge is taken at the passenger's own risk. Incidentally, I should imagine that there is the gravest doubt that the merchandise you take free is only at your own risk.

In *Wilkinson v. Lancashire & Yorkshire Ry. Co.* (6), the headnote says :

A The defendant company by its time table offered to allow commercial travellers to take with them by passenger train free of charge a certain amount of luggage, which was not ordinary passenger's luggage, "on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay" [precisely the condition at the top of p. 15]. The plaintiffs, who were commercial travellers, relying on this offer, but without signing any special contract to that effect, took with them on a journey by the defendant company's line a case of samples, which was lost on the journey by the negligence of the company's servants . . .

B The court held there was no defence because of the Railway and Canal Traffic Act, 1854, s. 7. That contention would be, in my view, clearly open to the plaintiff here even if this condition did apply to her personal luggage. But let me go a step further. Supposing I am wrong about that. Supposing counsel for the defendants is right and that the exception is meant to cover only goods which are carried free of charge. In my view, the words are not wide enough to exclude liability for negligence. One starts here with the statutory clause which I read, that merchandise is to be carried at the company's risk ; in other words, they have
C got the liability of ordinary carriers. The rule of interpretation is well known : the court is against holding that general words exclude liability for negligence, they will only apply to negligence if any other interpretation gave the words no meaning whatever. But in the case of carriers where there is a liability not merely for negligence but also as insurers, those general words have been always held merely to exclude the liability as insurers and not to extend to negligence.
D So that here again, even if the clause does apply to merchandise which a passenger is entitled to take, the words do not exclude liability for negligence, and that is emphasised, I think, by two examples on the same page :

(c) The company do not accept any liability whatsoever for loss, damage or delay . . . —the word "whatsoever" is in. Then in the clause immediately following the one I have been dealing with :

E The company will not be liable for loss or injury from whatever cause arising. Both these clauses are in sharp contrast with the words used in (g) (1) :

. . . will not be liable for loss, damage or delay . . . unless a declaration of its nature was made and the appropriate charges paid.

F Therefore I hold that there is no clause here which protects the railway company from liability for negligence. I repeat that in the background there is always the Railway and Canal Traffic Act, 1854, s. 7, which is a section preserved by the Railways Act, and the plaintiff here has been asked to sign nothing. It seems to me there was a plain contract made with regard to these specific parcels, an offer made by the company's servant which was accepted. No inquiry was made as to what the contents were, no statement was made by the plaintiff to deceive the company in any way. If a misleading and untrue statement was made the company gets protection under the clause dealing with fraud. But
G here there was a contract made. Doubtless when a mistake is made, from that note I read on p. 11 the appropriate rate may be demanded at any time. Here the whole difference was a matter of a few pence, if the whole two cwt. had been merchandise. At any rate, be that as it may, there is no contract excluding liability for negligence. I do not think this clause touches it and, in my judgment, the company are liable because these goods were lost owing to their negligence.

H *Judgment for plaintiff with costs.*

Solicitors : *Percy Haseldine & Co.* (for the plaintiff) ; *Alexander Eddy* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

MELLOWS (H.M. INSPECTOR OF TAXES) *v.* BUXTON PALACE HOTEL, LTD., FAUPEL (H.M. INSPECTOR OF TAXES) *v.* EXECUTORS OF HAYWARD.

[KING'S BENCH DIVISION (Macnaghten, J.), January 26, 1943.]

Income Tax—Requisition of hotel—Compensation deemed to be rent—Assessment of excess over Sched. A valuation—Compensation (Defence) Act, 1939 (c. 75), s. 2—Finance Act, 1940 (c. 29), s. 15. A

Emergency Legislation—Compensation deemed to be rent—Requisitioned property—Compensation (Defence) Act, 1939 (c. 75), s. 2.

The respondents owned and carried on an hotel until September, 1939, when it was requisitioned and compensation was paid at the rate of £7,600 per annum under the Compensation (Defence) Act, 1939. The hotel was assessed under Sched. A at £2,350 gross. The Crown, who were the appellants, contended that the annual value for the purposes of tax must be determined with reference to the compensation fixed at £7,600, which, by the terms of the Act of 1939 was to be deemed to be rent and that, under the provisions of the Finance Act, 1940, s. 15, the respondents should be assessed under Sched. D, case VI, on the annual value of the hotel determined with reference to a rent of £7,600. The respondents contended that the compensation was not "rent payable under a lease" within the meaning of the Finance Act, 1940, s. 15 :— B C

HELD : it was implied by the Compensation (Defence) Act, 1939, that compensation should be deemed to be rent and, therefore, the respondents must be deemed to be entitled to a rent of £7,600 per annum payable under a lease within the meaning of the Finance Act, 1940, s. 15, and were, accordingly, liable to assessment under Sched. D, case VI, in respect of the enhanced annual value of the hotel. D

[EDITORIAL NOTE. Upon the requisition of property compensation becomes payable to the owners. Where this compensation takes the form of an annual payment in respect of premises, the Crown is to be deemed to pay it as tenant and the owner to receive it as landlord. It is held, therefore, that such compensation is rent within the meaning of the Finance Act, 1940. Sect. 15 of that Act, in effect, brings into charge for tax the amount of the rent received in excess of the Sched. A assessment. There is some complication in the matter as neither the gross amount of the rent nor the gross assessment under Sched. A have to be considered. What has to be considered in each case is the gross amount less the appropriate deductions allowed under the Schedule. E

AS TO COMPENSATION (DEFENCE) ACT, 1939, s. 2, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1013.] F

APPEAL by the Crown against a decision of the Special Commissioners for Income Tax discharging an assessment made upon the respondents under the Income Tax Act, 1918, Sched. D, case VI.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and Reginald P. Hills for the appellants.

F. Heyworth Talbot for the respondents. G

MACNAGHTEN, J. : The case of Mellows and The Buxton Palace Hotel, Ltd., is an appeal by the Crown against a decision of the Special Commissioners discharging an assessment made upon the respondents, the Buxton Palace Hotel, Ltd., under the Income Tax Act, 1918, Sched. D, case VI. The respondents owned and carried on The Palace Hotel, Buxton, until September, 1939, when the hotel was requisitioned under the regulations made pursuant to the Emergency Powers (Defence) Act, 1939, s. 1 (2) (b). The compensation paid to the respondents under the Compensation (Defence) Act, 1939, s. 2 (1) (a) was £7,600 per annum. Sect. 2 (2) of that Act provides that for the purposes of the enactments relating to income tax, compensation paid under para. (1) (a) of that section shall be deemed to be "payable for" the property requisitioned, and that the Crown shall be deemed to pay it as "tenant occupier," and the person receiving it shall be deemed to receive it as "landlord." Accordingly, the annual sum of £7,600 paid by the Crown to the respondents by way of compensation for the H

requisition of the Buxton Palace Hotel is to be deemed for the purposes of the Income Tax Acts to be rent payable by a tenant to a landlord.

The Buxton Palace Hotel is assessed under Sched. A at £2,350 gross and £1,955 net. It is a "unit of assessment" within the meaning of the Finance Act, 1940, and sect. 15 of that Act provides that if the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent under a lease, to which that section applies, and, if the annual value of the unit had been determined by reference to that rent, the Sched. A assessment would have exceeded the actual assessment, then he shall be chargeable to tax under Sched. D, case VI, in respect of the excess.

If the annual value of the Buxton Palace Hotel had been determined with reference to the supposed "rent" of £7,600, the Sched. A assessment would have exceeded £2,350, and accordingly an assessment under Sched. D, case VI, was made upon the respondents under that section. The Special Commissioners, however, discharged the assessment on the ground that the £7,600 was not "rent payable under a lease" within the meaning of that section. Now it is quite true that in fact it was not rent, nor was it payable under a lease; it was money paid by way of compensation under the Compensation (Defence) Act, 1939. But since that Act provides that for the purposes of the Income Tax Acts the Crown must be deemed to pay the compensation money as "tenant," and the respondents must be deemed to receive it as "landlord," the respondents must, for the purposes of the Finance Act, 1940, s. 15, be deemed to be the immediate lessor of a unit of assessment and entitled in respect of such unit to a rent of £7,600 under a lease.

Counsel for the respondents argued with great ingenuity that, since the Compensation (Defence) Act, 1939, did not expressly provide that compensation money should be deemed to be "payable under a lease," the decision of the Special Commissioners was correct. But since a payment of money by a "tenant" to a "landlord" for the use and occupation of a hereditament necessarily implies the existence of a "tenancy," and the word "lease" in the Finance Act, 1940, includes any "tenancy," it follows that, for the purposes of the Income Tax Acts, the supposed tenancy by the Crown of the Buxton Palace Hotel is a "lease" within the meaning of sect. 15 of that Act, and that the decision of the Special Commissioners was erroneous in law. The appeal must be dismissed with costs. The same point arises in the second appeal, and the same result must follow.

Appeals dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Cripps, Harries, Hall & Co.* (for the respondents).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

MAHLIKILILI DHALAMINI AND OTHERS v. R.

[PRIVY COUNCIL (Viscount Simon, L.C., Viscount Sankey, Viscount Maugham, Lord Atkin and Lord Romer), **May 20, 1942.**]

Privy Council—Swaziland—Criminal law—Murder—Procedure—Native assessor—Opinion not given in public—Swaziland High Court Proclamation, 1938, ss. 8, 10 (1).

The appellants, who were natives of Swaziland, were accused of killing another native in accordance with an alleged native custom connected with agriculture. By the Swaziland High Court Proclamation, 1938, s. 8, it was provided that a native assessor might be called to give his opinion for the assistance of the court, and by sect. 10 (1) that the proceedings of the court must be carried on in open court. It transpired that at the trial of the appellants for murder, the native assessor gave his opinion to the judge privately in chambers. The Crown stated that this practice was invariably observed in similar trials in the Protectorate and contended that in this way the native assessor was less likely to be intimidated into giving a dishonest opinion:—

HELD: (i) the giving of his opinion by the native assessor was part of the proceedings of the High Court and its being given in private was contrary to the provisions of the Swaziland High Court Proclamation, 1938.

(ii) the failure to hold the whole proceedings in public amounted to such

a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by the Board in dealing with criminal appeals.

[EDITORIAL NOTE.] The general rule is that all proceedings should be in public, but it seems to have been the practice for the native assessor to give his opinion to the judge in private. Their Lordships have decided that this is contrary to the meaning of the Proclamation under which such trials took place in Swaziland and that it is desirable that all proceedings should be in public. They further decide that this is such an error in procedure as to warrant the conviction being set aside by the Privy Council, a course adopted only in exceptional cases.

AS TO THE LAW APPLICABLE IN SWAZILAND, see HALSBURY, Hailsham Edn., Vol. 11, p. 148, para. 266.]

Case referred to :

(1) *Lawrence v. R.*, [1933] A.C. 699 ; Digest Supp. ; 102 L.J.P.C. 148 ; 149 L.T. 574.

APPEAL from a judgment of the High Court of Swaziland. The facts are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

T. B. W. Ramsey for the appellants.

The Solicitor General (Sir David Maxwell Fyfe, K.C.) and Kenelm Preedy for the respondent.

LORD ATKIN : In this case on Apr. 8, 1940, the three appellants were convicted in the High Court of Swaziland by HUGGARD, C.J., of the murder of one Nkalane Vilakazi, and were sentenced to death. On appeal to His Majesty in Council by special leave, their Lordships, on May 20, 1942, intimated that they would recommend that the conviction be set aside and would give their reasons at a later date. This they now proceed to do.

The three appellants, together with the alleged victim, Nkalane, were natives resident in the central district of Swaziland. The case for the Crown was that the three accused, with a fourth man who was also convicted, but is now dead, agreed together to kill Nkalane in order to use certain parts of his body to make medicine to increase their crops. One, Mafukufuku, was alleged to be a party to this conspiracy, and he was called as a witness for the Crown and spoke to the agreement to the killing of Nkalane in the presence of the four accused and himself, and to the mutilation of the body. It was alleged that after the killing one Jojosa, a medicine man, was summoned by the first accused to supply some old war medicine for a body. He was told by the first accused that the confederates had killed Nkalane and that the medicine was required to purify them from the killing. According to Jojosa, who gave evidence, he first sent some medicine, then visited the kraal of the first accused where he met the four accused and Mafukufuku, ordered them to kill a black heifer in calf, and with the foetal fluid and part of the flesh made the necessary brew to achieve the desired purpose. The accused gave evidence strenuously denying the allegations and disputed the alleged native customs both as to the medicine for the crops, and for the purification from the killing. It is obvious also that grave questions arose as to the value of the evidence, both of Mafukufuku and Jojosa. The former was clearly an accomplice and the latter also, so far as he was an accessory after the fact. There were further questions as to discrepancies between the evidence they had given at the preliminary examination, and at the trial. Their Lordships, however, at the hearing of the appeal, reserved discussion by counsel of these points, and decided to hear in the first instance the complaint as to an alleged violation of the rules governing criminal trials in Swaziland, which is the matter upon which they eventually decided to advise that the convictions be set aside.

Swaziland, which before the conquest of the Transvaal in 1903 had been governed by the South African Republic, on that conquest was taken over by the British Government who by an Order in Council in 1903 made provision for its administration. By a proclamation of Oct. 15, 1904, the laws in force in the Transvaal at that date were put in force in Swaziland so far as applicable : a provision which was modified by a proclamation of 1907 which provided that the Roman-Dutch common law save in so far as the same had been or might from time to time be modified by statute should be law in Swaziland. There was a similar provision with respect to the existing statute law. Their Lordships mention these provisions to show that the nature of the common law has not been overlooked. They have not, however, been referred to any rule of the Roman-Dutch common law which affected the present matter, which appears

to be governed entirely by legislative enactments contained in proclamations by His Excellency the High Commissioner for South Africa, to whom is entrusted the legislative power in Swaziland. By the Swaziland High Court Proclamation, 1938, there was established the High Court of Swaziland, to whom a single judge was assigned having original jurisdiction in civil and criminal matters and appellate jurisdiction in respect of subordinate courts. The proclamation contained the following clauses :

A 7. If the judge shall so direct, any trial civil or criminal may be held and any appeal heard with the aid of not more than two administrative officers to be appointed for that purpose by the resident commissioner by notice in the GAZETTE for such sittings of the court as may be specified in that notice.

The opinion of each officer so associated with the court shall be given and shall be considered by the court, but the decision shall be vested exclusively in the judge.

B 8. The High Court may call to its assistance one or more native assessors who shall be chosen by the Paramount Chief of Swaziland from counsellors or headmen or other natives suitably qualified to aid the court. The assessor or assessors shall give his or their opinion and such opinion shall be considered by the court but the decision shall be vested exclusively in the judge.

C 10 (1). The pleadings and proceedings of the High Court shall be carried on and the sentences, decrees, judgments and orders thereof, pronounced and declared in open court and not otherwise : Provided, however, that at any time during a trial a judge may, if he thinks fit, order the court to be cleared or that any person or class of persons shall leave the court.

It will be noticed that the two administrative officers are not styled assessors, the trial if the judge so directs is to be held with their aid, and they are said to be associated with the court. The native assessor is called to the assistance of the court. Nothing seems to turn on this distinction. Both administrative officers and native assessor are to give their opinion and the respective opinions are to be considered by the court, but the decision is to be vested exclusively in the judge. If the matter rested on sects. 7 and 8 alone, it would appear that the direction to give the opinion is a direction to give the opinion in court as part of the proceedings at the trial, as the judge gives his judgment. But when read in conjunction with sect. 10 the effect of the sections seems plain. The giving of the opinions is part of the proceedings of the High Court, which are to be carried on in open court. The giving of the opinions must, therefore, under the enactment take place in open court. There was no indication in the record before their Lordships, when the appeal was first opened, whether the opinions had been given at all or how or when. Though the point had been taken by the accused in their petition for special leave to appeal, dated April, 1941, no information on the subject had been sought by or given to the representatives of the Crown in this country : and the Crown in their case for the respondents contended that the maxim "*omnia praesumuntur rite acta*" applied, which apparently meant that even if the opinions ought to have been given in public it ought to be presumed that they were so given. Their Lordships were not content to rely on a presumption of this kind in a capital case, and they directed that a telegram should be sent to the resident commissioner, asking for an answer to the following questions :

(a) whether the two administrative officers and the native assessor gave their respective opinions on the case before the judge's judgment :

G (b) if so, was each such opinion given in open court, and if so at what stage ? And were their opinions considered by the judge before giving his decision ?

(c) if the opinions were not given in open court, was each such opinion given to the judge privately ? If so, at what stage, and was it considered by the judge before he gave his decision ?

(d) what was in brief form the substance of each of the opinions so given after the evidence was closed ?

H They received through the Dominions office the following reply, dated May 12 :

Your telegram May 7.

Appeals of Dhalamini and others. Judge's answers to questions are as follows. Begins.

(a) Yes.

(b) and (c) opinions regarding both administrative officer and native assessor were given to the judge privately in chambers after closing addresses of counsel and were considered by judge before delivery of judgment. This is in accordance with procedure invariably observed in similar trials in the Union of South Africa and in High Commission Territories. Please see also sect. 7 and sect. 8 of the Proclamation No. 65, 1938.

(d) opinions so given were unanimous and in complete accord with conclusion expressed in judgment. Following is extract from report on case furnished to High Commissioner by opinion after conclusion of trial "On evidence I was satisfied beyond any reasonable doubt that all four accused had participated and were equally guilty of the crime with which they had been charged. In this conclusion of the facts I had complete concurrence of administrative officers who assisted me and of native assessor."

Judge further points out that even under the law in force prior to Proclamation No. 65 of 1938 (*vide* Proclamation No. 4, 1907, as amended by Proclamations No. 8, 1934; No. 23, 1935; No. 55, 1937, and No. 65, 1937) when administrative officers had a definite voice in decision it was never the practice for them to express their opinions in the open court unless they dissented. The object of the relevant portion, sect. 7 and sect. 8, Proclamation No. 65, 1938, appears merely to establish that although administrative officers have now no voice in decision, their opinion shall nevertheless be expressed to and considered by judge.

It is, therefore, established that the opinions of the officers and of the native assessor were given in private to the judge, contrary to the provisions of the proclamation as stated above. Their Lordships find nothing in the previous proclamations referred to in the judge's observations which throw any light on the construction of the present proclamation. Nor can they accept a construction other than what they have indicated by reason of the fact as stated that the practice adopted in this case has been invariably observed in similar trials in the Protectorate and elsewhere. It was suggested that so far as the native assessor was concerned if his opinion had to be given in public he might feel constrained to decide in favour of a native accused, whereas, in the privacy of the judge's room and in company only of the judge and the administrative officers he would be more likely to give an honest independent opinion. It was said that this was a good reason for construing the section as justifying the practice in fact adopted. Their Lordships cannot accept this contention. It would, in any case, afford insufficient reason for disregarding the plain meaning of the words used. But their Lordships do not take the view indicated of the respective probabilities of obtaining an honest opinion. In at least three codes with which their Lordships are familiar—those of India (Code of Criminal Procedure, 1898, s. 309), Gold Coast (Criminal Procedure Code (1936 Revision) s. 286), and Nigeria (Criminal Procedure Ordinance, 1914, s. 142) where trial is with the aid of native assessors, the assessor is directed to give his opinion orally in open court. These codes cannot, of course, be considered as throwing any light on the construction of the Swaziland code. They make express provision for the opinion being given in public. But they do indicate that in the countries named there need be no such fear of a dishonest public statement by a native assessor as to make it desirable for the opinion to be given in private. The analogy in the cases of Nigeria and the Gold Coast is, no doubt, closer than in the case of India. It must further be remembered that the provision for giving the judge, at his request, the assistance of a native assessor cannot be regarded solely from the point of view of aid given to the judge. It operates, and no doubt is intended to operate, as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood. From this point of view the importance of publicity is manifest. Under the present practice, judging by the present record, it is not made known to the public whether any opinion was given at all by the assessor or what it was. The High Commissioner alone is informed in the judge's report. So far as it is kept secret that it was not until this appeal was opened and a special request for information addressed by their Lordships to the Protectorate that the facts were made known for the purpose of appeal. There seems, therefore, no reason for refusing to give to the sections in the proclamation the meaning which the words clearly indicate. What then should be the result of a failure to comply with the proclamation and to hold the whole of the proceedings in public? In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside. An analogous case is that presented by cases where the judge has either pronounced sentence or altered sentence in the absence of the accused, see *Lawrence v. R.* (1), where a judge in Nigeria had altered sentence both in the absence of the accused and when sitting in chambers. *Prima facie* the failure to hold the whole of the proceedings in public must amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals. There

may no doubt be cases where the guilt of the accused is so apparent that in spite of the disregard of this essential need for publicity this Board would not consider it right to grant leave to appeal. But the present is not such a case, as a particular native custom formed an important consideration upon which it was essential that the proclaimed necessity for publicity should be observed. For these reasons their Lordships came to the conclusion that they should recommend to His Majesty that the appeal should be allowed.

Appeal allowed.

Solicitors: *A. L. Bryden & Co.* (for the appellants); *Burchells* (for the respondent).

[*Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.*]

Re BENNETT, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. FLETCHER.

[CHANCERY DIVISION (Uthwatt, J.), February 26, 1943.]

Executors—Specific bequests of leaseholds—Assent executed in respect of some bequests but not of others—Whether executors should retain indemnity fund in respect of leaseholds.

Where executors have assented to a bequest of leaseholds they are not entitled to retain any fund out of the estate for their indemnity in respect of such leaseholds, but they are entitled to retain such a fund where no assent has been made.

Re Owers (1) followed.

[**EDITORIAL NOTE.** This decision carries the matter one step further than *Re Owers* (1), since it is decided that no order to set aside a fund will be made where an assent has been executed.

AS TO PROTECTION OF PERSONAL REPRESENTATIVES IN CASE OF LEASEHOLDS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 331, 332, para. 616; and FOR CASES, see DIGEST, Vol. 23, pp. 369, 370, No. 4387-4391.]

Cases referred to:

- (1) *Re Owers, Public Trustee v. Death*, [1941] Ch. 389; [1941] 2 All E.R. 589; Digest Supp.; 110 L.J.Ch. 157; 165 L.T. 94.
- (2) *Shadbolt v. Woodfall* (1845), 2 Coll. 30; 24 Digest 606, 6372; 4 L.T.O.S. 491.
- (3) *Hickling v. Boyer* (1851), 3 Mac. & G. 635; 24 Digest 605, 6369; 21 L.J.Ch. 388; 20 L.T.O.S. 33.
- (4) *Smith v. Smith* (1861), 1 Drew. & Sm. 384; 24 Digest 607, 6375; 4 L.T. 44.

The testatrix, Annie Elizabeth Bennett, made her will on May 9, 1936, and two codicils on June 17, 1937, and Mar. 7, 1939, respectively. By her will the testatrix appointed the Midland Bank Executor and Trustee Co., Ltd. and Samuel Walter Gray to be the executors and trustees thereof, and among the dispositions made by her will were a number of pecuniary legacies and a considerable number of specific bequests of leasehold properties, of which the testatrix was in all cases the assignee and not the original lessee. The testatrix died on July 25, 1939, and probate of her will was obtained on Oct. 18, 1939. The residuary estate was insufficient to pay the pecuniary legacies in full. The executors entered into possession of the aforesaid leasehold properties and assented at various dates to the bequest of all these properties with one exception. The executors took out a summons asking whether or not any fund or funds ought to be set aside by them out of the estate and retained for their indemnity in respect of their liability under the lessees' covenants relating to all or any of the leasehold properties. It was contended for the pecuniary legatees that the executors were not entitled to any indemnity in respect of the properties to which they had already assented.

G. Maddocks for the plaintiffs, the executors.

H. Hillaby for the defendant, a pecuniary legatee.

UTHWATT, J.: The executors are not entitled to any indemnity out of the estate in respect of the properties as to which they have assented, but following *Re Owers* (1), they are entitled to retain a fund for their indemnity in respect of the property as to which there has been no assent, and an inquiry must be made to ascertain the amount of such fund.

Solicitors: *Billinghurst, Wood & Pope* (for all parties).

[*Reported by IRENE G. R. MOSES, Barrister-at-Law.*]

[CHANCERY DIVISION (Morton and Uthwatt, JJ.). **March 15, 1943.**]

Bankruptcy—Discharge—Refusal of discharge—No application made under the Liabilities (War-Time Adjustment) Act, 1941—Whether proper ground for refusal—Bankruptcy Act, 1914 (c. 59), s. 26 (1), (2), (3).

The debtor was mobilised on July 16, 1939, and had been serving with His Majesty's forces since that date. A continuing liability arose which the debtor was unable to meet, and he filed his own petition in bankruptcy on June 11, 1942, and was adjudicated bankrupt on the same day. His gross liabilities amounted to over £7,000, and the assets available for unsecured creditors were nil. On Oct. 6, 1942, the debtor made an application in the county court for his discharge. Although the Official Receiver's report contained no statement as to unsatisfactory conduct on the part of the debtor, the application was unconditionally refused by the county court judge on the ground that the debtor was not justified in filing his petition in bankruptcy under the Bankruptcy Act, 1914, when he could have availed himself of the protection under the Liabilities (War-Time Adjustment) Act, 1941 :—

HELD : (i) the existence of the Liabilities (War-Time Adjustment) Act, 1941, did not preclude the debtor from availing himself of proceedings under the Bankruptcy Act, 1914.

(ii) in the circumstances, the debtor had acted properly in filing his petition, and the order of discharge should be affirmed subject to a suspension.

[**EDITORIAL NOTE.** It was suggested that, where a debtor who could have availed himself of the facilities provided by the Liabilities (War-Time Adjustment) Act, 1941, filed a petition in bankruptcy, an order for his discharge should be refused and the county court judge upheld this suggestion. On appeal, however, the court have decided that that is a wrong view and that, although the debtor's difficulties might have been adequately dealt with under the recent Act, that was no reason for refusing an order of discharge.

AS TO PRINCIPLES GOVERNING COURT'S DISCRETION, see HALSBURY, Hailsham Edn., Vol. 2, p. 345, para. 464 ; and FOR CASES, see DIGEST, Vol. 4, pp. 544-546, Nos. 5010-5028.]

Cases referred to :

- (1) *Re Freeman, Ex p. Freeman* (1890), 62 L.T. 367 ; 4 Digest 575, 5288 ; 7 Morr. 38.
- (2) *Re Rankin, Ex p. Rankin* (1887), 5 Morr. 23 ; 4 Digest 570, 5248.
- (3) *Re Swabey, Ex p. Swabey* (1897), 76 L.T. 534 ; 4 Digest 569, 5240.

APPEAL from a decision of the county court judge at Windsor, refusing the discharge in bankruptcy of the appellant. All the relevant facts are set out in the judgment.

W. Summerfield (for *W. A. L. Raeburn*) for the appellant.

V. R. Aronson for the respondent.

MORTON, J. : In this case the debtor filed his own petition on June 11, 1942, and the receiving order and order of adjudication were made on the same day. According to his statement of affairs, as set out in the first report of the Official Receiver, the gross liabilities were estimated at £7,705 8s. 7d., and the liabilities ranking for dividend at £5,820 11s. 5d. ; but the Official Receiver has received notice of other unsecured claims to a further total of £1,000, and the proofs actually lodged amount to £2,002 13s. 1d. The assets so far as they were not assigned to creditors wholly or partly secured were estimated to produce nil. I shall refer later to certain other aspects of the case but it is clear, as the Official Receiver says in his report, that no dividend has been or can be paid to unsecured creditors.

On Oct. 6, 1942, the debtor made an application for his discharge, and the county court judge on Oct. 10, 1942, refused the application for discharge. It was an absolute refusal. From that decision the debtor appeals, and counsel on his behalf submits that the county court judge wrongly exercised his discretion under the Bankruptcy Act, 1914, s. 26. The Bankruptcy Act, 1914, s. 26, as amended by the Bankruptcy (Amendment) Act, 1926, s. 1, provides as follows :

On the hearing of the application the court shall take into consideration a report of the Official Receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy) and may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that where the bankrupt has committed any misdemeanour under this Act, or any enactment repealed by this Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, or where in any case any of the facts hereinafter mentioned are proved, the court shall either (i) refuse the discharge; or (ii) suspend the discharge for such period as the court thinks proper; or. . .

and then there follow two other alternatives. The facts referred to are set out in subsect. (3): they are numerous and I do not propose to read them all. The first fact, (a), is as follows:

That the bankrupt's assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible.

In the present case the Official Receiver reported as follows:

Having regard to the Bankruptcy Act, 1914, s. 26, (3), as amended by the Bankruptcy (Amendment) Act, 1923 s. 1, the Official Receiver submits: (a) That the bankrupt's assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities.

In para. 5 of his report the Official Receiver says:

The bankrupt's conduct during the proceedings under his bankruptcy has been satisfactory.

It has to be observed that while fact (a) is present in this case, the Official Receiver has not reported that facts (d) and (f) are present in the case. I think that is of some importance. Facts (d) and (f) in subsect. (3) of the section are:

(d) That the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it.

(f) That the bankrupt has brought on, or contributed to, his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs.

It seems to me that this court must consider the case on the footing that those two last-mentioned elements are not present in it.

It would appear that the bankrupt's business hopes have proved to be too optimistic, but the circumstances are as follows. He was in the Territorial Army prior to the outbreak of the present war. He was mobilised on July 16, 1939, and he has been serving with His Majesty's forces ever since that date. The reason which led him to file his petition is set out in para. 4 of the Official Receiver's second report:

The bankrupt further states that during the early part of last year a claim was made against him for payment of £2,261 8s. 6d., under a guarantee which he had given in conjunction with a third party in respect of the rents of the property known as 97, Baker Street, W.1. and that he thereupon sought advice upon the matter. In view of the fact that it was likely that an annual liability would arise under the guarantee during the continuance of the war, which it would be quite impossible for the bankrupt to meet, he was advised to file his petition, more particularly because his co-guarantor had disappeared, making it impossible for the bankrupt to obtain contribution.

In those circumstances, as this was a continuing liability which it was quite impossible for the debtor to meet, it seems to me that he took the right course in filing his petition; and, although it is clear that his hopes in business were not realised, that may well be due to the fact that war broke out in September, 1939, and he has been unable to attend to business since July in that year.

We have not been supplied with any note of the reasons which led the county court judge to meet the application with an absolute refusal; but the bankrupt has put in, by leave of this court, an affidavit stating what took place before the county court judge, and I gather that the Official Receiver does not dispute the accuracy of the statements made in this affidavit. Paras. 2 and 3 are as follows:

(2) After considering the report of the Official Receiver, dated Sept. 30, 1942, and

filed herein on Oct. 1, 1942, the county court judge adjourned my application for a further report to be made with a view to satisfying himself, as he stated, as to whether or not I was justified in filing my petition in bankruptcy herein instead of availing myself of the protection given by the Liabilities (War-Time Adjustment) Act, 1941. (3) On Feb. 10, 1943, the adjourned hearing of my said application came before the county court judge, who, having considered a supplemental report of the Official Receiver, dated Jan. 4, 1943, intimated that he was not satisfied that my liabilities could not have been adequately dealt with under the aforementioned statute, and refused my said application altogether.

Speaking for myself, I do not think that the existence of the Liabilities (War-Time Adjustment) Act, 1941, supplies a reason why discharge should be refused to a debtor who has chosen to avail himself of the Bankruptcy Act instead of taking proceedings under the Liabilities (War-Time Adjustment) Act, 1941. Further, it appears to me that in the circumstances of the present case the course which the bankrupt took was the proper course to take. The jurisdiction under sect. 26 is, of course, discretionary, but in the present case it appears to me, upon the evidence, that the county court judge has taken into account a matter which is not a suitable matter to be taken into consideration; and further, we have no information as to the other reasons, if any, which the county court judge had for arriving at his conclusion.

For my part I cannot imagine circumstances in which it would be justifiable to refuse an order of discharge in a case where the only fact against the bankrupt is that the assets are not equal to 10s. in the pound on the amount of his unsecured liabilities.

We have been referred to three cases, *Re Freeman* (1), *Re Rankin* (2), and *Re Swabey* (3), in which various suspension periods were attached as a condition of granting the discharge. Counsel for the respondent does not seek to contend that the judgment of the court below is correct; but he submits that there ought to be more than a nominal suspension. In a case such as the present, where there has been nothing in the nature of any fraudulent conduct and where the only fact against the debtor is the one which I have mentioned, I do not think it would be right to impose a long period of suspension. The order which seems to me to be right in the circumstances of the present case is that there should be a discharge, but that it should be suspended for a period of 6 months from the date of the application for discharge.

UTHWATT, J. : I agree.

Order accordingly. No order as to costs.

Solicitors : *Woolfe & Woolfe* (for the appellant); *Solicitor to the Board of Trade* (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

HARTSTOKE FRUITERERS, LTD. v. LONDON, MIDLAND AND SCOTTISH RAILWAY COMPANY.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.),
March 29, 1943.]

Railways—Standard terms and conditions of carriage—Goods at owner's risk—Failure to give notice of arrival—Onus on consignees to prove wilful misconduct—Standard Terms and Conditions of Carriage of Merchandise by Merchandise Train at Owner's Risk Rates, conditions 3, 9.

The appellants were fruit merchants for whom two trucks of bananas arrived at a railway station on Sept. 6 and 7, 1940, respectively. The goods had been forwarded at owner's risk rates and subject to the "Standard Terms and Conditions of Carriage of Merchandise by Merchandise Train at Owner's Risk Rates," condition 9 of which provides for notice of arrival to be given to the consignee by the railway company and condition 3 of which provides that the railway company shall not be liable for loss or damage, except upon proof that it arose from the wilful misconduct of the railway company or its servants. It was admitted, for the purposes of this appeal, that the respondents had failed to give notice of arrival of the goods within a reasonable time, and that in consequence the consignments in question has suffered damage to the amount claimed. For the appellants, it was contended (i) that condition 3 did not apply in a case where condition 9 had been broken, (ii) that, alternatively, there had been a misdelivery

within one of the specified exceptions to condition 3:—

HELD : (i) the respondents were not liable for the loss caused by the breach of condition 9 because condition 3 exempted them from liability except upon proof that the loss arose from the wilful misconduct of the company or their servants and the appellants had failed to prove wilful misconduct.

(ii) "misdelivery" in condition 3 means delivery to the wrong consignee and not merely delay or detention.

Decision of HALLETT, J. ([1942] 2 All E.R. 488) *affirmed*.

[EDITORIAL NOTE.] This is a short point on the construction of the Standard Terms and Conditions of Carriage governing the carriage of goods by railway companies. A consignee, although he establishes that the company has failed to give him notice of the arrival of goods and are, therefore, in breach of condition 9, must still show that the failure arose through the wilful misconduct of the company or its servants and the onus of proving such wilful misconduct is upon the consignee. In other words, although there is a breach of condition 9, the railway company are protected by condition 3 in the absence of proof by the consignee of wilful misconduct on the part of the company's servants.

AS TO CARRIAGE OF GOODS BY RAILWAY AT OWNER'S RISK, see HALSBURY, Halsbury's Laws of England, Vol. 27, pp. 136-138, paras. 312-314; and FOR CASES, see DIGEST, Vol. 8, pp. 64-68, Nos. 433-461.]

Cases referred to :

- (1) *London and North Western Ry. Co. v. Neilson*, [1922] 2 A.C. 263; 8 Digest 66, 454; 91 L.J.K.B. 680; *affg.*, [1922] 1 K.B. 192.
- (2) *Foster v. Great Western Ry. Co.*, [1904] 2 K.B. 306; 8 Digest 66, 452; 73 L.J.K.B. 811; 90 L.T. 779.

APPEAL by the plaintiffs from a judgment of HALLETT, J., in the King's Bench Division, dated July 7, 1942, and reported [1942] 2 All E.R. 488, where the facts which were not in dispute, are fully stated.

N. L. C. Macaskie, K.C., and *B. L. O'Malley* for the appellants.

G. L. Lynskey, K.C., and *R. E. Gething* for the respondents.

LORD GREENE, M.R. : This appeal relates to two consignments of bananas on a truck which were to be carried by the respondents to their Kew Bridge Station. It was admitted for the purposes of this appeal that the respondents failed to give notice of arrival by telephone, which was by mutual consent agreed to be the proper method of giving notice having regard to the course of business between the parties, within a reasonable time, and that in consequence the appellants incurred damage from loss, damage, deviation, delay or detention of or to the consignments in question to the amount claimed. That long string of words appears in the admission by reason of the language of one of the conditions of carriage, to which I shall refer in a moment. The substance of the admission is that the respondents in breach of a certain condition 9 omitted to give notice of arrival within a reasonable time. Not having received notice the appellants were unable to collect the goods, and, when they received notice and collected them, the goods had been seriously damaged by heat. The contract was an owner's risk contract, and was governed, accordingly, by the conditions lettered "B" in the Railway Terms and Conditions of Carriage, 1927. Subject to the conditions there set out, of course, the common law rules apply, and it is so provided by condition 22.

Condition 9, of which a breach admittedly took place, provides that :

The company shall in every case where merchandise is consigned to a station and is not to be delivered by the company's road vehicle, or barge, or by truck alongside ship, give notice in writing or by telephone, if so agreed in writing, on arrival to the consignee . . .

That condition was not observed, and damage to the goods resulted by reason of that breach. The railway company relies on condition 3. Condition 3 exempts them from liability in respect of certain matters :

. . . except upon proof that the same arose from the wilful misconduct of the company or their servants.

The finding of fact of HALLETT, J., in this case negatives any such wilful misconduct. The matters in respect of which the company are relieved from liability under that condition are loss, damage, deviation, misdelivery, delay or detention of or to a consignment or any part thereof. HALLETT, J., held that where, by reason of a breach of condition 9, damage was suffered by the con-

signee, the company was, nevertheless, entitled to rely upon condition 3, and, therefore, to be exempt from liability unless it were proved that the loss, or whatever it was, arose from wilful misconduct of the company or their servants. He did not, I think, specify the precise word in condition 3 under which the present case would fall on that basis, but it seems to me that it would fall, according to the natural meaning of language, under the word "damage."

The appellants are suing for damages which they claim to have suffered by reason of damage to the two consignments. *Prima facie*, the language of condition 3 appears to me perfectly apt to cover the present case; but it is said that condition 3 cannot apply where condition 9 has been broken, and the argument is put in two ways. First, it is said that, when the company commits a breach of condition 9, it goes outside the contract of carriage, and accordingly is not entitled to the limiting benefit of condition 3, and *London and North Western Ry. Co. v. Neilson* (1) is relied upon; but that was a totally different case. There the railway company having accepted goods consigned from one place to another in fact conveyed those goods to quite different destinations, and by so doing were not performing the contract of carriage at all, and, therefore, were not entitled to the protection of words inserted to limit their liability. In the present case the company had performed its contract of carriage by carrying the goods to Kew Bridge Station. The provision of condition 9 is merely an ancillary provision not bearing upon the contract of carriage at all, but enabling the consignee to be notified that the carriage is at an end, and that he can go and fetch his goods. It is of further importance in the machinery of these conditions, because condition 10 provides that at the expiration of one clear day after notice of arrival is given the transit is at an end, and the effect of the transit being at an end is, by condition 11, that the railway company from that moment holds the goods as warehousemen, with certain special provisions as to their obligations in that capacity. I cannot regard a breach of condition 9 in the circumstances of this case as in any way parallel to or similar to the complete departure from the contract of carriage which took place in *Neilson's* case (1).

The other way in which the argument was put was this. It was said that, when the language of condition 3 is looked at, it is not apt to cover damage to the goods caused, not by some act of the railway company in the course of transit, but by reason of their failing to serve a notice which would enable the consignee to collect the goods. It was then said that condition 3 does not apply after the transit has come to an end. That is a construction which I am quite unable to accept. It would have this remarkable result, that until the goods arrived at the station the company would be protected by condition 3, and that, at the expiration of one clear day after the notice of arrival was given, the company would be protected by the special warehousing conditions in condition 11, whereas in the interval of time between those two points of time condition 3 would have no application at all, and would not protect the company. I cannot see how it is possible to put a limit on the language of condition 3 in that sort of way. I am, therefore, of opinion that the judge came to the right conclusion upon the argument presented to him.

This additional argument was put before us. Condition 3, as I have said, exempts the company from liability for the matters mentioned except upon proof of wilful misconduct. That limitation of liability is qualified by a proviso which says that the limitation is not to take effect in three specified cases. The third of those cases is misdelivery:

... where merchandise addressed in accordance with condition 1 hereof is not tendered or placed at the disposal of the consignee within 28 days, or, in the case of perishable merchandise, within a reasonable time, which shall not be less than 72 hours after receipt of the consignment by the company to whom the same was handed by the sender.

It was argued that this was a case which fell within that paragraph, and that in consequence there was no necessity to prove wilful misconduct. The way it was put was this: "Misdelivery," it was said, in that paragraph has a special meaning, and it means the failure to tender the goods or to place them at the disposal of the consignee within the period specified. In the present case it was said that the goods were not tendered or placed at the disposal of the consignee within those periods, and, therefore, there was a case of misdelivery

within the meaning of the definition. In my opinion, that argument is based on a misapprehension as to the meaning of this paragraph. "Misdelivery" seems to me to mean misdelivery, and not delay or detention. It is contrasted in the opening words of the condition with delay or detention, and is clearly aimed at a different class of act. The reason why these periods are mentioned in the paragraph seems to me to be this, that where the company has delivered the goods to the wrong person and does not get them back again and tender them to the right person or place them at his disposal within the stated period, then the company is to be deprived of the limitation of its liability given by the opening words of condition 3. On the other hand, if, notwithstanding misdelivery, the company succeeds in getting the goods back and within the period stated tenders them, or places them at the disposal of the consignee, then the company is entitled to the benefit of the exemption from liability in the opening part of condition 3, and the consignee in order to recover would have to prove wilful misconduct. It seems to me that that is the clear meaning of that paragraph of condition 3, and that the word "misdelivery" is not to be construed in the very special way in which counsel for the appellants would have us construe it.

It is worth just referring to the way in which SCRUTTON, L.J., in *Neilson's* case (1), spoke of the word "misdelivery" in a condition which in some respects was similar to that which we now have before us, although the particular paragraph which I am now discussing either was not present, or was not relevant in that case. The word "misdelivery" did appear in the condition, and what SCRUTTON, L.J., said, at p. 202, was this :

Nor in my opinion is the word "misdelivery" an appropriate word to apply to the present facts. I cannot understand how LORD ALVERSTONE in *Foster's* case (2) took the view that letting the fish remain in the train that was going on to Taunton was misdelivering them. The company there did not, by so doing, deliver the goods to anybody, for they remained in their own possession. Misdelivery means a delivery to a wrong person, and if you keep the goods yourself you do not deliver them at all. In the present case the company had not delivered them to anyone. They were still in the company's trucks on company's sidings.

In my opinion, therefore, that argument, which was not presented to HALLETT, J., below, is one which quite clearly fails. In the result the appeal, in my opinion, should be dismissed with costs.

MACKINNON, L.J. : I agree.

GODDARD, L.J. : I agree. I only want to add one word, because Mr. Macaskie, in very moderate language, claimed that this was a case in which the railway company were trying to have their cake and eat it. Mr. O'Malley, in stronger language, said that it was neither fair nor reasonable, and, I think he said, honest, that they should set up this defence. The truth is that it is the appellants who want to have their cake and eat it, because they have taken advantage of these statutory rules which are published in accordance with the Railways Act, 1921—previously the material section had been the Railway and Canal Traffic Act, 1854, s. 7—and have availed themselves of the lower rate of carriage which the railway company offer them, and offer them on certain terms. They had under the old Act to offer them on terms which the court considered just and reasonable. It was very early held in the history of the Act that it was not just and reasonable unless the company gave them the option of two rates, an owner's risk and a company's risk, and it was also held not to be reasonable to put in a complete exemption, and so the companies have always excluded from their exempting clauses wilful misconduct of their servants. The fact here is that the owners, having a perishable consignment, chose to send it forward at a lower rate than they would otherwise have had to pay, on the condition that the railway company were exempted from liability if the damage was caused otherwise than by the wilful misconduct of their servants. It seems to me, therefore, that it is only just and right that the respondents should have the benefit of the contract which they have made, and I agree with LORD GREENE, M.R., that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Russell & Arnholz* (for the appellants) ; *Alexander Eddy* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

COMMISSIONERS OF INLAND REVENUE *v.* EXECUTORS OF HAMILTON-RUSSELL.[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), **March 2, 3, April 1, 1943.**]*Income Tax—Settlement—Beneficiary absolutely entitled leaving fund to accumulate in hands of trustees—Liability to tax.*

A settlor directed trustees to accumulate the income of a trust fund during his life and, in the events which happened, to hold the fund and the income thereof for the testator upon his attaining 21 years of age. The testator attained that age on Oct. 17, 1928, and was then in law entitled to call upon the trustees to hand over to him the fund and all accumulations of income. In fact he did not avail himself of this right until Jan. 18, 1939, at which date the settlor was still alive. The testator died in 1940 and his executors were assessed to sur-tax upon the income of the fund from 1928 until the testator called for the fund in 1939. It was subsequently admitted on behalf of the Crown that the assessment as originally made could not be maintained and that it ought to be varied by substituting the figure which represented the income received under the settlement between Apr. 5, 1938, and Jan. 18, 1939. It was held by MACNAGHTEN, J., that the moneys received under the settlement were capital and not assessable to sur-tax:—

HELD: from Oct. 17, 1928, the trust for accumulation was unenforceable because the funds belonged solely to the beneficiary for his own absolute use and benefit. Therefore the income of the funds was the income of the beneficiary and assessable to sur-tax.

Decision of MACNAGHTEN, J. ([1943] 1 All E.R. 166) reversed.

[EDITORIAL NOTE. The decision in this case is based upon the rule that, after a fund becomes absolutely vested in a beneficiary of full age, a trust for accumulation ceases. The position was not that the trustees must continue to accumulate until requested by the beneficiary to hand the fund over to him, but that, at any time after the beneficiary attained full age, the trustees could have refused to continue the accumulations and have paid the fund into court if the beneficiary was adverse to any other method of determining the settlement. For this reason it was held impossible to regard the accumulations as capital. The income must be treated as the income of the beneficiary and, therefore, subject to tax.

AS TO TAX ON INCOME TO BE ACCUMULATED, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 272, 273, para. 544; and FOR CASES, see DIGEST, Supp., *Income Tax*, Nos. 545a-545g.]

Cases referred to:

- (1) *Gosling v. Gosling* (1859), John. 265; 44 Digest 445, 2693; 5 Jur. N.S. 910.
- (2) *Saunders v. Vautier* (1841), Cr. & Ph. 240; 44 Digest 444, 2691; 10 L.J.Ch. 354.
- (3) *Wharton v. Masterman*, [1895] A.C. 186; 37 Digest 146, 721; 64 L.J.Ch. 369; 72 L.T. 431.
- (4) *Dewar v. Inland Revenue Comrs.*, [1935] 2 K.B. 351; Digest Supp.; 104 L.J.K.B. 645; 153 L.T. 357; 19 Tax Cas. 561.

APPEAL by the Crown from a decision of MACNAGHTEN, J., dated Oct. 12, 1942, reported [1943] 1 All E.R. 166. The facts are fully set out in the judgment.

The Solicitor-General (Sir D. Maxwell Fyfe, K.C.), J. H. Stamp, and Reginald P. Hills for the appellants.

Cyril King, K.C., and N. C. Armitage for the respondents.

Stamp v. Wharton v. Masterman governs this case because the form of trust there was exactly similar to that here. The trust here was solely for the benefit of an individual. The income, when it accrued, was his from the first. The trustee would be carrying out the trust on sufferance after the beneficiary attained the age of 21 years.

King, K.C.: This is a simple trust to accumulate during the life of Lord Boyne and after his death to deal with the property as directed. During the life of the settlor it is held on a perfectly valid trust for accumulation. Unless the sole beneficiary claims the income it remains subject to the trust. The court has no reason to hold that the income should be treated as the income of the beneficiary if he does not wish to receive it.

LUXMOORE, L.J. [delivering the judgment of the court]: On Oct. 12, 1942, MACNAGHTEN, J., reversed a finding of the Special Commissioners that the

executors of the late G. L. Hamilton-Russell were assessable for the year ending Apr. 5, 1939, in respect of sur-tax on a sum of £14,530, in addition to the sum on which they had already been assessed. The £14,530 was the aggregate amount of the accumulations of income made between the years 1928 and 1939 under a settlement executed by Lord Boyne on June 17, 1918, and at the material date was represented by a number of investments. At the hearing before MACNAGHTEN, J., it was admitted on behalf of the Crown that the finding of the Special Commissioners could not be supported in respect of the whole of the £14,530, but only to the extent to which it was income received in the period from Apr. 5, 1938, to Jan. 18, 1939. The case was argued on this footing before MACNAGHTEN, J. He decided against the contention of the Crown and allowed the appeal in its entirety.

The Crown has appealed to this court and asks that the order of MACNAGHTEN, J., may be discharged and the case remitted to the Special Commissioners with a direction that an additional assessment to sur-tax for the year in question should be made on the executors on the footing that that part of the £14,530 which was received in respect of income for the year 1938-9 on the investments comprised in the settlement of June 17, 1918, was the income of the late G. L. Hamilton-Russell and so liable to assessment for sur-tax. The respondents, who are the executors of the late G. L. Hamilton-Russell, deny that the sum in dispute was received by the deceased as his income and support the judgment of MACNAGHTEN, J., which is admittedly based on their contention.

The facts are simple. Lord Boyne, who was the father of G. L. Hamilton-Russell, made the settlement, under which the question arises, on June 17, 1918. It is expressed to be made between Lord Boyne of the one part and the Hon. E. S. Hamilton-Russell and K. C. Bayley of the other part. It contains a recital to the effect that Lord Boyne was desirous of forming a trust fund for the benefit of such persons and for such purposes as were thereafter mentioned and as a commencement of such fund had transferred to the trustees £15,000 National War Bonds to be held with any further sums which Lord Boyne might in his lifetime pay to the trustees for the like purposes upon trust as therein mentioned. The settlement provided that the trustees should stand possessed of the securities and of all further sums as aforesaid upon trust to invest and to stand possessed of the trust moneys and the investments representing the same (thereinafter and hereinafter called the trust fund) upon trust during the lifetime of Lord Boyne to accumulate the income of the trust fund by way of compound interest by investing the same and the resulting income thereof and after the death of Lord Boyne to stand possessed of the trust fund and the accumulations of income thereof or the investments representing the same up to the date of the death of Lord Boyne (thereinafter and hereinafter called the "accumulation fund") in trust :

... for such son or daughter of Lord Boyne by his then present wife as being tenant in tail male by purchase of the freehold hereditaments settled by the indenture of resettlement dated Oct. 3, 1906, of the Brancepeth Hardwick and Baysdale estates should first attain the age of 21 years.

The settlement contained provisions empowering the trustees after the death of Lord Boyne to apply all or any part of the income of the trust fund and of the accumulation fund for the maintenance and education or otherwise for the benefit of any such son or daughter of Lord Boyne who, being tenant in tail male in possession by purchase of the said settled estates, should be under 21 years of age and to apply the residue of any such income as therein mentioned. The settlement also contained trusts and provisions applicable to the trust fund and the accumulation fund in the event of no son or daughter of Lord Boyne being such a tenant in tail male by purchase as aforesaid attaining 21 years of age. Neither the provisions as to maintenance and otherwise during minority nor the trusts declared in default of a son or daughter of Lord Boyne attaining 21 came into operation, because the late G. L. Hamilton-Russell became tenant in tail male by purchase of the Brancepeth Hardwick and Baysdale estates under the resettlement referred to and attained 21 years of age on Oct. 17, 1928, in the lifetime of Lord Boyne. In these circumstances G. L. Hamilton-Russell became the sole beneficiary under the settlement and thereupon admittedly became entitled to call for the transfer of all the trust funds and the accumulations thereof to himself. He did not in fact do so, but allowed the trustees to receive

the income from the trust fund and the accumulation fund and to continue investing such income up to Jan. 18, 1939. On the last mentioned date the total income accrued under the settlement amounted to the sum of £14,530, and this sum was represented by various investments made by the trustees in accordance with the directions in the settlement. On Jan. 18, 1939, G. L. Hamilton-Russell called upon the trustees to discontinue any further accumulation of income under the settlement, and instructed them to transfer the investments representing the accumulations to himself and to pay the future income from the trust funds to himself or as he should direct. He also requested the trustees in spite of the determination of the settlement to retain the rest of the property subject to the trusts pending his further instructions. In accordance with these requests the trustees transferred to G. L. Hamilton-Russell during the tax year 1938-9 the investments representing the whole of the income which accrued during the period between Oct. 17, 1928, and Jan. 18, 1939.

G. L. Hamilton-Russell died on June 2, 1940. His executors were in due course assessed to sur-tax in respect of these accumulations. The executors contended that the accumulations constituted capital of the trust funds, while it was contended on behalf of the Crown that they were income and that the assessment to sur-tax in respect thereof was correct and should be affirmed. The Special Commissioners held that the accumulations represented income of each year under the settlement during which the beneficiary (G. L. Hamilton-Russell) after he attained his majority on Oct. 17, 1928, could have demanded should be paid over to him and that when the accumulations were transferred to him in response to his request of Jan. 18, 1939, they were transferred to him as income and there was a liability in respect thereof to sur-tax for the year 1938-39. They, therefore, confirmed the assessment in principle subject to certain relief and left the figures to be agreed between the parties. This was subsequently done and in consequence the Special Commissioners confirmed the assessment in the sum of £14,530. The executors appealed and, as already stated, it was admitted on behalf of the Crown that the assessment could not be maintained at the figure stated, and that it ought to be varied by substituting a figure to be ascertained which would represent the income received under the settlement between Apr. 5, 1938, and Jan. 18, 1939. MACNAGHTEN, J., held that the whole of the moneys received under the settlement including that representing the income accumulated between Apr. 5, 1938, and Jan. 18, 1939, were received as capital and were not assessable to sur-tax. The argument on behalf of the executors which was accepted by MACNAGHTEN, J., was that the settlement contained trusts which were lawful and although the late G. L. Hamilton-Russell could, when he attained 21 years of age, as the sole beneficiary under those trusts, have legally determined them, he did not in fact do so and consequently the income did not become his, but was accumulated under the trusts and turned into capital before the trusts were determined. Stress was laid on the fact that the settlement directed the accumulation of income during the lifetime of Lord Boyne coupled with the fact that there was no gift to the beneficiary until after the death of Lord Boyne. From this it was argued that unless and until the trusts were in fact determined by the beneficiary those trusts continued in force and the beneficiary took nothing until after the death of Lord Boyne unless and until the beneficiary in fact determined the trusts. It was argued that this contention was not precluded by such cases as *Gosling v. Gosling* (1), *Saunders v. Vautier* (2), and *Wharton v. Masterman* (3), and on this footing it was said that the principle laid down in *Dewar v. Commissioners of Inland Revenue* (4) was applicable and exonerated the executors from liability to assessment to sur-tax in respect of the sum in question.

We are unable to accept this argument. The question determined in *Dewar's* case (4) was in effect whether income existed which could be brought into assessment. That question was answered in the negative because the interest, although admittedly exigible in law, was never paid or claimed and, therefore, had no existence. In the present case there was unquestionably income in existence, namely, the interest which accrued due on the trust investments and the accumulations during the period from Apr. 5, 1938, and Jan. 18, 1939. Consequently the question is not "Is there any income?" but "To whom did the income, which admittedly existed, belong?" In our judgment there can only be one answer to this question. It belongs to G. L. Hamilton-Russell.

The settlement is indistinguishable in its material features from the will of the testator in *Wharton v. Masterman* (3). In that case there was a direction to accumulate the income of a trust fund during a period which continued until the death of the last survivor of a number of annuitants with a direction on the happening of that event to divide the trust fund and the accumulations between certain named charities. The court held that the trust for accumulation was unenforceable and, therefore, ineffective before the expiration of the period fixed by the will because there was an antecedent absolute vested gift of the fund and its accumulations although payment was postponed to a future date. Obviously, in the present case, neither G. L. Hamilton-Russell nor the trustees of the settlement could, after G. L. Hamilton-Russell attained his majority, have insisted on the continuation of the trusts. The trustees could at any time after the happening of that event, even though G. L. Hamilton-Russell had requested them to continue the accumulations, have refused to do so and, if he had refused to accept a transfer of the trust funds, could have paid them into court just in the same way as G. L. Hamilton-Russell could, contrary to the wishes of the trustees, have insisted on a transfer to himself of the whole of the trust funds. The reason why the trusts then became unenforceable and ineffective is because the funds were at home and belonged solely to the beneficiary for his own absolute use and benefit. The capital and income were his and no one else was interested in them: if the income was left in the hands of the trustees and they invested it they only did so by the sufferance of the beneficiary whose income it was. The trustees took the income as the income of G. L. Hamilton-Russell because neither the trustees nor G. L. Hamilton-Russell could enforce the trust for accumulation. As was pointed out in *Gosling v. Gosling* (1), the court does not hesitate to strike out of the will any direction that the devisee shall not enjoy the benefit in full until some future date beyond the attainment of majority unless the benefit is not to vest until the arrival of the future date. Once the question, whose is the income from the settlement between Apr. 5, 1938, and Jan. 18, 1939, is answered by stating that it is the property of G. L. Hamilton-Russell, there is an end of the case, for it is plain that that income is assessable to tax.

For these reasons, we think that the judgment of MACNAGHTEN, J., should be discharged and the appeal allowed, with the result that the case will be remitted to the Special Commissioners with a direction that an additional assessment to sur-tax for the year in question be made on the executors in respect of that part of the £14,530 which represents income under the settlement for the period between Apr. 5, 1938, and Jan. 18, 1939. The respondents must pay the costs here and below.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Wilson & Co.*, Durham (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

G J. LYONS & CO., LTD. v. KNOWLES.
[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.),
March 30, 1943.]

Landlord and Tenant—Lease—Assignee—Liability for rent—Express covenant by assignee with landlord included in licence to assign—Liability of assignee after re-assignment.

H By a lease, dated Jan. 15, 1924, the respondents let certain premises to Willcox. The lease contained a proviso that in the case of an assignment the assignor should procure a covenant by the assignee with the landlord to pay the rent and to observe and perform the other covenants. On May 24, 1924, Willcox with the licence of the respondents assigned the residue of the term to the appellant. On Mar. 21, 1928, the appellant, also by licence of the respondents, assigned the residue of the term to a company and it was admitted that this company was at the time of this action in default to the extent of the sums claimed. In each case the licence to assign contained

a covenant by the assignee with the landlord that he would henceforth during the residue of the term granted by the lease pay the rent reserved and observe and perform the covenants on the part of the lessee and the conditions therein contained. The respondents sued the appellant for the amount of the rent due from the company and the appellant contended that, despite his express covenant with the respondents to pay the rent, he was not liable after the assignment by him to the company :—

HELD : the obligation to pay rent arising under the covenant by the appellant in the licence to assign endured throughout the term and did not cease upon the further assignment of the lease to the company. The respondents, therefore, were entitled to succeed in their claim.

Decision of ASQUITH, J. ([1942] 2 All E.R. 393) affirmed.

[EDITORIAL NOTE.] The Court of Appeal have affirmed the decision of ASQUITH, J., and confirmed the general view that a covenant in the terms stated herein makes an assignee liable for the rent throughout the term. It is clear that that was the obvious intention of the arrangement and there was no reason to adopt any other construction. The Court of Appeal have found no difficulty in deciding that there was no novation. This suggestion, adopted from the law of partnership, was a new one so far as the law of landlord and tenant was concerned and it now seems clear that by adopting the method employed in this case, the lessor can make his rent secure, since, on the failure of the assignee in occupation to pay the rent, he can proceed against the original lessee or any one of the assignors of the lease, no doubt choosing the one from whom recovery is the most certain.

AS TO LIABILITY OF ASSIGNEE FOR RENT AFTER ASSIGNMENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 364, 365, para. 441 ; and FOR CASES, see DIGEST, Vol. 31, pp. 409-412, Nos. 5548-5586.]

APPEAL by the defendant from a judgment of ASQUITH, J., dated July 27, 1942, reported [1942] 2 All E.R. 393. The facts are fully set out in the judgment of LORD GREENE, M.R.

A. T. Denning, K.C., and *Frank Gahan* (for *H. C. Leon* on war service) for the appellant.

H. Wynn Parry, K.C., and *Frederick W. Wallace* for the respondents.

LORD GREENE, M.R. : The respondents granted a lease to one Willcox. The lease contained the usual covenant not to assign without consent, and, in addition, a provision that on an assignment taking place the assignee was to enter into a covenant directly with the lessor to observe and perform the covenants in the lease. Willcox was minded to assign to the present appellant. On that occasion a licence was applied for and was embodied in a document under seal, dated May 28, 1924. It recites the relevant parts of the lease, and the intention to assign, and it contains a covenant by the appellant in these terms :

The assignee hereby covenants with the lessor that he will henceforth during the residue of the term granted by the lease pay the rent thereby reserved and observe and perform the covenants and conditions on the part of the lessee therein contained and in particular will not at any time after the completion of the said assignment assign, transfer, underlet or part with possession of the demised premises or any part thereof without the consent in writing of the lessor for that purpose first had and obtained.

I must confess that I am quite unable to follow the argument that on the true construction of that covenant it does not extend during the whole term of the lease. It is expressed to do so in the clearest possible language. What other language could have been used by parties who desired to make the covenant extend during the whole of the lease I am unable to imagine. It seems to me that it is the clearest possible case of a covenant under which the assignee of a lease puts himself into the same relationship contractually with the lessor as that of the original lessee, and that is the business of a covenant of this kind, the nature of which is not unfamiliar.

The appellant himself at a later date was minded to assign to a limited company called Gordon Chambers Co., Ltd., and he duly applied for a licence to carry that assignment into effect. That licence, in its turn, was contained in a document of Mar. 21, 1928, and that document is in precisely the same form and contains exactly the same covenant as the earlier licence, save that the covenantor is the new assignee, Gordon Chambers Co., Ltd.. What took place was that Gordon Chambers Co., Ltd., failed to pay some rent, and the respondents, the lessors, sued the appellant under the covenant in the original licence which

was granted when he became the assignee. ASQUITH, J., gave judgment for the plaintiffs. Speaking for myself I can see no shadow of a ground for saying that his decision was wrong.

The argument for the appellant was put on two grounds. The first argument was that on the true construction of the licence of May 28, 1924, it was in some way limited so that in the case of a subsequent assignment by the appellant his liability would come to an end. For the reasons I have given I cannot understand how such a proposition can even begin to stand on its feet. It seems to me quite hopeless. The other argument was that assuming the covenant to have been of that nature, which I hold it to have been in its origin, there took place a novation on the occasion of the assignment to Gordon Chambers Co., Ltd., under which the appellant was released from his covenant for the future and the Gordon Chambers Co., Ltd., was accepted as the sole covenantor.

The principles which govern the question of novation do not require stating. If novation is said to rest not on an express contract, but on an implication from the circumstances of the case, all the circumstances, the conduct of the parties, and the subject-matter must, of course, be taken into account in order to see whether the inference is one that ought to be drawn, the inference, of course, being that the parties intended to enter into a contract of novation.

In the present case I am quite unable to see how it can be suggested that there was any *animus novandi*. The lessors had got their covenant. That covenant could be got rid of only by a release of the covenantor. A formal document embodying the licence to assign to Gordon Chambers Co., Ltd., to which the appellant was a party, was drawn up in the most solemn way in the form of a document under seal containing the appropriate covenants. Not a word of any intention to novate is to be found in that document, not a word that the appellant was to be released from his covenant for the future. I find it difficult myself to imagine a circumstance more cogent against any inference of novation than the fact that the parties have chosen to put their contractual intentions into a formal document and on the face of that document have not expressed the slightest intention to novate, a matter surely of such importance that you would have expected the parties to have included it in their written document and not to have left it to be inferred in some way from conduct or surrounding circumstances. That by itself would be sufficient to my mind to negative any suggestion of novation at all.

One has to consider again in dealing with novation the real business nature of the transaction, and a transaction of this kind is one the business sense of which is quite obvious. When the covenant with the appellant was taken the original lessee, of course, remained liable on his covenant notwithstanding the assignment, but the lease had many years to run. He might die, he might disappear, and so forth, and it would have been of importance to the lessors in those circumstances to have somebody standing in his shoes for the residue of the lease in relation to the whole of the term. When the appellant assigned, his assignee again, although no doubt responsible when the original assignment was taken, might become insolvent, and there would be no remedy of any use against it. In circumstances like that it is a matter of simple business to see how important it is for the lessor, if he is fortunate enough to be able to obtain that term when he bargains with his lessee, to have the full benefit of it. Not merely is there no indication whatsoever of any intention to novate in the present case, but it seems to me that to imply such a novation would be to fly in the face of the obvious facts of the case.

In my opinion the judgment of ASQUITH, J., is perfectly right, and the appeal must be dismissed with costs.

MACKINNON, L.J. : I agree.

GODDARD, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : Rubinstein, Nash & Co. (for the appellant) ; Bartlett & Gluckstein (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re THE BANCA COMMERCIALE ITALIANA.

[CHANCERY DIVISION (Bennett, J.), March 29, 1943.]

Aliens—Business carried on by enemy subjects—Winding up—Control of winding up by Board of Trade—No right of creditor to refer questions to the court—Trading with the Enemy Act, 1939 (c. 89), s. 3 (A) (3), (8), (9).

The Banca Commerciale Italiana was a bank, established under the laws of the kingdom of Italy, carrying on every description of banking from two offices in London, its head office being in Milan, Italy. By an order made under the Defence (Trading with the Enemy) Regulations, 1940, in Sept., 1940, it was ordered that the business of the bank carried on at its London offices should be wound up and a controller was appointed. Certain powers were conferred on him which were exercisable without reference to the Board of Trade, but the payment of creditors, and compromises or arrangements in respect of any debts or claims against the company required the sanction of the Board:—

HELD: (i) a winding-up order under the regulation created a new entity for the purpose of winding up, namely the business ordered to be wound up.

(ii) the winding up was not by a court of law carrying out statutory duties, but by the Board of Trade carrying out duties imposed upon it by the regulation as an act of state.

(iii) the controller was the officer and agent of the Board of Trade and responsible only to them for his actions.

(iv) the reference to the Companies Act was only for ascertaining and defining the powers of the controller and did not import into the regulation statutory provisions and rules as to the ascertainment of creditors and claims against the company.

(v) it was for the Board of Trade to decide whether a person was a creditor, and although the Board could refer that question to the court, the person claiming to be a creditor could not refer the question to the court.

[EDITORIAL NOTE.] The winding up here considered is of a special kind, being a winding up only of a part of the business of a company, namely, that part of its business carried on in this country. A winding up of such an exceptional character is necessarily subject to exceptional rules, but it is important to notice that upon the decision herein anyone who alleges that he was a creditor of the business to be wound up is bound by the decision of the Board of Trade and has no right to refer any question to the court for decision. The whole winding up is within the sole jurisdiction of the Board and is not subject to the jurisdiction of the courts except in so far as the Board may refer any question to the court.

AS TO TRADING IN WAR TIME, see HALSBURY, Hailsham Edn., Vol. 1, pp. 460, 461, para. 779; and FOR CASES, see DIGEST, Vol. 2, pp. 149-154, Nos. 216-249.]

Cases referred to:

- (1) *Re Hagelberg (W.) Akt.*, [1916] 2 Ch. 503; 2 Digest 150, 219; 86 L.J.Ch. 18; 115 L.T. 444.
- (2) *Re Goldschmidt (Th.) Ltd.*, [1917] 2 Ch. 194; 2 Digest 150, 221; 86 L.J.Ch. 521; 117 L.T. 23.
- (3) *Re Kastner & Co., Auto-Piano Co. v. Kastner & Co.*, [1917] 1 Ch. 390; 2 Digest 150, 220; 86 L.J.Ch. 235; 116 L.T. 62.
- (4) *Meyer & Co. v. Faber (No. 2)*, [1923] 2 Ch. 421; Digest Supp.; 93 L.J.Ch. 17; 129 L.T. 490.
- (5) *Re Francke and Rasche*, [1918] 1 Ch. 470; 2 Digest 150, 225; 87 L.J.Ch. 273; 118 L.T. 211.
- (6) *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.* (1882), 7 App.Cas. 795; 41 Digest 924, 8135; 52 L.J.P. 1; 47 L.T. 198.

SUMMONS to determine questions arising under the Defence (Trading with the Enemy) Regulation, 1940, in the winding up of the Banca Commerciale Italiana. All the facts are set out in the judgment.

I. J. Lindner for the applicant.

M. L. Gedge for the first three respondents, Thomas Cook & Son, Ltd., Barclays Bank, Ltd., and British Shareholders' Trust, Ltd.

R. F. Roxburgh, K.C., *Sir Norman Touche* and *Owen Bateson* for the fourth respondent, Pacific Steam Navigation Co.

F. E. J. Allemes for the fifth respondent, Duncan, Fox & Co., Ltd.
S. Pascoe Hayward for the sixth respondent, Henry Frei.

A BENNETT, J.: Before answering the questions asked by the summons, it is necessary, I think, to understand the effect of the Defence (Trading with the Enemy) Regulations, 1940, and of the order made on Sept. 25, 1940, by the Board of Trade for the winding up of the business of the Banca Commerciale Italiana. It is also, I think, necessary to ascertain the position of Mr. Kettle under the order, and to whom he is responsible for the discharge of the duties thereby imposed upon him.

B The regulation was obviously drafted with the Trading with the Enemy Amendment Act, 1916, s. 1, in mind. In many respects the language of the regulation and of the section are identical, and so judicial expositions of the meaning and effect of sect. 1 of the Act must, I think, be regarded as authorities upon the meaning and effect of the regulation. The regulation purports to amend the Trading with the Enemy Act, 1939, and to introduce into that Act a new section, sect. 3A, which provides as follows:

C (1) Where any business is being carried on in the United Kingdom by, or on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies, the board may, if they think it expedient so to do, make (a) an order (hereinafter in this section referred to as a "restriction order") prohibiting the carrying on of the business either absolutely or except for such purposes and subject to such conditions as may be specified in the order; or (b) an order (hereinafter in this section referred to as a "winding-up order") requiring the business to be wound up, and the making of a restriction order as respects any business shall not prejudice the power of the board, if they think it expedient so to do, at any subsequent date to make a winding-up order as respects that business.

D (2) Where an order under subsect. (1) of this section is made as respects any business, the Board of Trade may, by that or a subsequent order, appoint a controller to control and supervise the carrying out of the order, and, in the case of a winding-up order, to conduct the winding up of the business, and may confer on the controller any such powers in relation to the business as are exercisable by a liquidator in the voluntary winding up of a company in relation to the company (including power in the name of the person carrying on the business or in his own name, and by deed or otherwise, to convey or transfer any property, and power to apply to the court to determine any question arising in the carrying out of the order), and may by the order confer

E the purpose of giving full effect to the order.

F The meaning and effect of an order to wind up a business made under the Trading with the Enemy Amendment Act, 1916, s. 1, were discussed by YOUNGER, J., in *Re W. Hagelberg Akt.* (1). The question under consideration in that case was the right of English creditors of an enemy company, whose English business had been ordered to be wound up, to be paid out of the assets of the English business. The decision was that creditors of the enemy company whose debts did not arise out of transactions connected with the English business were not entitled to be paid out of the assets of the English business *pari passu* with creditors whose debts arose out of transactions connected with that business. The following observations were made by YOUNGER, J., at p. 509:

G The winding up directed by the Act is not a winding up of a company, nor the liquidation of the affairs of a firm or individual. It is merely the winding up of a business in the United Kingdom of a particular kind of company, firm, or person; the other property of its owner is left quite untouched by the Act, and, although for convenience the language of liquidation is copiously employed, one may perhaps hazard the conjecture that it was not the apprehended insolvency so much as the reputed acquisitiveness of such businesses that attracted the attention of the legislature to them in this statute. The truth is that although since the present war began we have been made

H familiar with the notion of branches and agencies as things distinct from the principal business of their owners, and as having rights and liabilities of their own, a notion, for instance, very clearly embodied in the licences granted by the Secretary of State to the London agencies of enemy banks and in the proclamation of Sept. 9, 1914, still I conceive that notion is unknown to the common law, and a statute which for its own purposes gives it effect must itself be referred to in order to ascertain the incidents which either expressly or by reasonable implication it has attached to the conception.

In *Re Th. Goldschmidt, Ltd.* (2), YOUNGER, J., said as follows, at p. 197:

I have already, in *Re W. Hagelberg Akt.* (1) and *Re Kastner & Co.* (3), considered at length the scope and purpose of the Trading with the Enemy Amendment Act,

1916, s. 1. The soundness of these decisions was not questioned upon this summons either by Gore-Browne on behalf of the controller or by Austen-Cartmell on behalf of the Board of Trade; and the principle upon which they proceeded, if it be correct, has an important bearing upon the question which now arises for decision. These cases show that a business with which under the Act the Board of Trade may deal, either by prohibiting it from being carried on except for the purposes and subject to the conditions specified in the order of the board, or by requiring it to be wound up, is treated by the Act as an entity separate and distinct from any other property, whether in the United Kingdom or abroad, and from any other business not in the United Kingdom, of the person, firm, or company owning or controlling it; that, accordingly, it is only the debts of the business, as distinct from the debts of such person, firm, or company irrespective of the business, that under the Act are to be paid; and it is only the assets of the business, as distinct from the general assets of that person, firm, or company, that are made, so far as the Act is concerned, available for their discharge. As it is the purpose of the Act either to curtail or destroy businesses which are obnoxious to it, the creditors of the business are alone provided for, and the assets of the business are alone taken in hand to provide for these creditors. True, these assets comprise all the assets of the business, whether subject to charges or not, for otherwise the avowed purpose of the Act might fail to have complete effect, but they do not comprise any assets except those which can be properly included in the description assets of the business. Further, a company owning such a business is not placed in liquidation by virtue of an order under the Act directing the business in the United Kingdom to be wound up. On the contrary, the Act expressly empowers the Board of Trade to present a petition for the winding up of the company by the court, enacting in sect. 1 (7), that an order under the Act shall be a ground on which the company may be wound up by the court. Too much importance, therefore, must not be attached to the fact that the language of liquidation is copiously employed in the section. Indeed, it is mainly in connection with the controller, whose possible powers are described by reference to those exercisable by a liquidator in a voluntary winding up of a company, that that language is used.

Considered in the light of these observations, a winding-up order made under the regulation must be held to create for the purpose of winding up a new entity, namely, the business ordered to be wound up, and this entity is considered as one which can possess assets and have liabilities of its own. The winding up is a winding up not by a court of law carrying out statutory provisions, but by the Board of Trade performing the duties imposed upon it by the regulation as an act of state. I apprehend that under such an order the Board of Trade is charged with the duty of seeing that all outstanding assets of the business are got in and converted into cash and of paying the creditors of the business and closing the business down. This last step is probably, from the point of view of the nation at war, the most important step of all. It stops trade activities in England of enemies of the state.

When a winding-up order is made under the regulation, it is not essential that a supervisor or controller should be appointed, see LORD STERNDALE, M.R., in *Meyer & Co. v. Faber* (4), at p. 431, and YOUNGER, L.J., in the same case, at p. 448. Presumably if a winding-up order is made but no supervisor is appointed, those in charge of a business ordered to be wound up who do not comply with the order can be proceeded against under sect. 3A (7), which provides that if any person contravenes or fails to comply with any order made under subsect. (1) of this section, he shall be guilty of an offence of trading with the enemy.

Sect. 3A (3) is imperative in its terms, and is as follows, excluding the proviso :

Where a restriction order or a winding-up order is made as respects any business, the distribution of any assets of the business which are distributed while the order is in force shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and the said assets of the business shall, so far as they are available for discharging unsecured debts, be applied in discharging unsecured debts to creditors of the business who are not enemies in priority to unsecured debts due to any other creditors, and any balance, after providing for the discharge of all liabilities of the business, shall be distributed among the persons interested in the business in such manner as the Board of Trade may direct.

The duties imposed by this subsection are, in my opinion, duties imposed on the Board of Trade, since they are winding up the business, and it must be for them to see that the assets got in under their order are distributed, in the right order of priority, to the creditors who are entitled to participate in them.

Subsect. (8) of the regulation provides as follows :

Where an order under subsect. (1) of this section has been made as respects a business carried on by any individuals or by a company, no bankruptcy petition, or petition for sequestration or summary sequestration against the individuals, or petition for the winding up of the company, shall be presented, or resolution for the winding up of the company passed, or steps for the enforcement of the rights of any creditors of the individuals or company taken, without the consent of the Board of Trade, but where the business is carried on by a company the Board of Trade may present a petition for the winding up of the company by the court, and the making of an order under this section shall be a ground on which the company may be wound up by the court.

It is not necessary or desirable for me to express any opinion as to the scope of this subsection. What is clear is that it is the consent of the Board of Trade which has to be obtained by creditors of the company or individuals whose business is being wound up before such creditors may do the acts referred to in the subsection.

The last subsection, subsect. (9), provides for payment of the remuneration of a controller where one is appointed, and for payment of any costs, charges and expenses out of the assets of the business. The subsection is as follows :

Where an order is made under this section appointing a controller for any business, any remuneration of, and any costs, charges and expenses incurred by the controller, and any other costs, charges and expenses incurred in connection with the control and supervision of the carrying out of the order shall, to such amount as may be certified by the Board of Trade, be defrayed out of the assets of the business, and as from the date of the certificate, be charged on those assets in priority to any other charges thereon.

It is clear that no payment for any costs, charges and expenses out of the assets of a business which is being wound up by the Board of Trade can be made without their certificate. It also seems to me clear that this court cannot make an order for payment of any costs out of such assets. They are not under the control of this court. The regulation does not contain any provision authorising this court to deal with the assets. This court is not administering the assets.

I now pass to the order of Sept. 25, 1940, from which Mr. Kettle derives his authority. When this order was made, the bank was carrying on every description of banking business from offices in Threadneedle Street, London, and Regent Street, London. The bank was established under the laws of the kingdom of Italy. Its head office is, or was, at Milan. It started to carry on business in England in 1911, and it has complied with the requirements of the Companies Act, 1929, Pt. XI.

By the order of Sept. 25, 1940, made under the aforesaid Defence Regulation, it is ordered by para. 1 that the business of the bank shall be wound up. The business ordered to be wound up is no doubt the business of the bank carried on in the United Kingdom, at the only English branches, namely, the Threadneedle Street branch and the Regent Street branch. By para. 2, Mr. Kettle is appointed to control and supervise the carrying out of the order contained in para. 1, and to conduct the winding up of the said business. By para. 3, powers are conferred upon Mr. Kettle in relation to the business and to the winding up thereof. Some of these powers, namely, those enumerated in sub-paras. (a), (b) and (c), are exercisable without reference to or the consent of the Board of Trade. Others enumerated in sub-para. (d) are exercisable with the sanction of the Board of Trade.

The powers exercisable without reference to the Board of Trade are, first, such powers as are exercisable in relation to the business and to the winding up thereof as are exercisable by a liquidator in the voluntary winding up of a company under the Companies Act, 1929. These, I apprehend, are the powers enumerated in the Companies Act, 1929, s. 191 (2), such powers being given to a voluntary liquidator by sect. 248 (1) (b) of the last-mentioned Act. Secondly, there are included powers to take possession of all or any of the assets of the business, and to require any person having possession or control of any of such assets to deliver or transfer the same to him or as he shall direct, and thirdly, power to close down the business and to determine contracts relating to the said business.

The powers which he may exercise only with the sanction of the Board of Trade are these :

(i) to pay any classes of creditors of the business in full; (ii) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained

or sounding only in damages in respect of the said business; (iii) to compromise debts and liabilities resulting in debts and all claims present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist in respect of the said business between the Banca Commerciale Italiana and any other person and all questions in any way relating to or affecting the assets of the said business on such terms as may be agreed and to take any security for the discharge of any debt, liability or claim and to give a complete discharge in respect thereof; (iv) to apply to the court to determine any question arising in the carrying out of this order.

Having regard to the terms of the regulation and of the order, I have no doubt but that Mr. Kettle is the officer and agent of the Board of Trade responsible to them and to them only for his actions. It is to the Board of Trade, I think, that he must apply for directions as to how he is to discharge his duties. It is for the Board of Trade to give him instructions as to how he is to get in outstanding assets and how he is to convert assets into cash, what steps he is to take to ascertain the creditors of the business, and when and amongst whom cash is to be distributed.

The reference in the regulation to the Companies Act, 1929, is only made for the purpose of ascertaining and defining the powers conferred upon Mr. Kettle. The reference for this purpose does not import into the winding up by the Board of Trade the statutory provisions and rules for ascertaining the creditors of or for dealing with the claims against a company which is being wound up under the Companies Act. The winding-up order brings into existence this anomalous entity, a business, and charges the Board of Trade with the duty of winding it up. It is for them to direct their controller as to the steps he is to take to wind this entity up. If any question arises as to whether a person is a creditor or not of the business, it is for the Board of Trade to determine that question. The Board of Trade can no doubt refer that question to this court for decision, but the person claiming to be a creditor cannot approach this court.

Having now stated what I conceive to be the effect of the regulation and of the winding-up order, and Mr. Kettle's position thereunder, I can now come to the questions asked by the summons which has been issued with the consent of the Board of Trade. The first question asked is as follows:

Whether upon the true construction of the Trading with the Enemy Act, 1939, s. 3A (3), the applicant, in calculating the rate in the pound at which a dividend, whether interim or final, can be paid to unsecured creditors of the said business out of the assets of the said business, ought to have any and what regard to the contingent claim of the respondents Thomas Cook & Son, Ltd., Barclays Bank, Ltd., and the British Shareholders' Trust, Ltd., under the said guarantee for the sum of £20,300 if at the time of the payment of the said dividend (a) such claim has become an absolute vested claim certain in amount, or (b) such claim is still contingent or uncertain in amount.

The relevant facts, shortly stated, are that in the year 1928, under a written agreement, dated Feb. 7, 1928, between Thomas Cook & Son, Ltd., of the first part, a Belgian company, named *Compagnie Internationale des Wagon-lits et des Grands Express Européens* of the second part, and the British Shareholders' Trust, Ltd., of the third part, 6 per cent. sterling bonds to bearer to the value of £2,000,000 were issued by the Wagon-lits Co., and sold to Thomas Cook & Son, Ltd.

By this agreement the Wagon-lits Co. covenanted and agreed with Thomas Cook & Son, Ltd., to discharge all stamp duties and fees which might be payable in respect of the issue of the said £2,000,000 bonds. On May 8, 1933, £1,333,200 of these bonds were outstanding, and on that day the bank entered into an instrument of guarantee expressed to be supplemental to the said agreement of Feb. 7, 1928, which agreement is referred to as the principal agreement, whereby the bank guaranteed to Thomas Cook & Son, Ltd., the due and punctual payment by the Wagon-lits Co. of all stamp duties and fees which might become payable under the principal agreement in respect of the said £1,333,200 6 per cent. bonds. The transaction appears on the face of the guarantee to have been entered into by the Threadneedle Street branch of the bank, and to have been a transaction connected with the business of that branch. The bonds issued by the Wagon-lits Co., and now outstanding are thought to be in enemy-occupied territory. No claim against the bank upon the guarantee has yet arisen; the probability is that no claim will ever arise. It is on these facts that the question which I have read arises.

Thomas Cook & Son, Ltd., are now the only persons interested under the

guarantee. The question should be amended by striking out the reference in it to Barclay's Bank and the British Shareholders' Trust, Ltd., who are not parties to the summons. I am proceeding to answer this question upon the footing that since the application before me, in its present form, has the consent of the Board of Trade, they wish this court to decide it for them. Indeed, it is upon this footing, and upon this footing only, that I am dealing with this and with all the questions asked by the summons.

A Upon the facts stated, Thomas Cook & Son, Ltd., are not at the present time creditors of the business of the bank now being wound up. In paying a dividend to the creditors of the business, the contingent claim of Thomas Cook & Son, Ltd., can be disregarded. (See *Re Francke & Rasche* (5).) But if, before a dividend is paid, a sum of money becomes payable by the bank to Thomas Cook & Son, Ltd., because the Wagon-lits Co. do not perform their obligations under the principal agreement, then in my judgment Thomas Cook & Son, Ltd., will be entitled to participate in that dividend. I entirely concur in the opinion of SIMONDS, J., in his unreported decision on July 22, 1942, in the matter of this bank, that there is no reason for confining the debts due to creditors of the business to those debts which were debts at the date of the winding-up order. The proper rule, as SIMONDS, J., said, is to treat as debts those claims which have matured into debts at a date when a distribution falls to be made.

C The second question asked is as follows :

Whether upon the true construction of the said subject. (a) the respondents the Pacific Steam Navigation Co., and (b) the respondents Duncan, Fox & Co., Ltd., are creditors of the said business in respect of their respective claims under the said bail bond or whether although creditors of Banca Commerciale Italiana they are not creditors of the said business in respect of the said claims.

D The facts are that the respondents, the Pacific Steam Navigation Co., are the owners of a motor vessel named the Lobos. Some Italians are, or were, the owners of another motor vessel named the Virgilio. Early in the year 1939, these two vessels being at sea off the coast of South America came into collision with one another. Both vessels sustained damage, and so did some of the cargo with which the Lobos was laden. In the year 1939, the owners of the Lobos, and persons who were owners of some of the cargo with which she was laden, took proceedings in the Admiralty Division of this court against the owners of the Virgilio, claiming damages for injuries to the Lobos and to the cargo respectively. The reference to the record in this action is 1939, L. No. 300, folio 39. Later in the same year other owners of cargo with which the Lobos was laden brought a second action in the Admiralty Division of this court, also claiming damages for injuries to their cargo. The reference to the record in that action is 1939, L. No. 976, folio 132.

In order to avoid the arrest of the Virgilio, the owners of that vessel procured the bank to give to the Admiralty Division of this court on Aug. 24, 1939, what is known as a bail bond. I will read this document, which is in this form :

G In the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty). 1939—L. No. 300, folio 39. Whereas an action of damage by collision is now pending in the Admiralty Division of the High Court of Justice between the owners of the motor vessel Lobos and certain owners of cargo now or lately laden on board her, and the owners of the motor vessel Virgilio, now therefore we, the Banca Commerciale Italiana, of 32, Threadneedle Street, in the City of London, hereby submit ourselves to the jurisdiction of the said court, and consent that if they the said defendants shall not pay what may be adjudged against them in the said action and in action 1939, folio 132, with costs, execution may issue forth against us, our goods and chattels, for a sum not exceeding £90,000.

H That is executed by the Banca Commerciale Italiana. On the back of it, there is an endorsement in these terms :

We, the sureties to the foregoing bail bond, hereby consent and agree that the same shall apply to any compromise or settlement between the parties of the subject matter of the action or to an admission of liability therein and to any amount of salvage, damages, interest and costs agreed by the defendants to be paid in the said action or assessed by the registrar and merchants after admission of liability or compromise, so that if the defendants shall not pay such amounts we shall be liable for the same in the same manner as if they had been adjudged by the court.

The circumstances in which this bail bond came to be given and the negotiations which led up to it are set out in para. 15 of Mr. Kettle's affidavit sworn on Nov. 23, 1942, in support of this summons and in the exhibit to that affidavit. Although the bail bond was given upon the instructions of the Genoa branch of the bank, the letters in the exhibit G, establish, in my judgment, clearly that the bond was given in the course of transacting the ordinary business of the Thread-needle Street branch of the bank. The bond was given to the Admiralty Division of this court to free the *Virgilio* from liability to arrest at the suit of the plaintiffs in the two actions. A

The first of these actions, that is to say, 1939 L. No. 300 folio 39, came on for trial before BUCKNILL, J., in Nov. and Dec., 1939, and he pronounced judgment on Feb. 7, 1940, the order as drawn up being in the following terms :

The judge, having maturely deliberated, pronounced the collision in question in this action to have been occasioned by the fault or default of the owners, master and crew of the motor vessel *Virgilio*, or some or one of them and by the fault or default of the owners, master and crew of the motor vessel *Lobos*, or some or one of them, and ordered the damages arising therefrom to be borne as to three-fifths by the owners of the motor vessel *Virgilio* and as to two-fifths by the owners of the motor vessel *Lobos*, and condemned the defendants and their bail in three-fifths of the plaintiffs' claim and also condemned the plaintiffs and their bail in two-fifths of the defendants' counterclaim, and referred the respective claims to the registrar, assisted by merchants, to report the amount in respect thereof. The judge further condemned the defendants in three-fifths of the plaintiffs' costs and the plaintiffs in two fifths of the defendants' costs. B C

On June 10, 1940, war broke out between this country and the kingdom of Italy, and there was considerable delay on the part of the plaintiffs in this action in prosecuting their claim under their judgment. This delay is explained as having been caused by the fact that many of the vouchers and documents required in support of the claims and much of the information required for the purpose thereof had to be obtained from various foreign countries in South America and elsewhere. D

On Oct. 23, 1942, the claim on behalf of the Pacific Steam Navigation Co., as owners of the *Lobos*, and, on Oct. 26, 1942, the claim on behalf of the owners of cargo laden on board her, who were plaintiffs in this action, 1939, L. No. 300, were respectively filed in the Admiralty registry.

These claims have now been reported upon by the Admiralty Registrar, and his report, subject to the amendment of one item in the claim of the Pacific Steam Navigation Co., has been confirmed by BUCKNILL, J.. The result of the reports is stated in an affidavit of Mr. W. L. Bateson, filed in these proceedings on Feb. 17, 1943. Mr. Bateson is the solicitor acting for the plaintiffs in the Admiralty action. It appears from this affidavit that there is due to the Pacific Steam Navigation Co., as owners of the *Lobos*, three-fifths of the sum of £56,388 17s. 9d., that is to say, £33,833 6s. 8d., with interest thereon at the rate of 5 per cent., per annum, from May 13, 1939, to Sept. 3, 1939, and thereafter at the rate of 4 per cent., per annum until payment, together with their costs of proving their claim. The established claim of the cargo owners, plaintiffs in this action, need not be further considered. No question is asked about their position on this summons. The quantified claim of the Pacific Steam Navigation Co., against the owners of the *Virgilio*, is liable to be reduced by the amount of the cross-claim of the owners of the *Virgilio*, when that cross-claim has been quantified. E F G

Duncan, Fox & Co., Ltd., are amongst the plaintiffs in the action, 1939, L. No. 976. In that action BUCKNILL, J., on Jan. 11, 1943, ordered that judgment be entered against the defendants, the owners of the motor ship or vessel *Virgilio*, and the bail in the following terms : (1) The defendants to pay to the plaintiffs 60 per cent. of the damages occasioned to the plaintiffs in consequence of the collision in question together with their costs of the action to be taxed ; (2) The damages to be referred to the registrar and merchants to assess the amount thereof. The registrar made his report on Jan. 19, 1943, and reported that the claim of Duncan, Fox & Co., Ltd., amounted to £214 0s. 11d., the items in the report being those therein numbered 28, 29, 30, 31 and 32, and that they were entitled to recover from the owners of the *Virgilio* three-fifths of this sum with interest at the rate of 5 per cent., per annum, from Feb. 23, 1939, to Sept. 3, 1939, and at the rate of 4 per cent. per annum, thereafter until payment, together with the costs of proving their claim. On Feb. 5, 1943, BUCKNILL, J., ordered H

that the registrar's report be confirmed. The owners of the *Virgilio* had no right of set-off or cross-claim against Duncan, Fox & Co., Ltd.

A I will answer question 2 of the summons by declaring that the claims of the respondents, the Pacific Steam Navigation Co., Ltd., and of Duncan, Fox & Co., Ltd., against the Banca Commerciale Italiana arise out of the business of that company transacted at Threadneedle Street, London. This does not seem to me to be a question of the construction of the regulation, but a mere question of fact. Furthermore, the claims of the said respondents, although no doubt based on the said bail bond, do not arise under it, but arose because of the judgment of BUCKNILL, J., the reports of the Admiralty Registrar, and the confirmation of those reports by BUCKNILL, J. I will now read Question 3 :

B Whether upon the true construction of the said subsection, the applicant, in calculating the rate in the pound at which a dividend, whether interim or final, can be paid as aforesaid, ought to have any and what regard to (1) the contingent claim of the respondents, the Pacific Steam Navigation Co., Ltd., under the said bail bond, or (2) the contingent claim of the respondents, Duncan, Fox & Co., Ltd., under the said bail bond, if at the time of payment (a) such claim has become an absolute vested claim certain in amount, or (b) such claim is still contingent or uncertain in amount.

C Dealing first with the claim of Duncan, Fox & Co., Ltd., it is common ground between the parties that, although they have not yet done so, they can at any moment, if they desire to do so, get what is the equivalent in the Admiralty Division of judgment against the bank for the amount of their established claim and costs. Strange as it may seem to those who pursue the amiable secrets of the law in the Chancery Division of this court, those who practise in the Admiralty Division never seem to find it necessary to set in motion the various processes of execution by which a successful litigant can endeavour to enforce payment of the sums of money to which he has been held to be entitled.

D The greater number of the litigants in the Admiralty Division seem to be Lloyds underwriters, and, whilst these gentlemen are ready to contest their liability to the uttermost, once it has been finally established they seem to pay.

E Duncan, Fox & Co., Ltd., have now established their right to recover from the bank a specific sum of money and costs. Although they have not yet done so, they can at any moment put themselves into the position of judgment creditors of the bank for this sum and costs. Their debt arose out of the business of the bank now being wound up. Although they had not established their claim to be creditors when the order to wind up the business was made, I propose to follow the unreported decision of SIMONDS, J., to which I have referred, and to decide that if and when a further distribution of the assets of the business is made amongst the creditors thereof, Duncan, Fox & Co., Ltd., are entitled to participate in that distribution in respect of their established claim and the costs of proving it.

F The Pacific Steam Navigation Co. are not yet in a position to get the Admiralty equivalent of a judgment against the bank because the amount of the cross-claim of the owners of the *Virgilio* against them has not yet been quantified. As I understand the Admiralty practice, the Pacific Steam Navigation Co., under a judgment such as that of Feb. 7, 1940, can only become judgment creditors for the balance of what has been found to be due to them after deducting therefrom the sum found due by them to the owners of the *Virgilio*. (See *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (6))

G I have already stated that, in my judgment, it is for the Board of Trade to determine all questions arising in the winding up of the business of the bank, and I only express my opinion upon the way in which the claims of the Pacific Steam Navigation Co. should be dealt with because the summons asking the

H questions has been issued with the consent of the Board of Trade, and from that fact I infer that the Board of Trade wish the court to state what should be done.

It appears from para. 21 of Mr. Kettle's affidavit that when paying dividends to creditors of the business, sums have been set aside to meet corresponding dividends on the maximum amount of claims under the said bail bond. If I may say so, this appears to me to have been a proper course to take. In an affidavit filed on Dec. 16, 1942, Mr. W. L. Bateson has sworn that the amount of the claim by the owners of the *Virgilio* against the Pacific Steam Navigation Co., will not be more than £12,000. Under para. 3 (d) (ii) of the winding-up

order, Mr. Kettle has power, with the sanction of the Board of Trade, to compromise with any creditor or person claiming to be a creditor or having any claim present or future, certain or contingent, in respect of the business being wound up.

In my judgment, in the circumstances the fair and proper way for the controller to deal with the claims of the Pacific Steam Navigation Co. is to endeavour to make a provisional compromise of it upon the basis that their claim now quantified will be reduced when the claim against them of the owners of the *Virgilio* has been quantified by the amount of that claim. If a provisional compromise can be arrived at on this basis, the Board of Trade should be asked to sanction it, and, if sanctioned, the Pacific Steam Navigation Co. should be dealt with upon the footing that they are creditors of the business for the agreed sum and should participate in future distributions of assets upon that footing.

If a compromise cannot be arrived at, then, in my judgment, before he makes any further distribution, the controller should make a reserve to meet what he considers will be the ultimate liability of the business to the Pacific Steam Navigation Co., when the claim against them of the owners of the *Virgilio* has been quantified, and should obtain the sanction of the Board of Trade to this course. If the Board of Trade sanction that course, their controller must then be protected. As I have said, the winding up now in progress is a winding up by the Board of Trade. This court cannot tell them what their officer is to do, nor can this court give orders to their officer; but the course I have indicated is the one I should direct an officer of this court to take if the business of the bank was being wound up by this court and the controller, as an officer of the court, had applied to me, as a judge thereof, for directions.

I will answer Question 3 by declaring that the applicant ought to include Duncan, Fox & Co., Ltd., as a creditor of the business when paying any further dividends to creditors thereof, and ought to take steps to effect a provisional compromise of the claims of the Pacific Steam Navigation Co. against the said business, and, if successful, ought to endeavour to obtain the sanction of the Board of Trade to such compromise. But, if unsuccessful, ought, with the sanction of the Board of Trade, when calculating the rate in the pound at which any further dividends can be paid, to make proper provision for the claims of the Pacific Steam Navigation Co., against the said business.

Having regard to those answers, it does not seem to me to be necessary to answer Question 4.

Question 5 is as follows :

Whether upon the true construction of the said subsection, the applicant, in the winding up of the said business, is at liberty to apply in relation to creditors of the said business the provisions which, under Nos. 104, 105 and 106 of the Companies (Winding-Up) Rules, 1929, are applicable in relation to creditors of a company being wound up under the Companies Act, 1929, and, if so, how and to what extent any one or all of such rules should be applied.

I have endeavoured to make it clear that the operation which is being carried out under the winding-up order of Sept. 25, 1940, is not a winding up by this court. It is a winding up by the Board of Trade of a business; an anomalous entity created by the winding-up order. To such a winding up the provisions of the Companies (Winding-Up) Rules, have no application, and sect. 3A (3) of the regulation does not incorporate those rules into the winding up. But, no doubt, if the Board of Trade desire that he should do so, they can give directions to the applicant, as their officer, to apply those rules to the winding up of the business.

For similar reasons the answer to Question 6 of the summons must be that sect. 3A (3) of the regulation does not apply any of the provisions of the Companies Act, 1929, ss. 261, 262, to the winding up of the business. In conducting the winding up of a business under an order made by the Board of Trade similar in terms to the order of Sept. 25, 1940, four matters must, as it seems to me, be kept clearly in mind.

The first is that it is a business and not a company or the affairs of a partnership or the estate of an individual which is being wound up. The second is that the winding up is being conducted by the Board of Trade, who alone under the regulation are authorised to direct the way in which the business is to be wound up and its creditors ascertained and paid. The third is that a controller, if appointed, is the officer of the Board of Trade. It is for them to give him

orders as to how he is to discharge his duties. It is to them that he is answerable for his conduct. It is from them that he must seek guidance. Lastly, as it seems to me, the jurisdiction of this court under the regulation and the winding-up order, is merely advisory, exercisable only at the instance of the Board of Trade or of the controller with their consent. No creditor of the business, or person claiming to be such, is given any right under the regulation or the order to approach this court.

A The last matter raised by the summons with which I am asked to deal is the question of the costs of these proceedings. As I have said, I have no power to make an order for payment of these out of the assets of the business. There is, of course, no difficulty in deciding that the costs which the controller has made himself liable to pay to his solicitors for bringing the present summons before the court are costs incurred by him in connection with the carrying out of the winding-up order. These no doubt can be paid out of the assets of the business to such amount as may be certified by the Board of Trade. Having regard to the fact that this summons was issued in its present form with the consent of the Board of Trade, and presumably because they wished for the opinion of this court upon the questions asked by their summons, putting a liberal interpretation upon the language of sect. 3A (9) of the regulation, I can properly hold that, upon its true construction, the words :

C . . . other costs, charges and expenses incurred in connection with the control and supervision of carrying out the order . . .

extend to and include the costs incurred with their solicitors by the respondents to this summons, and are costs which may, to such amount as may be certified by the Board of Trade, be defrayed out of the assets of the business. I will not make any order for payment of costs, for I am satisfied that I have no power to make such an order in the absence of the Board of Trade. I will make an order for taxation as between solicitor and client of the costs of the applicant and of the respondents to this summons. It may well be that when these costs have been taxed the Board of Trade will certify for their payment out of the assets of the business : but in case they do not I will give liberty to any party to apply for an order for payment and to add the Board of Trade as respondents to any such application.

E I will conclude by saying that it seems to me very desirable that if any further applications are made in this matter or under any similar order for the winding up of a business, the Board of Trade should be named as respondents. This court can then be sure that it does not decide any question arising in the winding up which the Board of Trade does not wish it to decide.

Declaration accordingly.

F Solicitors : *Slaughter & May* (for the applicant and the sixth respondent) ; *Ashurst, Morris, Crisp & Co.* (for the first three respondents) ; *Middleton, Lewis & Clarke* (for the fourth respondent) ; *Wallons & Co.* (for the fifth respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

G

LEANSE v. EGERTON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J.), February 23, 1943.]

Nuisance—Creation by stranger—Presumed knowledge of occupier—Liability of occupier for continuing nuisance—Glass falling from raid-damaged premises.

H

As a result of an air raid which took place on the night of Friday, Nov. 15, 1940, damage was caused to the window frames and glass of an empty house of which the defendant was the owner. No steps were taken to remedy the damage until the following Monday, because the offices of the agents were closed on Saturday and there was difficulty in getting builders to work on that day. On Nov. 19, before the damage had been repaired, the plaintiff was struck on the head by a piece of glass which fell from the house as she was passing, with the result that she sustained injuries which had a serious effect on her health :—

HELD : the house in its damaged condition after the air raid was a nuisance

and the defendant was liable for continuing the nuisance, of which he had presumed knowledge on Nov. 16, since he had failed to abate it.

[EDITORIAL NOTE.] The liability of the occupier for continuing a nuisance was settled by the decision in *Sedleigh-Denfield v. O'Callaghan* (2). The present case deals with the question of "presumed knowledge" of the nuisance and the taking of reasonable precautions to avert danger to others upon their lawful occasions. Where premises abut directly upon the highway it is obviously necessary that passers-by must be protected in some way. This may be done by removing the danger or by diverting traffic, and it seems essential that immediate steps must be taken in this respect upon premises becoming for any reason a potential danger to passers-by.

AS TO CONTINUING A NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 84, 85, para. 148; and FOR CASES, see DIGEST, Vol. 36, p. 214, Nos. 567-575.]

Cases referred to:

- (1) *Cushing v. Walker (Peter) & Son (Warrington & Burton), Ltd.*, [1941] 2 All E.R. 693.
- (2) *Sedleigh-Denfield v. O'Callaghan (Trustees for St. Joseph's Society for Foreign Missions)*, [1940] A.C. 880; [1940] 3 All E.R. 349; Digest Supp.; 109 L.J.K.B. 893.

ACTION for damages for personal injuries caused by a piece of glass falling from premises damaged by enemy action. The facts are fully set out in the judgment.

Phineas Quass for the plaintiff.

N. R. Fox-Andrews for the defendant.

VISCOUNT CALDECOTE, L.C.J.: In this case the plaintiff, when walking along Curzon Street, was struck on the head by a piece of glass large enough to cause injuries which have had some rather long-standing effects upon the plaintiff's health; and she claims damages against the owner of the premises from which, it must now be taken, the glass fell.

I think the law is not really in question here, nor is it difficult. As the most convenient statement of the law I refer to the passage which I have here in *Cushing v. Peter Walker & Son (Warrington & Burton), Ltd.* (1), quoted from the opinion of LORD ROMER in *Sedleigh-Denfield v. O'Callaghan (Trustees for St. Joseph's Society for Foreign Missions)* (2), at p. 371.

The respondents did not themselves create this potential nuisance, and cannot, therefore, be held liable for its creation, but an occupier of land upon which a nuisance has been created by another person is liable if he "continues" the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question which probably does not admit of a comprehensive answer, but I agree with my noble and learned friend VISCOUNT MAUGHAM, whose opinion I have had the privilege of reading, that the occupier "continues" a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so.

An air raid took place on the night of Nov. 15-16. I am satisfied that the consequence of that raid was that damage was caused to the window frames and glass of this house. From the moment when the damage was done I think that there was a danger to people passing on their lawful occasions along the road. In other words, I think the house was a nuisance in the condition in which it was, but the defendant certainly did not do anything to create that potential nuisance, to use the phrase of LORD ROMER, and he is liable only, if he continued the nuisance, putting the case upon nuisance alone.

Lord Egerton was the owner of the house but he did not live in it. He had no furniture therein. He did not even have a housekeeper on the premises. There was nobody on the premises either to watch or take care of anything which might happen to the house or to remove anything which might make the house a nuisance if something had damaged it so as to make it dangerous. But, in my judgment, that cannot make the position any better from the defendant's point of view. The case must be treated in precisely the same way as if, instead of the house being empty and there being no caretaker, Lord Egerton himself or somebody in his service had lived there. The fact that Lord Egerton lived either somewhere else in London or in the country—at any rate, not these premises—and did not know of the damage to the house, does not, in my judgment, prevent him from having what is called "presumed knowledge." He had presumed knowledge on Saturday, Nov. 16, and it is said that on the Monday, which was the first day when there was any reasonable opportunity of doing anything, immediate action was taken, or steps were taken for immediate action,

because the agents, Messrs. Winkworth & Co., whose offices were closed on Saturday and Sunday, wrote on the Monday that they were getting in touch with the builders. They had first to get the consent of the solicitors and then telephone to the builders, but before anything was done, unhappily, the glass fell.

With the "presumed knowledge" of what happened, which, I think, the defendant first had on the morning of Nov. 16, it is quite clear that the house should not have been left as it was just because it was inconvenient or difficult or troublesome to make arrangements with regard to it. Supposing instead of a loose pane of glass there had been an obvious injury to a balcony which was hanging down, nobody could suppose that the occupier of the premises could escape liability for leaving that dangerous state of affairs merely because it happened to be a Saturday or even a Sunday.

I think something was required to be done by the defendants. It may be that if there had been somebody in the house the proper thing, and the easiest thing, would have been to go and pull out what broken glass there was, or it may be the police should have been informed and a proper warning given, or a proper barrier formed to prevent people walking close by the house and to compel them to walk in the road. But nothing was done, for a reason which is quite intelligible from one point of view, although a reason which does not seem to me to excuse the defendant from liability, namely, the difficulty, which everybody knows exists, of getting such work done on a Saturday. There would have been no nuisance, of course, if people had not been able to get into the range of injury from the house. A damaged house in itself is no nuisance; it is only a nuisance when it is likely to cause injury or annoyance to people coming within the danger area.

I have come to the conclusion that in this case the defendant is liable on the grounds which I have stated, that there was a nuisance, and that he continued the nuisance without taking any action to prevent the nuisance from injuring anybody, and I think on those grounds, unfortunate as it is for Lord Egerton, the plaintiff is entitled to recover.

Judgment for plaintiff for £275 with costs.

Solicitors: *Franks, Charlesly & Co.* (for the plaintiff); *Ellis, Peirs & Co.* (for the defendant).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

ADAMS AND WATTS v. THE RATING AUTHORITY OF SOUTHALL.

[KING'S BENCH DIVISION (Charles and Tucker, JJ.), March 23, 1943.]

Rating—Distress warrant—Rent collected by rent collector—"Person entitled to receive the rent"—Warrant issued against rent collector—Middlesex County Council (General Powers) Act, 1938, s. 118 (2).

The owners of a block of flats employed the appellants, a firm of estate agents and surveyors, to collect the rents. The flats were each separately rated but the tenants paid inclusive rents. At the request of the appellants the rate demands were sent direct to them by the rating authority. By the Middlesex County Council (General Powers) Act, 1938, s. 118 (2), it is provided that the expression "owner" shall mean the person who is entitled to receive the rent. The rates being in arrear the magistrates, at the instance of the respondents, issued a distress warrant against the appellants, even though the appellants had not in their hands sufficient funds to the credit of the owners to cover the rates in arrear. It was contended that the rating authority was entitled to the issue of a warrant against the agents as they were persons entitled to receive the rent within the meaning of sect. 118 (2) of the above Act:—

HELD: on the proper construction of the section, the words "the person entitled to receive the rents" meant a person entitled to receive them for his own use and benefit and not merely as agent, and the summons was wrongly issued against the appellants.

[EDITORIAL NOTE.] A local Act provided for the recovery of rates from the owner. The owner was by the Act defined as the person entitled to receive the rent. These words are held to include only persons entitled to receive the rent for their own use and benefit and do not include an ordinary rent collector who receives the rent merely as agent for the owner. No distress warrant can, therefore, be issued against such an agent.

AS TO RECOVERY FROM PERSONS OTHER THAN OCCUPIER, see HALSBURY, *Hailsham Edn.*, Vol. 27, p. 526, para. 975; and FOR CASES, see DIGEST, Vol. 38, pp. 628, 629, Nos. 1470-1485.]

Case referred to:

- (1) *Nokes v. Strong*, [1909] 2 K.B. 625; Digest Supp.; 78 L.J.K.B. 1041; 101 L.T. 318.

APPEAL by way of case stated from a decision of the Middlesex magistrates sitting at Ealing, who held they were entitled to issue distress warrants for rates against the appellants. The facts are fully set out in the judgment of CHARLES, J.

A. S. Comyns Carr, K.C., and the *Hon. Dougall Meston* for the appellants.

Harold B. Williams for the respondents.

CHARLES, J.: This matter comes before the court on a case stated by justices for the county of Middlesex and concerns a distress warrant issued against the appellants, Adams & Watts. They were proceeded against as agents in respect of rates to which the Southall rating authority said they were entitled and which were in arrear and unpaid, although the appellants did not then have in their hands sufficient sums to the credit of their principals to cover the rates in arrear. It is not suggested—although it was suggested in the summons—that Adams & Watts are persons rated and assessed; they are neither rated nor assessed to a rate and their name does not appear in the rate book. Their position is perfectly plain. The owners of the property were trustees, the property consisted of flats let to various tenants, and the rents, which included the rates, were collected by Adams & Watts, who were the agents to collect the rents and no more. It is stated in the case that the respondents relied on the Middlesex County Council (General Powers) Act, 1938, s. 118, which provides as follows:

Where the owner of any hereditament has agreed with the occupier thereof that the owner shall pay the general rate charged on such hereditament the owner shall be liable to pay to the council of the district in which such hereditament is situate so much of any payment in respect of rent received by him from the occupier as shall represent the proportion of rate included in such payment and so much of such payment may on proof of such agreement be recovered by such council from the owner in the same manner and subject to the same conditions under and subject to which rates are recoverable from occupiers of rated hereditaments. The remedy of such council under this section shall be in addition and without prejudice to their other remedies for the recovery of rates. (2) For the purpose of this section the expression "owner" in relation to a hereditament means the person who is entitled to receive the rent payable in respect thereof.

It is argued on behalf of the rating authority that "receive" does not point only to the person who ultimately receives the rent, but also applies to the person through whose hands it passes, such as an agent, who in fact physically receives the rent. It appears to me that that is a wholly fallacious argument. When the statute says that the owner is the person entitled to receive the rent, that means receive it as his own, and if, for convenience, he appoints an agent to collect his rents, the agent's duty is to pass those rents on. If the owner asks the agent to pay a proportion of those rents to a rating authority, he is at liberty so to do, for it would be the owner's act. I am quite unable to see in these circumstances that the justices were in any way entitled to decide that a distress warrant in respect of arrears of rates should issue against these agents, who were agents only and neither owners nor occupiers.

That being so, I think the proper order, having regard to what I have said, is that the decision of the justices that a distress warrant should issue against the appellants in respect of arrears of rates should be quashed and the appellants are entitled to costs.

TUCKER, J.: I agree. I would only add this. The whole of this case turns upon what is the correct meaning of the word "owner" in the Middlesex

County Council (General Powers) Act, 1938, s. 118 (2). That subsection gives a definition of the word "owner" and it is this:

For the purpose of this section the expression "owner" in relation to a hereditament means the person who is entitled to receive the rent payable in respect thereof.

A I agree with what has been said by CHARLES, J., that *prima facie* that definition means a person who is entitled to receive rent in his own right. I think it is made very clear that that is the meaning, and, in rating statutes, that is recognised to be the meaning by reason of the fact that in various rating statutes, including the Rating and Valuation Act, 1925, when the legislature desires to render agents who have collected rent as agents liable for the payment of rates, they use very clear language to achieve that result. An example is to be found in the subsection to which our attention has been drawn, namely, subsect. (4) of the Rating and Valuation Act, 1925, s. 11, where in certain circumstances, which are not relevant in the present case, it is provided:

B Where in pursuance of this section the owner is rated or has undertaken to pay or collect the rates charged in respect of any hereditament, the amount due from him in respect of the rates shall be recoverable by the rating authority from him or, where the rates are collected by an agent of his, either from him or from that agent, in the same manner and subject to the same conditions in and subject to which rates are recoverable from occupiers of rated hereditaments.

C I think it would want some such clear words as those to make persons in the position of Adams & Watts liable to pay the rates in respect of premises where they have merely collected rent on behalf of the owners for whom they act as rent-collectors.

I agree that this order for the issue of the distress warrant should not have been made on the facts set out in this case.

Appeal allowed with costs.

D Solicitors: A. J. Adams & Adams (for the appellants); Sharpe, Pritchard & Co., agents for M. Lindsay Taylor, Town Clerk (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

E FINNEGAN v. ALLEN.

[COURT OF APPEAL (Lord Greene, M.R. and Goddard L.J.). April 5, 1943.]

Valuers—Valuation—Action against valuer—No liability in absence of mala fides—Sale of shares—Price to be fixed by third party—Alleged breach of warranty on part of third party—Alleged failure of consideration.

F The respondent was the owner of certain shares in a limited company and by a contract dated Aug. 19, 1941, he agreed to sell them to one G. The terms of the contract were that the price was to be ascertained by a valuation made by the appellant, a chartered accountant, and his decision was to be final and binding upon both vendor and purchaser. A copy of the sale contract, which contained directions which the appellant was to follow in making the valuation, was sent to the appellant with a written request on behalf of both parties to make the valuation accordingly. On July 27, 1942, the respondent's solicitors were informed by letter that the award would be available on July 31, 1942, subject to payment of the appellant's costs and charges which, under the contract, were to be borne by the vendor and the purchaser in equal shares. On July 31, 1942, the appellant wrote to the respondent that he had valued the shares in accordance with the instructions and had fixed the price to be paid for them at £15,691 2s. 1d. The respondent alleged that the appellant had not valued the shares in accordance with the agreement and claimed damages for breach of warranty said to be contained in the letter of July 31, 1942, or, alternatively, in the letter of July 27, 1942, the damages alleged to have been suffered being the difference between the appellant's valuation and a correct valuation which the respondent estimated at about £40,000. The respondent further claimed repayment of his moiety of the costs of the valuation on the ground that the money had been paid for a consideration which had wholly failed. The appellant contended that the statement of claim

should be struck out as disclosing no cause of action, since no action lies against an arbitrator or *quasi*-arbitrator in the absence of bad faith:—

HELD: (i) neither the letter of July 27, 1942, nor that dated July 31, 1942, constituted a warranty.

(ii) the plaintiff had received the award which, by the terms of the contract dated Aug. 19, 1941, was to be final and binding, and, therefore, there had been no failure of consideration.

(iii) a person who is brought in by agreement between the parties to a contract to fix a term upon which they themselves cannot agree is not liable, in the absence of bad faith, to be sued for damages. Therefore, the statement of claim must be struck out.

[EDITORIAL NOTE. The action here is against the valuer. It is not a proceeding analogous to that where the award of an arbitrator is sought to be set aside for misconduct in the arbitration but is of the nature of an action by one of the parties to the arbitration against the arbitrator himself for having given an award unsatisfactory to that party. Such an action cannot be maintained without proof of bad faith or fraud on the part of the arbitrator and the principle, which had long been applied to a class of persons known as *quasi*-arbitrators, is here shown to be applicable to valuers as members of that class.

AS TO LIABILITY OF VALUERS, see HALSBURY, Hailsham Edn., Vol. 33, pp. 360-362, paras. 621-624; and FOR CASES, see DIGEST, Vol. 43, pp. 1044, 1045. Nos. 22-33.]

Cases referred to:

- * (1) *Pappa v. Rose* (1871), L.R. 7 C.P. 32; *affd.* (1872), L.R. 7 C.P. 525; 2 Digest 429, 791; 41 L.J.C.P. 187; 27 L.T. 348.
- * (2) *Tharsis Sulphur & Copper Co., Ltd. v. Loftus* (1872), L.R. 8 C.P. 1; 2 Digest 429, 792; 42 L.J.C.P. 6; 27 L.T. 549.
- * (3) *Stevenson v. Watson* (1879), 4 C.P.D. 148; 2 Digest 429, 793; 48 L.J.Q.B. 318; 40 L.T. 485.
- * (4) *Boynton v. Richardson*, [1924] W.N. 262; Digest Supp.; 69 Sol. Jo. 107.
- * (5) *Chambers v. Goldthorpe, Restall v. Nye*, [1901] 1 K.B. 624; 2 Digest 429, 794; 70 L.J.K.B. 482; 84 L.T. 444.
- * (6) *Re Carus-Wilson and Greene* (1887), 18 Q.B.D. 7; 2 Digest 319, 53; 56 L.J.Q.B. 530; *sub nom. Re Wilson and Greene, Re Casterton Estates*, 55 L.T. 864.
- (7) *Re Hopper* (1867), L.R. 2 Q.B. 367; 8 B. & S. 100; 2 Digest 320, 61; 36 L.J.Q.B. 97; *sub nom. Wrightson v. Hopper*, 15 L.T. 566.
- (8) *Wisbech Rural District Council v. Ward*, [1928] 2 K.B. 1; Digest Supp.; 97 L.J.K.B. 56; 138 L.T. 308.

APPEAL by the defendant from an order of ASQUITH, J., dated Feb. 16, 1943, refusing to strike out a statement of claim. The facts are fully set out in the judgment of LORD GREENE, M.R.

A. T. Denning, K.C., and *Harold Brown* for the appellant.

W. A. L. Raeburn for the respondent.

Denning, K.C.: There is no cause of action in the present case and the statement of claim should be struck out. The only duty of the appellant was to act honestly. That is a principle of fundamental importance. The respondent seeks to get over that by alleging that the appellant represented and warranted that his award was correct. It is not said that the award is wrong owing to the appellant's want of skill or because of his negligence. Also, it is said that the consideration has wholly failed. It was, however, agreed that the award should be final and binding. The principle is the same whether a man be called an arbitrator, or a valuer, or a *quasi*-arbitrator. In *Pappa v. Rose* (1) it was held that there is no obligation upon an arbitrator except to act fairly and *bona fide*. The present case is sought to be established, not as a case of want of skill, but as one of breach of warranty. It is put as being a warranty by saying that by his letter, stating that he had made his award, the appellant warranted that he had not made a mistake. [Counsel referred to *Tharsis Sulphur and Copper Co., Ltd. v. Loftus* (2), *Stevenson v. Watson* (3), *Chambers v. Goldthorpe* (5), and *Boynton v. Richardson* (4).]

Raeburn: *Re Carus-Wilson and Greene* (6) shows that a valuer is not an arbitrator. The decision applies in respect of other purposes as well as in respect of the purpose of that case. Until the respondent received the letter dated July 27, 1942, the appellant was not bound. The appellant became bound only when he acknowledged to the respondent that he had accepted the employment by sending to him the letter saying that the award was ready. [Counsel referred to *Re Hopper* (7) and *Wisbech Rural District Council v. Ward* (8).]

LORD GREENE, M.R. : This is an appeal from a refusal of ASQUITH, J., to strike out the statement of claim.

Since that refusal the statement of claim has been amended, which could be done without leave, and I shall have to consider both the original statement of claim with which ASQUITH, J., dealt and the amended statement of claim. Both documents are of a remarkable character. I will deal first with the original statement of claim.

A The plaintiff was the owner of certain shares in a limited company. Those shares he agreed to sell to a Mr. Gleeson. The price was to be ascertained in accordance with the terms of the sale contract, under which a valuation was to be made by the defendant, who is a chartered accountant, and his decision was to be final and binding on vendor and purchaser alike. The contract of sale, as set out in the statement of claim, contained certain directions which the defendant was to follow in arriving at his valuation. It is manifest from B the nature of those directions that his task was not merely a mathematical one, but involved his bringing to the valuation his skill, knowledge and judgment.

The sale contract was dated Aug. 19, 1941, and in para. 3 of the statement of claim it is alleged that on Aug. 21 a copy of the sale agreement was sent to the defendant with a written request, on behalf of both parties, to make a valuation of the plaintiff's shares in accordance with the terms stated. Nearly a year afterwards, on July 27, 1942, as is stated in para. 4 of the statement of claim, C the defendant's firm :

... wrote to the plaintiff's solicitors informing them that the defendant's purported award would be available for posting on July 31, 1942, subject to the receipt by the defendant from the respective parties to the agreement of their respective shares of what the defendant alleged were his costs and expenses, including (so it was alleged) the disbursement by the defendant of all necessary fees and expenses in connection D with consultations with chartered surveyors, barristers and professional colleagues, amounting to an inclusive charge of £512 10s.

The contract of sale provided that the costs and expenses were to be borne by the vendor and purchaser in equal shares.

Para. 5 as originally drawn was as follows :

E By letter dated July 31, 1942, and written by the defendant to the plaintiff, the defendant purported to report, and thereby represented and warranted, that he had valued the plaintiff's said shares in accordance with the instructions set out in the agreement, and accordingly fixed the price to be paid for the said shares at £15,691 2s. 1d. Then it says that the letter was not despatched to the plaintiff nor were its contents divulged to him until after Aug. 13.

In para. 6 the plaintiff goes on to say that he sent his half of the fee and then in para. 7 he alleges this :

F In fact the defendant had not valued the plaintiff's said shares in accordance with the instructions set out in the agreement and had not incurred the alleged or any costs and expenses in connection with consultations with chartered surveyors, barristers and professional colleagues or otherwise howsoever, and was not in any event authorised to consult barristers and professional colleagues at the plaintiff's expense and accordingly the consideration for which the sums represented respectively by the aforementioned cheque and postal order and amounting altogether to £256 5s. were paid wholly failed.

G In para. 8 the plaintiff says :

Further, the facts alleged in the last preceding paragraph hereof amount to a breach of the warranty given by the defendant as is alleged in para. 5 hereof, in consequence whereof the plaintiff has suffered damage.

H He then sets out particulars of damage. He says that he cannot arrive at an accurate valuation pending discovery, but that the valuation of £15,691 falls far short of the correct amount, which he estimates provisionally to be about £40,000. Then he says :

The plaintiff, being bound under the agreement to accept the defendant's valuation has lost the difference between the said valuation and a correct valuation of the said shares.

It will be noticed that that claim falls into two parts. The principal claim is a claim for damages for breach of warranty, the damage alleged to have been suffered being the difference between the defendant's valuation and a correct valuation. The other claim relates to the plaintiff's moiety of the fees claimed by the defendant. It is convenient to deal with the former claim first. It is

based upon the allegation that the plaintiff was bound under the purchase agreement to accept the defendant's valuation ; in other words, as between himself and the purchaser he admits, and in this action he asserts as the very foundation of his claim, that the agreement of sale had been duly carried out as between vendor and purchaser, the price payable had been fixed in accordance with the contract and he, the vendor, was bound to accept that price. If that were not so, the damage alleged to have been suffered by the alleged breach of warranty by the defendant, of course, would not have been suffered.

The cause of action is not laid as a breach of the original contract under which the defendant at the request of both parties and for the remuneration provided for in the agreement agreed to undertake the task of valuation. There is no allegation of a breach of any such contract. Counsel for the respondent in his argument said that there never was any such contract and the present defendant only became a contracting party when he notified that his valuation was ready to be taken up.

That is a very remarkable proposition ; but let me for the moment assume that it is in accordance with the pleading. The pleading alleges that the defendant warranted by his letter of July 31, 1942, to the plaintiff that he had valued the shares in accordance with the instructions set out in the agreement. It is for breach of that warranty that damages are claimed. On the face of it the letter as pleaded is merely a letter reporting that the defendant had done certain work, namely, had valued the shares in accordance with the instructions.

Warranty is a contract. It is one of the most ill-used expressions in the dictionary of the law ; but it is contractual in its nature and it must be pleaded in terms sufficient to assert that contractual relationship. On the face of the letter pleaded here, there is nothing but a statement by a valuer who had been employed to value that he had accomplished his task and that the report stating the price was ready. How in the world a statement in a letter of that description can support an allegation that by that letter a contract came into existence I cannot understand. The document on the face of it is completely inconsistent with the conception that there was any contractual intent whatsoever in writing it.

It seems to me that this is one of those cases where the word "warranty" has been used, as it unfortunately is used so frequently, in an attempt to manufacture a cause of action by calling something a warranty, which on its face is clearly not contractual. Warranty is something which is collateral to some contract or incidental to some contract ; but in this case there is no contract alleged to which it is incidental. This, according to counsel for the respondent, is the only contract between the parties, namely, that the defendant had valued the shares in accordance with his instructions. That, with all respect to him, seems to me to be quite fantastic.

The fundamental difficulty about the whole of the plaintiff's case lies in this circumstance. He is in effect wishing to recover damages from a valuer, employed to fix a price *inter partes*, using his skill and knowledge to enable him to do so, for not having valued in the way in which his instructions contemplated that he should value. There is no charge of bad faith. We have, therefore, to deal with this question on the footing that the defendant, perfectly honestly intending to carry out his instructions, has made an honest mistake—a mistake which may have consisted in misunderstanding his instructions or may have consisted in inadvertently failing to comply with some element in them. Can such an action be maintained ? In my opinion, for the reasons which I shall give in a moment, such an action cannot be maintained.

That being the position, this attempt to create a liability on an alleged warranty at a later stage is really an attempt to get out of the rule, which, in my opinion, is well established, that a person in the position of this defendant cannot be made liable for the sort of thing with which he is charged here. The plaintiff, being confronted with that, endeavours to find a cause of action arising at a later stage and finds it in the warranty which is alleged to have been implied in the letter reporting that the defendant had finished the valuation.

I refer particularly to that because counsel for the respondent in the course of his argument on behalf of the plaintiff said that, if necessary, it would be competent to him to amend his statement of claim by alleging as his cause of action a breach by the defendant in failing to comply not with the terms of the

alleged warranty which I have been discussing, but with his original instructions, on the footing of which he accepted the task of making a valuation. In my opinion, such an amendment would not improve the position. Whichever way one looks at this, the substance of the claim against the defendant is that he did not value in accordance with his instructions, that he made some honest mistake or oversight or whatever it may have been, and that he must pay the penalty for that.

A We have been referred by counsel for the respondent to authorities which draw the well-known distinction for certain purposes between a valuer and an arbitrator. It is, of course, well-known that, if an expert is employed to conduct a valuation, his award is not an arbitration within the meaning of the Arbitration Act, nor is he bound to act in the same way as an arbitrator would have to act. That is common knowledge, but it does not touch the present point. The question is whether a person who is brought in by agreement between the parties to fix in their contract a term upon which they themselves cannot agree is liable, in the absence of bad faith, to be sued for damages.

B There are a number of authorities which, in my opinion, make it clear that that is not the law. The earliest one is *Pappa v. Rose* (1). There the defendant as broker made for the plaintiff a contract for the sale of "500 tons black Smyrna raisins, fair average quality in opinion of selling broker." The selling broker was there brought in to determine on behalf of the parties whether or not the raisins which were being sold complied with the description of "fair average quality." No suggestion was made that the broker had not acted *bona fide* and the action was based on the proposition that he had made a mistake in assessing the quality of the raisins.

C At p. 42 BOVILL, C.J., said :

D Upon the other question, namely, whether an action can be maintained against the broker, who is admitted to have acted *bona fide*, I see no reason to dissent from the conclusion arrived at by my learned brothers. The selling broker was the person selected by both buyer and seller to determine whether or not the raisins tendered were of fair average quality. It by no means follows that, when two persons submit a matter in difference to the arbitrament of a third, they agree to take a person of the greatest amount of skill or intelligence. No matter what may be the degree of skill he possesses, the decision of the person selected is final and conclusive; and he is not liable to an action if he makes a mistake. Here, it is want of skill only that is suggested.

E The defendant was in the nature of an arbitrator chosen by the parties, whose decision is final. Upon general principles, no action lies against him.

It is perfectly true that in that case the determination which the broker was to make was one which related to quality and in so acting he was no doubt forestalling possible disputes between the parties, and it may very well be that he was in some respects technically in the position of an arbitrator; but BRETT, J., referring to the ruling of the Chief Justice, said, at p. 39 :

F The ruling upon that was, not that the defendant was in the strict sense of the term an arbitrator, but that he was a person filling a position which brought him within an exception well-known to the law of England, namely, that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty entrusted to him a due and reasonable amount of skill and knowledge. The question is merely one of implied undertaking; and the law says there is none such. Was, then, the defendant within that exception? I apprehend that every person falls within it who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion.

G In one sense, of course, it is true to say that the fixation of a price in a contract is not a matter of dispute; but I cannot, myself, see the difference between fixing a matter such as price on which the parties are unable to agree and determining some issue which has arisen or may arise between them.

H That case came up to the Court of Exchequer Chamber and there BLACKBURN, J., stated the principle more widely, because he said, at p. 528 :

I do not stop to inquire whether the defendant stood in the position of an arbitrator or not. But he was bound to exercise his judgment impartially between the two contracting parties. The question is, how far he is liable if he has given an erroneous opinion. The court below seem to have thought that the defendant might have been liable for a breach of duty, or a breach of contract, if he had altogether declined to examine the raisins, but that, provided he acted honestly, he was not responsible for

an error in judgment. I think it would be extremely dangerous to hold that either party could bring an action under such circumstances.

It is quite clear that BLACKBURN, J., was not there basing his decision on the answer to the question whether the defendant was technically an arbitrator or not.

In *Tharsis Sulphur and Copper Co., Ltd. v. Loftus* (2), the defendant was an average adjuster and to him the cargo owners and the ship-owners had agreed to refer the adjustment of a general average loss which had to be apportioned between the ship and the cargo. At p. 7, BOVILL, C.J., said :

It must constantly happen that parties are dissatisfied with the decision of an arbitrator or quasi-arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this.

He then refers to *Pappa v. Rose* (1), and lays down that such an action is not maintainable. Then Keating, J., says, at p. 7 :

One of the most frequent grounds upon which actions of negligence are brought is not exhibiting due skill in the performance of a duty. Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule when parties agree to be bound by the decision of a third party on any matter is, that they take him in such a case for better or worse ; and if he discharges his duty faithfully and honestly they must be satisfied.

It was said by BRETT, J., that there were the strongest grounds for deciding against the claim in that case ; and he said, at p. 8 :

Then it is said that the defendant is liable because he was not an arbitrator, but only a person who had undertaken to adjust accounts between two parties. Now the case of *Pappa v. Rose* (1) decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless, is not liable to an action for want of skill. It appears to me that the reasoning employed in that case is equally applicable to an action for want of care, and that if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between parties is also not liable.

Another case was *Stevenson v. Watson* (3). That was a case where all questions or matters of dispute were to be referred to the architect under a building contract ; and it was held that the architect there occupied the position of an arbitrator. The matter is stated, as I think, correctly, by LORD COLERIDGE, C.J., at p. 159, where he sums up the authorities and says :

I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised.

Lastly, GREER, J., in *Boynton v. Richardson* (4), dealt with the matter. There under a contract for the sale of growing timber the defendants, a firm of surveyors and valuers, had been employed to value the timber for the purpose of ascertaining the proper purchase price—a case which seems to me to be on all fours with the present. GREER, J., said, at p. 262 :

... the valuation necessarily involved an impartial consideration by the valuers as to the measurement of the timber, the current price, and similar matters. They must hold the scales between the two parties, and under these circumstances no action for negligence would lie against them. This rule extended not only to arbitrators but to quasi-arbitrators, the test being whether the person against whom want of care was alleged was under a duty to exercise an impartial judgment between the parties . . . After referring to *Pappa v. Rose* (1), GREER, J., said that :

Chambers v. Goldthorpe (5) was an authority binding upon him in the present case, and it was clear from *Tharsis Sulphur Co. v. Loftus* (2) that the principles there laid down were not confined to the case of an architect giving his certificate as to the amount due to the building contractor, but applied to any person in the position of an arbitrator or quasi-arbitrator, who ought to be able to exercise his judgment free from the embarrassment of a possible action for negligence.

Those authorities, in my opinion, apply to the cause of action alleged in the present case, just as they would apply to the suggested alternative cause of action which counsel for the respondent wished to bring in by amendment. I have given the further reason why I consider that this statement of claim cannot stand, based, as it is, on an alleged warranty which on the face of the pleading is quite clearly not a warranty at all.

A After his success before ASQUITH, J., the plaintiff amended his statement of claim. He struck out the allegation of a warranty in the letter of July 31, and substituted a warranty alleged to be contained in the letter of July 27, in which the defendant informed the plaintiff's solicitors that the award would be available for posting, subject to receipt of the necessary fee. The warranty alleged is that in consideration of the payment to the defendant of the fees charged he, the defendant :

B . . . would on or after July 31, 1942, furnish to the respective parties (and in particular to the plaintiff) a valuation of the said shares made in accordance with the instructions set out in the agreement . . .

and then the amendment proceeds to deal with the matter of disbursements, to which I will refer on the second branch of the case.

C There, again, that amendment to the pleadings seems to me to fail for exactly the same reasons as the original claim. The letter announcing that the award would be available for posting, subject to receipt of fees, is not a thing out of which any warranty can be spelt at all. It is an attempt to import a new contract, under which the defendant agreed to furnish a correct report in consideration of the payment of his fee. On the face of it, it seems to me that that is an allegation which simply cannot stand, having regard to the other matters pleaded in this document.

D That brings me to the other branch of the case, which is concerned with the £256 5s., the plaintiff's moiety of the fee paid to the defendant.

That is claimed in two alternative ways : one as on a consideration which has wholly failed and the other as part of the damage suffered by the alleged breach of warranty. That latter claim must obviously go with the rest of the claim based on the warranty.

E So far as the claim on a consideration which has wholly failed is concerned, that, again, seems to me to be completely inconsistent with the whole basis of this pleading. First, it is asserted that the plaintiff is bound to accept the defendant's valuation ; in other words, the defendant has produced a valuation which is binding on vendor and purchaser alike. Next, if the defendant has not broken his contract (and that must be so if the main claim cannot be supported), counsel for the respondent agrees that he could not assert that the consideration for the £256 paid had wholly failed. That would be quite an unsustainable proposition.

F I would like to mention in passing that in para. 7 of the statement of claim there is an allegation which on the face of it would appear to suggest that the claim for certain costs and expenses was a dishonest one ; but I am glad to say that when this was pointed out to counsel for the respondent he disclaimed any intention to allege fraud in the pleading. That is no more than one would have expected from him. Accordingly, no such charge is to be deemed to have been made.

G The result, in my opinion, is that the original claim, which was before ASQUITH, J., the amended claim which is before us, and the suggested further amended claim which counsel for the respondent wished to put in are, all three, bad on their face and necessarily so, having regard to the law on the subject. The appeal must be allowed and the statement of claim struck out.

GODDARD, L.J. : I agree, and I want to add only a very few words.

H I think that the statement of claim should be struck out and that no opportunity should be given to amend, because, whatever way one looks at this case and whatever attempts the pleader may use to get over the difficulties which confront him, in substance this is an action brought by the plaintiff because he says that the defendant has given a wrong valuation and that action will not lie. Counsel for the respondent seeks to distinguish this case from the authorities which have been cited by saying that those authorities do not apply to a person who is in the position of a valuer, but only to a person who is in the position of an arbitrator,

I need not repeat the passages read by LORD GREENE, M.R., which clearly show the contrary. The well-known case of *Re Carus-Wilson & Greene* (6) cited by counsel for the respondent only goes to show that a valuer is not an arbitrator for purposes connected with the Arbitration Act for dealing with valuations as you can deal with awards, because the proceeding in *Re Carus-Wilson & Greene* (6) was a motion to set aside an award and the court refused to do it because it was a valuation and a valuation only.

It is quite clear, I think, from the first of the cases which have been referred to, *Pappa v. Rose* (1), that you find the court applying the doctrine that this action will not lie in respect of a person who is not an arbitrator in the strict sense. Whether a person is an arbitrator or what the courts have called a *quasi-arbitrator* is not, I think, capable of perfect definition. It has to be decided from the matters which are submitted to the person who is in the position of arbitrator or *quasi-arbitrator*—the nature of the matters submitted to him and the reasons why those matters are submitted to him.

It is frequently found in commercial contracts that a question of quality is to be submitted to Mr. A.B., as, indeed, it was in *Pappa v. Rose* (1). People do not as a rule mean by that that the person to whom the matter is submitted is to sit as an arbitrator, to hear parties and to hear witnesses as an arbitrator, if he is a true arbitrator, must do. If it is intended that he, being an expert in the trade, should look at a sample on which the goods were sold and look at a sample of the goods delivered and say that there is to be an allowance of so much per lb. or so much per ton, as the case may be, as is constantly done, as we know, in Mincing Lane, that person is perhaps a *quasi-arbitrator* or you may say that he is an arbitrator; but he is an arbitrator of a particular sort and it is not intended that there should be the same judicial proceeding on his part as there would be in the case of an arbitrator appointed under a formal submission, where the parties clearly intend that he is to hear witnesses, hear arguments and so forth; but obviously under the cases and the passages which my Lord has cited, a valuer comes within the protection, which is given to people occupying the position which the defendant occupied in this case. I venture to think that the underlying principle in the case is this. You have to consider what it is that, by accepting the task submitted to him, the valuer, arbitrator or whoever it may be undertakes to do. He is selected, of course, because the parties have confidence in him and have confidence in his skill and judgment. What he undertakes to do, according to this long line of authority, I think, merely is to give an honest decision between the parties.

Counsel for the respondent contends that, if you say to a person: Will you decide between us and value a piece of property and apply a certain formula? and he says that he will, you can bring an action against him if you can show that he has not applied that formula. I think that you must go much further. You must show not only that he has not applied the formula, but that he has dishonestly refused to apply the formula; that for some improper reason or another he has chosen to say: I will not apply this formula. I can well imagine a case in which some rather complicated formula might be devised between the parties and the matter then be submitted to an expert valuer and he be asked to fix a price which should be binding on the parties and he might say in terms: I fix the price as so and so; I have not applied all the terms of this formula, because, in my opinion, it is quite impracticable to do so and I cannot do so. That would not make his action dishonest. Whether the parties would be bound in those circumstances as between themselves is another matter; but how it could be suggested in those circumstances that an action would lie against the valuer I do not understand.

Of course, it is quite clear in this case that, if it be open—I am not saying whether it is now or not—to the plaintiff to dispute the figure at which the defendant has arrived on the ground that he has not arrived at it in accordance with the contract between the parties and it is open to him to question it as between himself and his purchaser, he has not suffered any damage by what Allen has done; but I am content to decide the case on the ground that, however this action is put, unless a charge of dishonesty or *mala fides*, as it is generally called, is made against the defendant, he cannot be liable in the circumstances alleged in this case.

In an attempt to get round the difficulties created by the line of cases to

which reference has been made, an attempt has been made to set up a case of warranty, using that much-abused and hard-worked word in a way which I frankly cannot understand. The most that can be said in this case is that in asking for his fees the defendant made a bare representation. It is not a warranty. There is no trace here of any collateral contract. It is simply the case of a person, being employed to do a piece of work, who would be, therefore, entitled when he had done the work to be paid for it and to be paid for it simultaneously with his handing over the results of his work, saying: I am ready to give you the report which I undertook to make and I will give it to you in return for the fees due to me. There is no suggestion or trace of warranty there.

I quite agree that on the face of the pleading there is no cause of action in warranty.

With regard to the remaining point in the case, the plaintiff cannot have it both ways. The plaintiff says that a valuation has been made which is binding between the parties, which binds him and binds the other side too. If that is so, obviously there cannot be a total failure of consideration.

In my opinion, unless and until the plaintiff can bring himself to make a charge of bad faith (and it is quite obvious after what counsel for the respondent has said that he cannot do that and has no intention of doing that in this case) there cannot be any case against the valuer in these circumstances and, therefore, the statement of claim ought to be struck out and it is not a case in which we should give an opportunity of further amendment.

Appeal allowed with costs. Action dismissed with costs.

Solicitors: *John F. Chadwick* (for the appellant); *Hyman Stone & Co.*, agents for *Hyman Stone & Co.*, Sheffield (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

DAVIS v. GEORGE TROLLOPE & SONS.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), April 2, 9, 1943.]

Agency—Remuneration—Commission—Contract to pay share of commission on introduction of willing buyer—Willing buyer found—Property sold to another person—Claim to share of commission.

The plaintiff and defendants were estate agents. The plaintiff told the defendants that he might be able to introduce a purchaser for a house on their books. A contract was, therefore, made by which the defendants agreed to pay the plaintiff one-half of the sum they would earn if the plaintiff introduced to them a willing buyer for £4,250. The plaintiff accepted the offer of £4,250 on behalf of his client although he had no authority to go beyond £4,000, but at about the same time the house was sold through another channel to another purchaser at £4,250. It was argued for the plaintiff that the commission was payable if he introduced a person willing to buy even though a sale to that person was not effected:—

HELD: the share of the commission was payable to the plaintiff only if the sale of the house at £4,250 was effected through him and, since the acts of the plaintiff were not the effective cause of the sale, he was not entitled to any part of the commission.

[EDITORIAL NOTE.] In the case of an estate agent, it has been established that, in certain cases, the agent when contracting with the actual vendor may claim his commission if he has found a person willing to purchase at the stated price although that purchaser does not in fact complete the transaction. Here the agent was contracting with another agent on the terms of sharing the commission if he introduced a purchaser. The decision, as in all such cases, is based upon the construction of the actual contract made, but there are passages which seem to suggest that in such a case, apart from some special term, the normal contract will be restricted to the case where the person introduced completes the purchase. A contract to share commission contemplates only the sharing of commission earned through the efforts of the person with whom it is to be shared, and it seems doubtful whether the agent claiming to share can say that he did all he contracted to do, and that the other agent having sold to someone else deprived him of the right to earn his share of the commission.

As to AGENT'S RIGHT TO REMUNERATION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-263, paras. 432-436; and FOR CASES, see DIGEST, Vol. 1, pp. 498-502, Nos. 1703-1721.]

Case referred to :

** (1) Luxor (Eastbourne), Ltd. v. Cooper*, [1941] A.C. 108 ; [1941] 1 All E.R. 33 ; Digest Supp. ; 110 L.J.K.B. 131 ; 164 L.T. 313.

APPEAL by the defendants from a decision of His Honour JUDGE SIR GERALD HURST, K.C., sitting at Westminster County Court, dated Nov. 27, 1942. The facts are fully set out in the judgment of SCOTT, L.J.

S. R. Edgedale for the appellants.

J. A. Pugh for the respondent.

SCOTT, L.J. : This is a claim of one estate agent against another, for, as put in the claim, " a half share of the commission " due upon the sale of a particular property in respect of introducing a person who was willing to buy. I think that is the fair way of stating it. The county court judge has found for the plaintiff for £56 17s. 6d., being half the commission appropriate to a sale of a leasehold house, 69, Mount Street, at a price of £4,250.

The contract between the plaintiff and the defendants was entirely oral. It is important to appreciate the position of the defendants when the bargain found by the county court judge, or whatever the bargain was, was made. The defendants are a well-known firm of estate agents in London, who had this house, 69, Mount Street, on their books. The plaintiff was an estate agent, who thought that he knew somebody who might be willing to buy. His evidence was this :

I called at the defendant's office on May 7 and saw Irving [their manager]. He asked me if 69, Mount Street, would interest me.

The plaintiff inspected the property, called and had another talk with Irving, who told him that there was a possibility of £4,000 being accepted for the leasehold interest. The plaintiff thereupon told Irving that he might be able to introduce a purchaser, subject to an agreement to share commission. Irving agreed. In cross-examination the plaintiff said :

Irving agreed to share commission without reference to his principals. If sale to my client went off so that defendants earned no commission, I did not expect to share.

I need not refer to the defendants' evidence, because, in my opinion, the oral agreement as found by the county court judge was one under which, in the events which happened, the plaintiff was not entitled to recover anything. The county court judge found as follows :

On the above facts, I find that the parties made a contract by which the defendants agreed to pay the plaintiff one-half of the sum they would earn if the plaintiff introduced to them a willing buyer for £4,250.

The facts were these. The buyer that the plaintiff had in mind, Warshaw, told the plaintiff that he was willing to pay £4,000. The plaintiff then rang up the defendants and gathered from them that £4,250 would be accepted, but not £4,000. Then, though he had no authority from Warshaw to go to £4,250, he told the defendants he would take the responsibility of accepting that offer on behalf of his buyer.

In fact the house was sold just about the same time through another channel to another purchaser at £4,250. The plaintiff, having observed a notice board put up a few days later saying that the house had been sold by the defendants, took the matter up with them and claimed that he was entitled to half commission. The defendants refused to pay any commission and the plaintiff then brought an action in the county court and got judgment for the amount to which I have referred, from which an appeal has been brought to us.

The oral agreement is very simple in its language, and I think quite simple in its meaning. It is important to bear in mind that the person who agreed to make the payment of half commission was himself an agent who would only be paid by commission from his principal, the seller. An owner employing an agent to sell may make a contract with his agent in terms saying : " If you find a person who is willing to buy, I will, on your doing that, pay you a commission "—either a fixed sum or on the usual scale. It would be an improvident bargain for an owner to make, because it would tie him to pay the commission in any event and deprive him of the right to say whether he approved of the particular buyer ; and it would deprive him of the right to sell to another buyer. But it is a possible agreement, though improbable.

When a commission agent employed to sell on the ordinary terms of getting no commission unless a sale is effected by him for his principal agrees with another agent that, if the latter helps by bringing a willing buyer, he will share his commission, that contract must necessarily have quite a different meaning. It must mean: "If through your bringing a willing buyer I earn my commission, I will then pay you half of it." In my view, that is the precise bargain made here. A promise "to share the commission" must necessarily mean: "If I earn my commission through you I will pay you half of what I so earn."

The county court judge has interpreted the oral contract which I have quoted from his judgment as if it had been a promise by the defendants to pay a lump sum, measured by the ordinary scale of commission applicable to the sale of a house for £4,250, whether the sale was brought about by the plaintiff or not. In my view, the offer and the acceptance by the defendants were alike limited to an obligation to pay the plaintiff if, through him, the sale of the house at £4,250 was effected. As that did not happen, the plaintiff fails to recover the sum which is alleged to be payable under the agreement.

Counsel for the respondent has argued that the plaintiff would be entitled to some *quantum meruit*; but as there was "a special contract"—in the terms of the old *BULLEN AND LEAKE* pleading—the idea of *quantum meruit* is not applicable at all. It is either a sum agreed under the contract to be paid and so payable or nothing.

In a faint-hearted way counsel for the respondent also asked that the same sum should be awarded by way of damages on the ground of the breach of a contract which the plaintiff had never alleged in his particulars of claim, which was never put forward, and of which no evidence was given.

In my view, it is quite unnecessary to refer to any of the authorities; but I may add that the court has had in mind the opinions of their Lordships in *Luxor v. Cooper* (1) in arriving at this decision. I am of opinion that there is nothing in those judgments which affects anything that I have said in this judgment. That was a case of complicated facts, in which the House of Lords reversed the decision of this court, of which I was a member.

The appeal must be allowed with costs here and below.

LUXMOORE, L.J.: I agree that this appeal must be allowed.

In determining the question of liability of the defendants to the plaintiff, the county court judge had to do two things. First, he had to find out what was the contract into which the two parties entered. Having done that, he had to apply the law to it and construe the contract.

After a most careful review of the evidence, the county court judge found what the contract was. He found that the defendants had agreed to pay to the plaintiff one-half of the sum they would earn if the plaintiff introduced to them a willing buyer for £4,250. That was a question of fact undoubtedly; and this court cannot, even if they wished, alter that finding of fact in any way.

It was then the duty of the county court judge to apply the law to the finding of fact. He had before him the most recent authority on the point, *Luxor v. Cooper* (1), and he seems to have taken the view that, in order to defeat the plaintiff's claim on the contract that he had found, it was necessary to add something to the contract by implication. I think he entirely misdirected himself with regard to what had been said in the case to which I have referred. If the language of the contract itself is plain, and there is no necessity for any implication, then the sole question which has to be determined is what is the construction of the contract. Just look at the words of the contract: The defendants would pay one-half of the sum they would earn if the plaintiff introduced to them a willing buyer for £4,250. Counsel for the respondent has argued (and the county court judge certainly decided) the case on the footing that the words of the contract were not "if the plaintiff introduced to them a willing buyer," but "if the plaintiff introduced to them a person willing to buy." The distinction between those two phrases is most clearly brought out in the opinion of *VISCOUNT SIMON, L.C.*, in *Luxor v. Cooper* (1)—I need only refer to the passages on p. 120 ([1941] 1 All E.R., at pp. 40, 41).

That view of the contract is made even more clear by the fact that the sum which is to be paid is one-half of the sum they would earn. That means what,

in the circumstances, they would earn if a willing buyer was introduced, not if a person willing to buy was introduced, which is quite a different thing.

For that reason, I think the county court judge was in error in saying that it was necessary to imply some term in order to defeat the plaintiff's claim. On the plain words of the contract found by him and construed in accordance with that decision which affords to us the guiding principles in this class of case, I have no doubt that the county court judge ought to have held that the plaintiff was not entitled to recover.

For these reasons, in addition to those given by SCOTT, L.J., I agree that this appeal must be allowed with costs here and below.

DA DU PARCQ, L.J. : I agree. We are, of course, bound by the finding of fact of the county court judge. But when one looks at the words of the plaintiff as stated in his evidence, I have no doubt that, upon their true construction, what they mean is this. The defendants were saying to the plaintiff : " If you introduce to us a person who is ready and willing to buy at the price named by the vendor, and the sale to that person goes through, so that he becomes the buyer, and we get our commission on the sale, we shall share that commission with you." I have not any doubt that that is the true construction of the contract, and I think, therefore, that the county court judge erred in the construction that he placed upon it.

I think also that Davis had very little doubt that that was the construction of the contract, because when cross-examined he said that, if the sale went off, so that the defendants earned no commission, he would not expect to share it.

I agree that this appeal should be allowed and judgment entered for the defendants with costs here and below.

Appeal allowed. Judgment for defendants with costs.

Solicitors : Crump, Sprott & Co. (for the appellants) ; Beaumont, Son & Ridgen (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

R v. GREENBERG.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Lewis and Croom-Johnson, JJ.), **March 30, 1943.**]

Criminal Law—Sentence—Prisoner already serving sentence—Sentence to commence at expiration of previous sentence—Misdemeanours—"Subsequent offence"—Criminal Law Act, 1827 (c. 28), s. 10.

In Dec., 1942, the appellant was sentenced to 12 months' imprisonment in respect of two misdemeanours committed prior to May, 1941, such sentence to commence at the expiration of a previous sentence of 2 years' imprisonment imposed in May, 1942, in respect of a misdemeanour committed about Dec., 1941. The appellant contended that the sentence of Dec., 1942, should not have commenced at the expiration of the earlier sentence as it was not awarded in respect of a "subsequent offence" within the meaning of the Criminal Law Act, 1827, s. 10 :—

HELD : sect. 10 only applied to felonies and did not, therefore, apply to the present case ; and where a man was guilty of two misdemeanours there was, and always had been, power to order a second sentence to commence at the expiration of the sentence already imposed.

SEmBle : "Subsequent offence" within the meaning of sect. 10 means subsequent conviction for an offence and is not limited to a second offence committed after an offence for which a defendant was already serving a sentence.

[**EDITORIAL NOTE.** So far as misdemeanours are concerned, it is here pointed out that the law always has been that a sentence may be made to run from the completion of a sentence which the prisoner is already serving. There were difficulties in the case of felonies and these were provided for in the Criminal Law Act, 1827, s. 10. Therefore in all cases a second sentence can now be made to commence from the completion of the first. The meaning of the term "subsequent offence" in this connection has long been regarded as doubtful and it may be taken as decided by the statement in this case although the point could not technically be decided and so must theoretically remain open.

AS TO SENTENCE TO COMMENCE ON COMPLETION OF PREVIOUS SENTENCE, see HALSBURY, Hailsham Edn., Vol. 9, p. 228, para. 321; and FOR CASES, see DIGEST, Vol. 14, pp. 333, 334, No. 3523-3528.]

Cases referred to:

* (1) *Castro v. R.* (1881), 6 App. Cas. 229; 14 Digest 334, 3526; 50 L.J.Q.B. 497; 44 L.T. 350; affg. S.C. *sub nom. R. v. Castro* (1880), 5 Q.B.D. 490.

* (2) *R. v. Wilkes* (1769), 19 State Tr. 1075; 4 Burr. 2527; 14 Digest 333, 3524; *sub nom. Wilkes v. R.*, 4 Bro. Parl. Cas. 360; Wilm. 322.

A * (3) *R. v. Williams* (1790), 1 Leach 529; 14 Digest 334, 3525.

* (4) *R. v. Hemming* (1912), 28 T.L.R. 402; 14 Digest 476, 5184; 7 Cr. App. Rep. 236.

APPEAL from a decision of OLIVER, J., given at Manchester Assizes. All the facts are set out in the judgment of LEWIS, J.

C. N. Glidewell for the appellant.

R. H. Blundell for the Crown.

B LEWIS, J. [delivering the judgment of the court]: On Saturday, Dec. 12, 1942, the appellant pleaded guilty at the Manchester Assizes before OLIVER, J., to three counts of an indictment charging him with three misdemeanours, all of which were committed during periods prior to May 31, 1941. In May, 1942, he had been convicted of another misdemeanour under the Defence (General) Regulations, committed in Dec., 1941, or the early part of 1942, and for that offence he was sentenced to 2 years' imprisonment. He appealed unsuccessfully against that sentence to this court, and when he was sentenced by C OLIVER, J., in Dec., 1942, he was serving that sentence. OLIVER, J., sentenced him to 12 months' imprisonment to commence at the expiration of the sentence of 2 years, which he was then serving.

The appellant appeals on two grounds, first,

D . . . that the sentence was wrong in law in that it was awarded in respect of an offence, not being a "subsequent offence," within the meaning of the Criminal Law Act, 1827, s. 10, or at common law, to commence at the expiration of a term of imprisonment to which the appellant had been previously sentenced, which said imprisonment the appellant was then, and still is, undergoing.

The second ground of appeal is that the sentence is excessive, and there are set out four reasons why it is contended that the sentence was excessive.

E With regard to the first ground of appeal, it is contended that the Criminal Law Act, 1827, s. 10, applies to this case, and that that section only permits the court to postpone the commencement of a sentence to the expiration of a previous sentence which the person is at the time serving if the second sentence is in respect of a subsequent offence, that is to say, an offence committed subsequent to the date of the offence in respect of which that person is at the time serving a sentence.

F It is to be observed at the outset that the section in terms deals only with cases where the second sentence is passed for felony. The offences for which the sentence was passed, against which the appellant now appeals, were misdemeanours. Our attention has been called to certain of the authorities. In *R. v. Castro* (1), which was affirmed by the House of Lords, it was held that in cases of two misdemeanours it was proper to make the sentence for the second misdemeanour date from the expiration of the sentence for the first. LORD SELBORNE, L.C., in delivering the leading opinion in their Lordship's House, stated as follows, G at p. 238:

So far, therefore, my Lords, as relates to misdemeanours, and, subject to the question whether this authority would apply when the aggregate of the two punishments exceeds, in point of time, that which there would have been power to award for either offence alone, subject to that distinction, *R. v. Wilkes* (2) in this House is clear and distinct authority in favour of the proposition, that, when a man is found guilty of two misdemeanours, being distinct and separate offences, (I apprehend it makes no kind of difference whether it be by two indictments simultaneously tried and found against H him, or upon two counts in one and the same indictment), there not only a competent but the proper course was, and is, to pronounce a second sentence of imprisonment (assuming it to be within the power of the court as to duration), to commence and begin after the expiration of the first.

In the view of the court there always was power in cases of misdemeanour to adopt such a course, and that is laid down in *R. v. Wilkes* (2), where WILMOT, C.J., delivered the unanimous opinion of the judges, to the effect that:

. . . a judgment of imprisonment against a defendant, to commence from and after

the determination of an imprisonment to which he was before sentenced for another offence, is good in law.

In *R. v. Castro* (1), BRETT, L.J., commenting on that decision in *R. v. Wilkes* (2), said, at p. 514 :

The counsel for the plaintiff in error naturally attempted to get rid of the force of the answer by the judges in the House of Lords by referring to the circumstances, under which *R. v. Wilkes* (2) was decided. But when the judges were consulted by the House of Lords, they were asked an abstract question; and the question which they were asked was whether a sentence of imprisonment, to commence from and after the termination of an imprisonment to which the defendant had been before sentenced for another offence, was good in law. It is to be observed that the answer has no reference as to whether the sentences were passed for offences charged in one indictment or in separate indictments. The question was general in its terms, and the judges answered the question put by the House of Lords in the very words in which it was asked, and that answer was that a judgment of imprisonment against a defendant may commence from and after the determination of an imprisonment, to which he was before sentenced for another offence.

It is interesting to note that WILMOT, C.J., in *Wilkes'* case (2), in giving his reasons for the decision and answer of the judges, points out that any other course might lead to great injustice.

We were also referred to a case which shows what the practice was after *Wilkes'* case (2), namely *R. v. Williams* (3).

There was no power previous to the passing of the Criminal Law Act, 1827, to adopt such a method in cases of felony for various reasons, some of which have been referred to, and counsel who argued *R. v. Hemming* (4) in this court, where the point was raised and not decided, gave historical reasons why the case was different in questions of felony. In our view, in the case of misdemeanour, the power to do what OLIVER, J., has done in this case has always existed, and has never been abrogated. The Criminal Law Act, 1827, s. 10, is not applicable to this case. But if, as was said in *R. v. Castro* (1), the object of the legislature in enacting this section was to make the power existing in the case of misdemeanour applicable to cases of felony, it would seem that in cases of felony to which the section is applicable, the words "subsequent offence" should be interpreted as subsequent conviction for an offence, and not as limiting the exercise of this power to cases of a second offence where it has been committed subsequent to the offence for which the defendant is already serving a sentence. In the view which this court has taken, it is not necessary to decide that question, but we express our view with regard to it.

The second ground of appeal is that the sentence is excessive. In our view, in all the circumstances of the case, we feel that the sentence was not excessive, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Janson, Cobb, Pearson & Co.*, agents for *Dunderdale, Wignall & Co.*, Manchester (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

Re ENGELS, NATIONAL PROVINCIAL BANK, LTD. v. MAYER AND OTHERS.

[CHANCERY DIVISION (Uthwatt, J.). March 30, 1943.]

Wills—Construction—Gift over—Perpetuities—"After the termination of the present war"—Validity.

The testator, by his will dated Nov. 19, 1939, bequeathed a sum of War Loan "to the endowment fund of the German Evangelical Church, Great Horton, Bradford, provided that after the termination of the present war with Germany services in the German language be held in the said church," with a gift over in favour of residue "if the said legacy shall fail." One of the regulations annexed to the trust deed of the church provided that the German language was to be used in all services, although during the war of 1914-1918 such use was discontinued:—

HELD: (i) the bequest should be construed as a gift of capital to the

trustees upon trust to apply the income to the charitable purposes of the endowment fund, subject to a gift over in favour of residue if after the present war services ceased to be held in the German language.

(ii) since it could not be stated with certainty that the war would end within 21 years, the gift over in favour of residue would not necessarily vest within the period limited by the rule against perpetuities, and failed as contrary to that rule.

A [EDITORIAL NOTE. The point of importance here is the application of the perpetuity rule to a gift defined with reference to the termination of the war. The rule requires that a gift shall vest in interest within 21 years where no life is mentioned, and, since it cannot be definitely said that the war will not last for 21 years, a gift over which can only be ascertained at the termination of the war fails as contrary to the rule.

AS TO THE PERPETUITY RULE IN CHARITY CASES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 202-204, paras. 284-290; and FOR CASES, see DIGEST, Vol. 8, pp. 325-329, Nos. 1078-1116.]

B SUMMONS to determine a question of construction arising under a will. All the facts are set out in the judgment.

S. Pascoe Hayward for the plaintiffs.

W. Hunt for the first eight defendants.

A. Mulligan for the ninth and tenth defendants, residuary legatees.

H. O. Danckwerts for the Attorney-General.

C UTHWATT, J. : This summons raises a short question of construction. The testator was a member of the German Evangelical Church at Great Horton, Bradford, and by his will, dated Nov. 19, 1939 (made, therefore, just after the outbreak of the present war), after giving certain immediate bequests to Mrs. Heslop and to Elsa and Dorothy Gellert, made the bequest I have to consider. The terms of the bequest are :

D I give (free of death duty) the sum of £500 3½ per cent. War Loan to the endowment fund of the German Evangelical Church, Great Horton, Bradford, provided that after the termination of the present war with Germany services in the German language be held in the said church.

Then he declared later :

... the receipt of the treasurer or other proper officer shall be a sufficient discharge to my trustees for the said legacy and I declare that if the said legacy shall fail, then the said sum of £500 3½ per cent. War Loan shall fall into and form part of the residue of my estate.

E The German Evangelical Church, Bradford, appears to have been founded in 1882. There is in evidence a trust deed which declares a charitable trust of the land upon which the church is built and of the parsonage or pastor's residence held with the land. There are annexed to the trust deed certain regulations which deal with the management both of the church itself and also of its services. The provisions of the trust deed cannot be altered, but the regulations can be altered by the members of the congregation, the church being founded upon congregational lines. It is not necessary to refer to more than a few of the regulations. The doctrines and basis of the church are laid down. Provision is made as to divine services and religious rites :

G Divine services are held every Sunday and Christmas Day in the morning and evening, and one service on Good Friday and the Day of Ascension . . .

and so forth, and provision is made for the management of the affairs of the church by the church council and for the election of a council. The regulations further provide that the pastor must have been educated at a German University and examined and ordained by some German ecclesiastical authority, and so forth, and must be elected by the congregation ; then his duties are laid down.

H It is provided by sect. 25 :

In all the divine services, holy rites and acts, in preparing for confirmation and in all the meetings of the congregation and the church council the German language is to be used.

Sect. 23 provides :

All donations and legacies given to the church are to be received by the church council, through the pastor or any of the members, and are to be applied for church purposes in agreement with the intention of the donor, provided this be in harmony with these regulations.

I need only mention two facts. The first is that during the war of 1914-1918 this church discontinued the use of the German language in its services. It was no doubt his recollection of that fact which induced the testator to put this particular condition in his will. The second fact is this, that the trust deed contains no mention of an endowment fund as such, but there was, in fact, an endowment fund in the hands of the trustees, and I am satisfied the trustees were to use the income only for their purposes and to preserve the capital. The testator himself, I should add, was one of the trustees of this particular church. A

In that set of circumstances I have to construe this particular bequest of £500 War Loan. It appears to me that the first consideration which emerges upon this bequest is that by his gift to the endowment fund the testator intended that no part of the capital should be spent, but that the income should be used from time to time for the purposes to which the endowment fund was applicable; that is the first thing. The second thing is this. I think it is right to read the proviso in the light of the object which one would rationally attribute to the testator, namely that the services generally should continually be conducted in the German language. B

Putting those two matters together, what is the right way of treating this proviso? Having regard to the fact that in form it is an immediate gift, but that the holding of the services in the German language during the present war would, as the testator recognised, be, to say the least, bad form, he wished the German language to be used after the war. With that in mind, it appears to be the right way to read the gift as an immediate gift of £500 to the endowment fund of the German Evangelical Church, with liberty to use the income during the present war without regard to any direction as to the language in which their services should be held, but that after the war they were to enjoy the income so long as they, in fact, used the German language in their services. In other words, I think the rational way to construe this gift is as a gift of the capital on trust to apply the income for charitable purposes to which the income of the endowment fund is applicable, subject to the condition subsequent that, if, after the present war services are not as a general matter of current church practice held in the German language, then the gift over takes effect. C D

Counsel argued that the residuary gift must fail in its entirety. I think that is putting too strict a construction upon the word "fail," and that "fail" can apply quite properly and logically to the case where the income of the legacy ceases to be applicable for the purpose I have mentioned. My view of the construction of the will is that it is a gift of capital to the trustees upon trust to apply it to the charitable purposes of the endowment fund, subject to the gift over in favour of residue if at any time services cease to be held in the sense in which I mentioned. E

A subsidiary point arises as to whether the gift over is effective in law. There would be no doubt that if the gift over were in favour of another charity the rule against perpetuities would not operate; but the gift over is not in favour of another charity, and I have to consider, therefore, if one can say, not whether the war may or may not end within the period limited by the perpetuity rule, but whether one can now say that it is necessarily the fact that the interest of residue would vest in this case within 21 years. The answer, I think, is obvious, that one cannot say that. In all probability the war may well be over before that period, but as a practical certainty (and that is what the rule implies) one cannot say that it will. I, therefore, propose to hold that the gift over is bad for perpetuity and that the bequest is a gift to the trustees of the present endowment fund to be held as a capital sum, the interest of which is applicable to the purposes of the trust at the date of the testator's death. F G

Declaration accordingly. Costs as between solicitor and client to come out of the estate. H

Solicitors: *Cunliffe & Airy*, agents for *Morgan, Wright & Co.*, Bradford (for the plaintiffs and ninth and tenth defendants); *Blundell, Baker & Co.*, agents for *Jonathan Knowles & Cox*, Bradford (for the first eight defendants); *Treasury Solicitor* (for the Attorney-General).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

EMERY AND OTHERS v. SAGE.

[KING'S BENCH DIVISION (Charles and Tucker, J.J.), March 23, 1943.]

Emergency Legislation — Military service — Conscientious objector — Offence — Refusal to undertake civil defence duties—Claim to exemption as minister of religious denomination—Claim to exemption not proceeded with at time of registration—National Service (Armed Forces) Act, 1939 (c. 81), ss. 5 (6) (b), 11 (1) (e)—National Service Act, 1941 (c. 15).

The appellants were registered under the National Service (Armed Forces) Act, 1939, as conscientious objectors on condition that they undertook certain kinds of civil work. Having failed to obey an order to do so, they were charged with an offence under the Act. On behalf of the appellants it was contended that, as they were "Jehovah's Witnesses," they were fully ordained ministers of a religious denomination within sect. 11 (1) (e) of the Act and were, therefore, under no liability to register and were exempt from service under the Act :—

HELD : the appellants once having been registered as conscientious objectors subject to certain conditions, they had committed an offence by not complying with those conditions, and it was immaterial whether or not they were under liability to register in the first instance.

[EDITORIAL NOTE. The appellants having duly registered as conscientious objectors, they were liable to be compelled to obey every proper order made upon them as conscientious objectors. If the original registration was in error, it would appear that any remedy open to them would be of the nature of getting such registration set aside and vacated. So long as they remained so registered they must obey orders properly made upon them under the Act. Such orders would be binding upon them as conscientious objectors, and any disobedience to them would be punishable as an offence.

FOR THE NATIONAL SERVICE (ARMED FORCES) ACT, 1939, s. 5, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1046.]

APPEAL by way of case stated by the metropolitan police magistrate. The facts are fully set out in the judgment.

Victor Wolff for the appellants.

Arthian Davies for the respondent.

CHARLES, J. : This matter comes before the court upon a special case stated by a metropolitan police magistrate. It involves a consideration of certain sections of the National Service (Armed Forces) Act, 1939, and the National Service Act, 1941. There are numerous appellants, but I think it is necessary only to take the name of one of them in order to indicate the matters which we have to consider. One of the appellants is named Wilfred Vryburgh Emery, and the allegation is that on Apr. 17, 1942, he conditionally registered in the register of conscientious objectors under the National Service (Armed Forces) Act, 1939, s. 5 (6) (b), and, having so conditionally registered, failed to comply with the condition on which he was so registered, to wit, that he should undertake full time A.R.P. work, A.F.S. work or work on the land. He was brought before the court, from which this appeal is made, in order that his disobedience might be dealt with.

Before that court he raised certain matters which he said ought to have been considered by the magistrate and contended that no conviction should have been made against him. He contended that he was a "Jehovah's Witness" and that, as a fully ordained minister working under the International Bible Students' Association, he was not liable at all to service under the National Service (Armed Forces) Acts, inasmuch as he came within one of the exempted classes set out in sect. 11 (1) (e) of the 1939 Act, that is to say, a man in holy orders or a regular minister of any religious denomination ; and that, therefore, he was entitled to complete and absolute exemption.

The answer which was made to that seems to me to be unanswerable. The answer was this : "You, Emery, of your own motion and by your own choice, registered, and having registered you put yourself within the ambit of all the matters of procedure which we find in the National Service (Armed Forces)

Act, 1939, s. 5." Sect. 5 (3) provides as follows :

A person who has been provisionally registered in the register of conscientious objectors shall, within the prescribed period and in the prescribed manner, make to a local tribunal constituted under Pt. I of the Schedule to this Act an application stating to which of the matters mentioned in paras. (a) to (c) of subsect. (1) of this section he conscientiously objects, and, if he fails to do so, the Minister shall remove his name from the register of conscientious objectors.

Continuing to carry out his acceptance of the position of a conscientious objector, he went before the local tribunal, and, not having got satisfaction before the local tribunal, he went before the appellate tribunal.

It is to be noticed that the decision of the appellate tribunal is a final decision and cannot be called in question. Subsect. (12) provides as follows :

No determination of a local tribunal or the appellate tribunal made for the purposes of this Act shall be called in question in any court of law.

As I have indicated, his own act has brought him within the ambit of the machinery for conscientious objectors, and he cannot, in my view, blow hot and cold. I have no doubt that the appellate tribunal exercised a proper jurisdiction ; they were exercising jurisdiction over a man who was said to be a minister and was taking certain objections, and they must be held to have considered the matter in a way which was well within their jurisdiction.

With regard to the proceedings before the magistrate, it was contended that, although the appellant was admittedly conditionally registered as a conscientious objector, and, therefore, was within the ambit of the Act, the magistrate ought in some way to have gone behind that voluntary registration and inquired whether or not he was liable to register at all. In my view, the magistrate was perfectly correct in coming to the conclusion that he could not consider that matter ; all he had to consider was whether the conscientious objector who was ordered to do certain things had failed to do them. Having done that, I think that he did all that he was required to do.

It is further suggested that there was a reasonable excuse which the magistrate ought to have considered under the National Service (Armed Forces) Act, 1939, the reasonable excuse alleged was that he had been advised by somebody in the Ministry of Labour to register and then have the matter inquired into. Unfortunately, that is just what he did not do. He did not register and leave the matter to be inquired into, either on his refusal to be medically examined or in some other way ; he chose to register as a conscientious objector. It is perfectly true that sect. 5 (4) of the 1941 Act (which is the subsection under which the conviction was registered), provides as follows :

If a conditionally registered conscientious objector fails to comply with any condition on which he is registered, he shall, unless he satisfies the court that he had reasonable excuse for the failure, be guilty of an offence . . .

That means a reasonable excuse for disobedience as a conscientious objector, and cannot be taken to mean that, where a conditionally registered conscientious objector fails to comply with any condition, the magistrate is supposed to inquire whether he was ever liable to be registered at all. It does not seem to me to be consistent with the words, or the intention, of the Act of Parliament.

In my view, this appeal should be dismissed.

TUCKER, J. : I agree and have nothing to add.

Appeal dismissed with costs.

Solicitors : Sparks, Russell, Isard & Co. (for the appellants) ; *The Solicitor to the Ministry of Labour and National Service* (for the respondent).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

ROBINSON v. ROBSON.

[KING'S BENCH DIVISION (Charles and Tucker, JJ.), March 24, 1943.]

Shipping—Seaman—Offence—Charge under Defence (General) Regulations—Ship's log-book—Entry not brought to man's notice as provided by the Merchant Shipping Act, 1894—Whether log-book admissible as evidence of charge—Defence (General) Regulations, reg. 47A—Merchant Shipping Act, 1894 (c. 60), ss. 228, 239, 695.

Emergency Legislation—Seaman—Offence—Charge under the Defence (General) Regulations—Ship's log-book—Entry not brought to man's notice as provided by the Merchant Shipping Act, 1894—Whether log-book admissible as evidence of charge—Defence (General) Regulations, reg. 47A—Merchant Shipping Act, 1894 (c. 60), ss. 228, 239, 695.

A merchant seaman, a member of the crew of a ship in port, was charged with the offences of being drunk, absent without leave and neglecting his duty under the Defence (General) Regulations, reg. 47A. The only evidence before the court was an entry in the log-book, duly made and signed, setting out the man's offences. The magistrates took the view that, the defendant not having been furnished with a copy of the entry, nor having had it read over to him, as provided by the Merchant Shipping Act, 1894, s. 228, they were precluded from dealing with the cases and accordingly dismissed the informations:—

HELD: in proceedings not commenced under sect. 228 of the Merchant Shipping Act, 1894, it is not a condition precedent to the admissibility in evidence of an entry in an official log-book, otherwise properly made, that such an entry should be read to the accused or a copy thereof supplied to him.

[EDITORIAL NOTE. The Merchant Shipping Act, 1894, by sects. 239 and 695 makes entries in the ship's log-book admissible in evidence generally. Sect. 228 of the Act requires that in certain special cases the entry shall be read over to the seaman or that he shall be given a copy of it. In this case the seaman was charged under the Defence (General) Regulations with one of the offences—absence without leave—mentioned in sect. 228. It is held, however, that sect. 228 is not applicable here, and that it is applicable only where the proceedings are taken under the Merchant Shipping Act.

AS TO ENTRY OF OFFENCES IN LOG-BOOK, see HALSBURY, Halsham Edn., Vol. 30, p. 237, para 413; and FOR CASES, see DIGEST, Vol. 41, p. 252, No. 935.]

Case referred to:

*(1) *Patterson v. Robinson*, [1929] 2 K.B. 91; Digest Supp.; 98 L.J.K.B. 457; 141 L.T. 165.

APPEAL by an officer of the Ministry of Shipping on a case stated by the magistrates of South Shields from the dismissal of two informations under the Defence (General) Regulations, 1939, reg. 47A, and the Emergency Powers (Defence) Acts, 1939 and 1940. The facts are fully set out in the judgment.

Ralph Etherton for the appellant.

The respondent did not appear and was not represented.

Etherton: The Defence (General) Regulations govern the determination of these cases. The provisions of the regulations are quite distinct from the Merchant Shipping Acts which have no application to this case. A proper entry was made in the log-book and duly signed. There was no need to comply with the Merchant Shipping Act, 1894, s. 228. [Counsel referred to *Patterson v. Robinson* (1)].

CHARLES, J.: This matter comes before us by way of a case stated by the justices of the peace for the county borough of South Shields, and concerns a prosecution which was launched on the authority of the Minister of War Transport under the Defence (General) Regulations, reg. 47A, against a man named Robson. That regulation provides as follows:

No person lawfully engaged to serve on board any ship to which this regulation applies shall (a) neglect or refuse without reasonable cause to join his ship or to proceed to sea in his ship; or (b) desert or be absent without leave from his ship; or (c) be absent without leave from his duty at any time.

If he offends against any of those rules he commits an offence.

It was found by the justices that on May 19 Robson, who was engaged on a ship called the River Afton, was very drunk, and absented himself from his ship, and further, in consequence of his condition, hopelessly neglected to keep the fire up in order that the donkey engine might have sufficient pressure. That, of course, raised a difficult and perhaps dangerous condition on board the River Afton, and it is just one of those cases to which reg. 47A, in my opinion, directly applies.

The magistrates considered that the Merchant Shipping Act, 1894, applied to this case and had not been complied with. Sect. 228 of that Act provides as follows :

If any offence, within the meaning of this Act, of desertion or absence without leave or against discipline is committed, or if any act of misconduct is committed for which the offender's agreement imposes a fine and it is intended to enforce the fine, (a) an entry of the offence or act shall be made in the official log-book, and signed by the master and also by the mate or one of the crew ; and (b) the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit ; and (c) a statement of a copy of the entry having been so furnished, or of the entry having been so read over, and, in either case, the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid ; and (d) in any subsequent legal proceeding the entries by this section required shall, if practicable, be produced or proved, and in default of that production or proof the court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct.

The log, which it is not disputed was properly entered and properly signed, was produced, and nothing more, and at the conclusion of the entry in that log, signed by the master, the chief engineer and the second engineer, there is this statement :

I wish this man to be dealt with under the Defence (General) Regulations, reg. 47A, for absence without leave, drunkenness and neglect of duty.

The magistrates considered that inasmuch as sect. 228, to which I have already referred, had not been complied with, they could not consider the log, and that there was no evidence for them to consider.

Let us, for a moment, consider the accuracy of that conclusion. It is quite clear from sect. 695 (1), that :

Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer.

The log is declared to be admissible in evidence by sect. 239 (6), which says :

Every entry made in an official log-book in manner provided by this Act shall be admissible in evidence.

So that it is perfectly clear that, by the Merchant Shipping Act, 1894, ss. 239 and 695, the log is not only admissible in evidence, but, subject to all just exceptions, shall be actual evidence of the matters stated therein.

The matter was referred to in *Patterson v. Robinson* (1), in which the Divisional Court, consisting of LORD HEWART, L.C.J., AVORY and SWIFT, J.J., made it abundantly clear that the Act goes out of its way to make this entry in an official log-book admissible, and further, as AVORY, J., said, at p. 96 :

... the real intention of the Act was that the entry in the log-book should wherever practicable be admissible as the best evidence ...

The magistrates came to the conclusion that sect. 228 applied, that it had not been complied with, that, as this was not done, the entry in the official log-book was not admissible in evidence. That being the only evidence, they dismissed the information. In my opinion, that was an incorrect decision on a point of law. That conclusion can be based only on a holding that it is a condition precedent to the admission of the entry in the log-book that that entry should be read over to the person charged or that he should be supplied

with a copy of it. It seems to me that that may be so in proceedings under sect. 228, but the proceedings here are not taken under that section and effect must be given to sects. 239 and 635, under which this entry in the log-book is admissible in evidence without any qualification. The case should be sent back to them for their consideration, and for them to adjudicate thereon as they should see fit.

A TUCKER, J.: This is a case stated in respect of two informations under the Defence (General) Regulations, reg. 47A, made under the Emergency Powers (Defence) Acts, 1939 and 1940.

B The short point is whether in proceedings under these regulations charging the respondent with desertion from his ship and with drunkenness, an entry in the official log made under the Merchant Shipping Act, 1894, is receivable in evidence, having regard to the facts of this particular case, namely, that the provisions laid down in the Merchant Shipping Act, 1894, s. 228 (b), had not been complied with. Those provisions are that the offender :

... if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit.

C In this case, admittedly, the entry in this ship's log was not read over to the respondent, nor was he furnished with a copy of the entry, and it is said that by reason of the non-compliance with sect. 228 (b), the entry in the log was not admissible in evidence. The admissibility or otherwise of this document in evidence depends upon the Merchant Shipping Act, 1894, ss. 239, 695. Sect. 695 (1) provides :

D Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence . .

Sect. 695, therefore, makes such a document admissible not only in proceedings under the Merchant Shipping Act, but in any court in any proceedings ; but it is to be observed that before such a document is admissible in evidence, it must be a document by this Act declared to be admissible in evidence. Sect. 239 (6) provides :

E Every entry made in an official log-book in manner provided by this Act shall be admissible in evidence.

F In this case, as stated, I think that this was an entry made "in an official log-book in manner provided by this Act." The making of the entry is in no way connected with the provision of sect. 228 providing for the reading over of the entry to the seaman. That may or may not be necessary, I express no opinion with regard to that, in proceedings under sect. 228, but, in my view, it is not a condition precedent to the admissibility in evidence of an entry in an official log-book otherwise properly made. I express no view, and I do not think there is anything in our decision in this case, which decides that an entry in an official log-book which has not been made as soon as possible after the occurrence is an entry which has been made "in manner provided by this Act." I think that, if that had been the argument put forward in the court below, it is one that might possibly have required consideration, and might require consideration in some other case where an entry had in fact been made in the log for some unexplained reason many days after the occurrence of the act. I think it is possible it might be argued in such a case that such an entry had not been made in manner provided by the Act. But, as I read this case, that is not the point that was taken. The point that was taken was that this entry was not receivable in evidence because it had not been read over to the accused person. I do not think that is a condition precedent to its admissibility in evidence.

H For those reasons, I agree that this case should be remitted to the justices with the direction indicated by CHARLES, J.

Appeal allowed. Case remitted to justices to hear and determine.

The Treasury Solicitor (for the appellant).

[Reported by C.ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

PENANG AND GENERAL INVESTMENT TRUST, LTD.
AND ANOTHER *v.* COMMISSIONERS OF INLAND REVENUE.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Romer), **March 15, 16, 18, 19, 22, 23, April 19, 1943.**]

Income Tax Sur-tax—Undistributed income—Apportionment of income—Apportionment to members on register of company—Apportionment to members not liable to sur-tax—Apportionment according to members' interest in assets—Finance Act, 1922 (c. 17), s. 21—Finance Act, 1937 (c. 54), s. 14 (2), (3)—Finance Act, 1938 (c. 46), ss. 38 (2), (3), 41 (4) (a) (ii)—Finance Act, 1939 (c. 41), s. 38.

In cases which fall within the Finance Act, 1922, s. 21 : (i) the commissioners have power to apportion the company's income to members on the register who are not liable to sur-tax, e.g., trustees of settlements and incorporated bodies ; (ii) in determining the respective interests of the members for the purpose of apportioning income, the commissioners have an unfettered discretion to attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

Decision of the Court of Appeal ([1942] 1 All E.R. 290) affirmed.

[**EDITORIAL NOTE.** The questions here discussed arise solely under the Finance Act, 1922, s. 21 and the subsequent legislation upon the same matter, that is, undistributed income of companies. The argument is founded on the words in the section : “. . . in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super tax.” From this it was argued that the section had no application where the member of the company in question was not liable to super tax, e.g., a trustee of a settlement. This contention is rejected because the phrase in the section refers to the mode of distribution of the company's income and not to the result of distribution on shareholders of a particular class.

AS TO APPORTIONMENT OF INCOME, see HALSBURY, Hailsham Edn., Vol. 17, p. 295, paras. 583, 584 ; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674g-674r.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Blott, Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171 ; 28 Digest 107, 663 ; 90 L.J.K.B. 1028 ; 125 L.T. 497 ; 8 Tax Cas. 101.
- (2) *Inland Revenue Comrs. v. Burrell*, [1924] 2 K.B. 52 ; 28 Digest 108, 665 ; 93 L.J.K.B. 709 ; 131 L.T. 727 ; 9 Tax Cas. 27.
- (3) *Inland Revenue Comrs. v. Sansom*, [1921] 2 K.B. 492 ; 28 Digest 101, 612 ; 90 L.J.K.B. 627 ; 125 L.T. 37 ; 8 Tax Cas. 20.
- (4) *Ormond Investment Co. v. Betts*, [1928] A.C. 143 ; Digest Supp. ; 97 L.J.K.B. 342 ; 138 L.T. 600 ; 13 Tax Cas. 400.

APPEALS by the taxpayers from a decision of the Court of Appeal given on Dec. 12, 1941 and reported [1942] 1 All E.R. 290, affirming the decision of MACNAGHTEN, J., given on July 15, 1941. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

J. Millard Tucker, K.C., and Leonard Stein for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

VISCOUNT SIMON, L.C. : My Lords, this is an appeal from a decision of the Court of Appeal (LORD GREENE, M.R., CLAUSON and DU PARCQ, L.JJ.), affirming a judgment in favour of the Crown pronounced by MACNAGHTEN, J., upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, who had upheld a direction given and apportionment made in respect of the income of the appellant company for the year 1937-38, under the Finance Act, 1922, s. 21. This section, as its opening words declare, was passed :

With a view to preventing the avoidance of the payment of super tax [now sur-tax] through the withholding from distribution of income of a company which would otherwise be distributed . . .

The Special Commissioners followed up the direction (dated Aug. 28, 1939) and the apportionment (dated Dec. 19, 1939) by an assessment upon the second appellant of £81,867 as “settlor” (see the Finance Act, 1938, s. 38 (2) and (3),

and s. 41 (4) (a) (ii)), but it is unnecessary to trace out the application of these complicated sections since it is admitted (see para. 12 of the case stated) that this assessment is correctly made if the direction and apportionment are upheld.

The appellant company is a company to which sect. 21 applies, and is moreover an "investment company" as defined by the Finance Act, 1936, s. 20 (1). It was incorporated on June 10, 1937, and its nominal and issued capital amounted to £856 11s., divided as follows: 749 A ordinary shares of £1 each; 100 B ordinary shares of £1 each; and 151 C voting shares of 1s. each. The A shares and C shares are not entitled to any dividend; the C shares are entitled to repayment of capital in a winding up; the B shares are entitled to receive the whole of the dividends declared by the company and to a repayment of capital, and the A shares to the balance of surplus assets, in a winding up. Both the A shares and the B shares are registered in the names of trustees holding them under discretionary trusts established by settlements made by the second appellant Sir John Ramsden.

The company's structure is unusual, and when it is added that in its first year of life this company, with its modest capital of £856 odd, made a profit (mainly from shares it had acquired in Penang Rubber Estates Co., Ltd.) of £81,974—i.e., at the rate of 9,500 per cent. on its capital—it may be safely inferred that the whole arrangement was entered into in the hope of escaping sur-tax thereby.

This, however, is not the point. The appellants are entitled to succeed, whatever the purpose of these arrangements may be, unless the provisions of the relevant statutes authorise the direction and the apportionment which have led to the assessment.

The main contention of the appellants is a contention of law arising on the construction of sect. 21. As sur-tax applies to the income of an individual (Finance Act, 1927, s. 38 (1)) and is charged in respect of a "total income from all sources" of that individual, when this exceeds the exempted minimum, it is clear that the tax cannot apply to a trustee in respect of income coming to him on trust and received by him for the benefit of another. Such income, for purposes of sur-tax, is part of the total income of the beneficiary. The appellants argue that, inasmuch as the only shares in the company that can receive any dividend are the B shares, and the B shares are all registered in the names of trustees, it is impossible for this company to distribute to its members any part of its income.

... in such manner as to render the amount distributed liable to be included in the statement to be made by the members of the company of their total income for the purposes of sur-tax.

The argument then is that, since *lex non cogit ad impossibilia*, it cannot be within the powers of the Special Commissioners (or, at any rate, cannot be a proper exercise of their powers) under sect. 21 to give a direction on the view that a reasonable part of the company's income has not been distributed "in such manner," when the company is not in a position to make any such distribution at all.

The argument, in my opinion, breaks down *in limine*. The phrase in the section refers to a mode of distributing the company's income, and not to the result of the distribution on shareholders of a particular class.

In *Blott's* case (1), this House decided that a company with undistributed profits could, by suitably devised arrangements, distribute bonus shares "in such manner" that the distribution was a distribution of capital and not of income: *Burrell's* case (2) was a further illustration of the same principle. Yet another decision which illustrated how a company's profits could be distributed in a manner which did not expose the recipient to super tax is *Comrs. of Inland Revenue v. Sansom* (3). It is not without significance that these cases arose shortly before the Finance Act, 1922, was passed. Again, if a company with undistributed profits goes into liquidation, its assets are distributed to the contributories "in such manner" that they are capital in their hands. It is the contrast between a manner of distribution which gives the opportunity for the law providing for sur-tax to be applied, and a manner of distribution which cannot result in attracting sur-tax, which is the distinction at which sect. 21 is aimed. The authority of the Special Commissioners to make a

direction under sect. 21, in cases where it appears to them that the company has not made a reasonable distribution, is not in the least affected by the fact that the recipients are trustees. The appellants' first point, therefore, fails.

The next point to be considered is whether an apportionment under sect. 21 can be rightly made (as was the case here) to trustees on the share register. The argument urged against this seems to assume that the assessments to sur-tax must be made on the same persons as are named in the apportionment. But is this so? The section says that the direction is made "for purposes of assessment," and that upon apportionment among the members sur-tax "shall be assessed and charged in respect of the sum so apportioned," but it does not say that the individual named in the apportionment is necessarily the individual to be assessed. If a part of the income is apportioned to a shareholder who is a trustee holding the share in trust for a beneficiary, it would be the beneficiary who would be assessed. A statement of income from all sources must include amounts received from a trustee. Moreover, by sect. 21 (7) the expression "member" is to include any person having a share or interest in the capital or profits or income of the company. I incline to think that, inasmuch as the apportionment is "amongst the members," it would be legitimate for the Special Commissioners to apportion a proper fraction to the beneficiary in the first instance, if they already knew that the shareholder on the register was a bare trustee. Information as to this could be obtained under Sched. I, para. 11. But whether the Special Commissioners have the information, and act upon it, in the first instance or not, it seems to me clear that an original apportionment to a trustee may properly be followed up by an assessment on the beneficiary.

I should be prepared to reach the conclusion that an apportionment can be made to shareholders who are trustees by interpreting the words of sect. 21 as they stand. This view, moreover, was certainly the view taken by the legislature when enacting the Finance Act, 1938, s. 41 (4) (a) (ii), which defines "income arising under a settlement," for that paragraph, when referring to apportionment under sect. 21 of the 1922 Act, contemplates an apportionment of income "to the trustees of or a beneficiary under the settlement." The appellants, quoting *Ormond v. Betts* (4), are driven to contend that this is an erroneous assumption made by the legislature as to the previous state of the law—a contention particularly difficult to sustain in a Finance Act which is to be read with previous Finance Acts as a single code; but for the reasons above given, the assumption is correct.

This is really the end of the case, for it was admitted on behalf of the present appellants before MACNAGHTEN, J., that the appellant company did not distribute within the year of assessment a reasonable part of its income. The penal provisions of sect. 21 of the 1922 Act originally applied only if it appeared to the Special Commissioners that there had not been a distribution of a reasonable part of the company's income "within a reasonable time after the end of any year, etc.", but by the Finance Act, 1937, s. 14 (2) (a), the Special Commissioners are empowered, if they think fit, to give a direction in the case of an investment company (which the appellant company is) where the company has not "within the year of assessment" distributed "a reasonable part of its actual income from all sources for that year." This admission having been made, it was not open to the appellants to argue that there was no sufficient evidence to support this conclusion; indeed, the case stated raises no such contention.

On the whole matter, I am of opinion that the appeal fails, and I move that it be dismissed with costs.

My Lords, my noble and learned friend LORD ATKIN authorises me to say that he agrees with this opinion.

LORD THANKERTON: My Lords, I agree with VISCOUNT SIMON, L.C. In view of the admissions in this case, it is only necessary to deal with the two main arguments of the appellant which respectively challenged the validity of the direction and the validity of the apportionment under the Finance Act, 1922, s. 21 (1), as subsequently amended, it being admitted that the appellant company is one to which the section applies.

The conditions precedent to the issue of a direction are that it should appear to the commissioners that the company has not, within the period prescribed

. . . distributed to its members in such manner as to render the amount distributed

liable to be included in the statements to be made by the members of the company of their total income for the purposes of super tax, a reasonable part of its actual income from all sources . . .

for the prescribed period. The appellant maintains that, as the only registered shareholders to whom a distribution of income by way of dividend could have been made were the trustees of the B settlement, who were not liable to super tax, there could be no distribution in the manner predicated by the section ;
A that, especially in a penal provision such as this section, the maxim *lex non cogit ad impossibilia* applies, and, accordingly, the condition precedent to the issue of a direction cannot arise, and the direction in this case was unwarranted by the terms of the section. The argument of the appellant was that where all the registered shareholders of a company, to whom a distribution of its net income could be made, were trustees with only a fiduciary interest in their holding, the section could not apply, but the appellant conceded that his contention
B would be defeated if only one of such shareholders had the beneficial interest in his holding. This concession, in my opinion, does not help him at all.

I am unable to accept the appellant's construction. In my opinion, the words above quoted refer to the quality of the distribution predicated. It appears to me to be clear that this part of subject. I had within its purview the failure of a company to distribute a reasonable part of its income as income, which, in an appropriate case, would render it returnable as part of the recipient's total income for purposes of super tax. My construction of the words quoted
C may easily be expressed by the substitution of "would" for "to" and the insertion of the words "if any" after "statement," as follows:—"distributed to its members in such manner as *would* render the amount distributed liable to be included in the statements, *if any*, to be made by the members of the company of their total income for the purposes of super tax." Accordingly,
D the appellant's ground of challenge of the direction fails, and, in that view, the appellant did not dispute the finding that the company had failed to distribute a reasonable amount of its actual income within the prescribed period.

The appellant's challenge of the validity of the apportionment was based on the view that the apportionment, according to the terms of sect. 21 (1), as amended, could only be made on members of the company, on whom super tax could be assessed and charged, that is, on members who had a beneficial interest, and that the apportionment in the present case, which was made on trustees only, was invalid. I am of opinion that the appellant's construction is too narrow, and that this is sufficiently demonstrated by paras. 8, 11 of Sched. I, to the 1922 Act, which contemplate the ascertainment of the beneficial owner after the apportionment has been made. This does not necessarily exclude the ascertainment of the beneficial owner prior to making the apportionment.
E I am, therefore, of opinion that the apportionment on trustees was valid, and, in that view, the appellant has conceded, as stated in para. 12 of the case, that the assessment is correct. This concession relieves me from considering, in the present case, whether, in view of the terms of sect. 21 (2), there should be an apportionment, whether original or amended, on the member sought to be assessed and charged, and I express no opinion on that point.

Accordingly, I concur in the motion proposed by VISCOUNT SIMON, L.C.

LORD MACMILLAN : My Lords, the Special Commissioners of Income Tax, professing to exercise the powers conferred on them by the Finance Act, 1922, s. 21, and the Finance Act, 1937, s. 14 (2) and (3), directed that for the purpose of the assessment of sur-tax the actual income of the appellant company for the year of assessment ending on Apr. 5, 1938, should be deemed to be the income of its members and, further, made an apportionment of the actual income of
H the appellant company among the members, whereby a sum of £81,867 was apportioned to the trustees of a settlement made by the appellant Sir John Ramsden, consequent upon which an additional assessment to sur-tax in that sum was made upon him as the settlor. The appellants challenge the validity both of the direction and of the apportionment.

The point arises in this way. Under the constitution of the appellant company its nominal and issued capital is divided into A ordinary shares which are not entitled to dividends, B ordinary shares which are entitled to the whole of any dividends declared by the company, and C voting shares which are not entitled

to dividends. All the B ordinary shares originally belonged to Sir John Ramsden, but were transferred by him to trustees under a deed of settlement dated June 24, 1937, which was varied by two subsequent deeds in 1937 and 1938. These trustees thus become the only parties entitled to receive dividends out of the company's profits. In the course of the year of assessment the company declared and paid to the trustees interim dividends amounting to £2,000 gross on the B shares. The Special Commissioners were of opinion that this was not a reasonable part of the company's income for the year, which amounted to £81,974 2s. 1d., and made the direction the validity of which is now contested.

It was admitted that the company was an investment company within the statutory meaning and that the relevant legislation applied to it. I shall throughout refer to sur-tax without discriminating it from the super tax which it superseded.

In order that the Special Commissioners may give a direction under the Finance Act, 1922, s. 21 (1), as amended by the Finance Act, 1937, s. 14 (2), in the case of a company such as the appellant company, it must appear to them that the company has not within the year of assessment

... distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of sur-tax, a reasonable part of its actual income from all sources ...

for the year of assessment. Under the constitution of the company the only distribution of any part of its actual income which it could competently make was to the holders of the B shares and the holders of these shares being trustees were under no obligation to make a statement of total income for the purposes of sur-tax. Consequently, it was argued, the appellant company could not make any distribution of its income, reasonable or unreasonable, in such manner as to render the amount distributed liable to be included in statements to be made by the members of the company of their total income for the purposes of sur-tax. The only parties to whom the company could make any distribution were trustees who were under no liability to make a return of total income for sur-tax purposes. If the company could not distribute any of its income in such a manner as to have the result indicated, it could not appear to the Special Commissioners that it had not distributed a reasonable part of its income in that manner.

This argument, in my opinion, is based on a misreading of the language of sect. 21 of the 1922 Act. The section may not be happily expressed, but its meaning is plain enough, once its origin and purpose are understood. The circumstance that the income of a company is not in general liable to sur-tax in its hands but becomes liable to sur-tax only in the hands of its members after distribution among them, so far as the total income of the recipient members renders them liable to sur-tax, naturally suggested a means of evading liability to sur-tax. If a company refrained from distributing its income among its shareholders or distributed only a small part of its income, then its income altogether or *pro tanto* escaped sur-tax; but, if no distribution or only an inadequate distribution of income were made, the shareholders got no benefit or only an inadequate benefit. So resort was had to means of distributing the profits of a company in such a way that they should reach the shareholders otherwise than as income liable to sur-tax. There were various ways of achieving this result. Thus the company might convert its undivided profits into paid-up capital and then make a bonus allotment of the new shares among its shareholders. The distribution of these shares did not constitute a distribution of income and the recipients were under no obligation to include the value of the shares in their return of total income for sur-tax purposes (*Commissioners of Inland Revenue v. Blott* (1)). The same result could be attained by the issue of debentures or debenture stock. It was thus possible by resort to such expedients to effect a distribution of a company's profits among its members "in such manner as" *not* "to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of" sur-tax. The section is designed to meet the cases where a company refrains from distributing any or a reasonable part of its income or, by utilising one of the expedients indicated, distributes its income in such a manner that the recipients are under no obligation to include what they receive

in any return of total income which they are bound to make. In such cases the Special Commissioners are empowered to make a notional distribution of the company's income, disregarding what the company has actually done.

A The condition precedent of the operation of the section is not that the company should have failed to make such a distribution of its income as that all or at least some of the recipients should be liable to return what they receive in statements of total income for sur-tax. The condition is that the company should have failed to make a distribution of its income in such a form as to oblige the recipients to include what they receive in any statement of total income which they may be liable to make for sur-tax purposes. If it makes a reasonable distribution in this form it is immaterial that some or all of the recipients happen not to be liable to make a return of total income for sur-tax purposes. It is the character of the distribution, not its ultimate tax effect that is referred to in the section.

B Applying this reading of the section to the present case, I see no obstacle to the issuing of a direction by the Special Commissioners in the fact that the only members of the company to whom the company could make a distribution of its income happened to be trustees who were under no obligation to make a return of total income for sur-tax purposes.

C If, then, it was competent for the Special Commissioners in the present instance to issue a direction under the section, the next question is whether they made a valid apportionment of the company's income. The apportionment is to be "among the members" of the company, but it may be a very different apportionment from that which the company itself could have made. The section contains a subsect. (7), enacting that :

... the expression "member" shall include any person having a share or interest in the capital or profits or income of a company.

D A company can distribute its profits only among its registered shareholders, but the Special Commissioners in their apportionment are not so restricted. Further, under the Finance Act, 1937, s. 14 (3), the Special Commissioners, in making their apportionment

... may, if it seems proper to them so to do, attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

E The apportionment may be among the members or to each class of shares. (1922 Act, Sched. I, para. 10). Power is conferred on the Special Commissioners to require information as to the beneficial ownership of any shares (*Ibid.*, para. 11).

F What the Special Commissioners did in the present case was to apportion the actual income of the company to the shareholders on the register in accordance with their interests in the assets of the company on a winding up. Under the constitution of the company the holders of the B ordinary shares and of the C voting shares were entitled on a winding up to receive payment only of the amount paid up on their shares, viz., £100 and £7 11s. All the rest of the surplus assets belonged to the holders of the A ordinary shares. These A shares, like the B shares, were also the subject of a deed of settlement by the appellant Sir G John Ramsden, which was dated June 24, 1937, and was varied by a subsequent deed of Dec. 7, 1937. The result of the Special Commissioners' apportionment of the actual income of £81,974 2s. 1d. was accordingly to attribute £100 to the trustees who were the holders of all the B shares, £7 11s. to the 10 individual holders of the C shares, and the balance of £81,866 11s. 1d. to the trustees who were the holders of all the A shares. If the trustees of the A shares had been bare trustees for the distribution of the trust income among beneficiaries, the H Special Commissioners, availing themselves of the expanded definition of "member," might no doubt have made an apportionment among the beneficiaries instead of to the trustees, but the provisions of the trust deed, which it is not necessary to particularise, precluded this. It was not a bare trust.

The apportionment to the trustees of the A shares was challenged on the ground that as trustees they had no beneficial interest in the shares and were under no obligation to make a return of total income for sur-tax purposes. In my opinion, the Special Commissioners, in virtue of their powers as above set out and construed, were entitled to apportion the sum of £81,866 11s. 1d. to the

trustees of the A shares, who were the registered holders of these shares (though, of course, not *qua* trustees), and members of the company. It was immaterial that they were under no liability to make a return of the total trust income for sur-tax purposes.

It is to be noted that the Finance Act, 1938, s. 41 (4) (a) (ii), which, by sect. 55 of that Act is to be construed as one with the Income Tax Acts, makes express reference to the case of an apportionment under sect. 21 of the 1922 Act to trustees under a settlement.

It is, of course, true that the trustees of the A shares were not liable to pay sur-tax on this income notionally attributed to them. But the resources of the law were not exhausted. The Special Commissioners next invoked the Finance Act, 1938, ss. 38 (2) and (3) and 41 (4) (a) (ii), and treated the income of the trustees as the income of the settlor, namely, the appellant Sir John Ramsden, on whom accordingly an additional assessment to sur-tax in the sum of £81,867 was made. It is unnecessary to discuss the justification of this last step for it was admitted, as appears from the stated case, that if the direction and the apportionment were in order, as I hold them to have been, then the personal assessment on the appellant Sir John Ramsden was correct.

There are two matters I should mention in conclusion. It appears that the company, after the conclusion of the year of assessment ending on Apr. 5, 1938, in point of fact paid a final dividend of £60,500 net to the holders of the B shares. The appellants in their printed case to this House maintained that in the circumstances the company had made a reasonable distribution of its income in the year of assessment and that the Special Commissioners were consequently not justified in issuing their direction. The appellants, however, admitted that in the courts below they had accepted the position that the company had not distributed a reasonable part of its income in the year of assessment. This point was accordingly not open to the appellants in this House, and your Lordships decided to express no opinion upon it. The other point is that, as a result of the apportionment, the £2,000 distributed by way of interim dividends to the B shareholders would appear to be brought twice into assessment. The matter was left somewhat obscure, but an assurance was given by the Solicitor-General that the proper steps would be taken to prevent any double taxation.

The appeal should, in my opinion, be dismissed.

LORD ROMER (read by LORD THANKERTON): My Lords, your Lordships are in possession of the material facts in this case and I need not repeat them. Whether upon those facts there was evidence upon which the Special Commissioners could properly find that the company had not within the year of assessment ending on Apr. 5, 1938, distributed to its members a reasonable part of its income for that year is a question that your Lordships cannot be called upon to decide in this appeal. In the case submitted for the opinion of the court the several contentions of the appellants are quite clearly stated and they do not include a contention that there was no such evidence. Nor was any such contention advanced by the appellants either before MACNAGHTEN, J., or before the Court of Appeal. It is too late for them to advance it now. Nor are your Lordships asked to decide the question whether, upon the assumption that the direction and apportionment given and made by the Special Commissioners under the provisions of the Finance Act, 1937, s. 14 (2) and (3) can be justified, the assessment of £81,867 upon Sir John Ramsden was properly made. It has been admitted by Sir John that upon such assumption the assessment upon him cannot be successfully attacked. In these circumstances, I refrain from expressing any opinion upon either of the two questions to which I have referred, and will turn at once to a consideration of the two other questions which are the only ones that have to be decided upon this appeal. The first of them is this. Can a direction be given under the Finance Act, 1922, s. 21 (1), or the Finance Act, 1937, s. 14 (2), where all or some of the shares in the company concerned are held by trustees? The second of the questions is whether the apportionment made in the present case under subsect. (3) of the last mentioned section was a proper exercise by the Special Commissioners of the discretion that the subsection gives them.

The appellants contend that a negative answer should be given to both of these questions. As to the first of them their contention is as follows. Both the Finance Act, 1922, s. 21 (1), and sect. 14 (2) of the 1937 Act presuppose that

A the shares of any company to which they are to be applied are so held that one at least of its members is liable to include his proportion of any income of the company distributed to its members in a statement to be made by him of his total income for the purposes of sur-tax. If, therefore, there be no such member, as will be the case if all the members are trustees, no direction, it is said, can be given under either subsection. As to this, I would observe in the first place that to be logical the appellants should contend that no company can be the subject of a direction under either subsection unless every one of its members is liable to include any income of the company distributed to him in a statement of his income for the purposes of sur-tax. For the words of each subsection are "as to render the amount distributed liable to be included in the statements to be made by the members," and this means the whole amount distributed. But I am satisfied that the subsections apply to a company even though there is no single member who can be called upon to include any income of the company distributed to him in a statement of his income for the purposes of sur-tax. The subsections, I think, contemplate two possibilities and two only. The first is that the company may have altogether failed to distribute a reasonable part of its income. In that case the company will necessarily have failed to distribute the income in the particular manner referred to in the subsections because it will have failed to distribute it in any manner at all. The words "in such manner" can have no reference to such a case. The other possibility is that the company has in fact distributed a reasonable part of its income among its members, but has not distributed it as income. The company for instance may have capitalised it and distributed it as capital. In such a case the amount distributed would not be liable to be included in the statements made by the members for the purposes of sur-tax whether they were trustees or not. It would not have been distributed in the manner mentioned in the subsections and consequently a direction could be given by the Special Commissioners. There is, of course, yet another possibility. The company may have distributed a reasonable part of its income as income, but owing to one or more of its members being trustees the whole amount distributed will not have been liable to be included in sur-tax statements. If a direction could be given in such a case and an apportionment then made under sect. 14 (3) of the 1937 Act in accordance with the interests of the members in the assets of the company available for distribution in a winding up, quite fantastic results might ensue. But in truth this third possibility is in no way covered by the words of the subsections. In cases where there has been a distribution of a reasonable part of the income of a company the subsections are, in my opinion, upon their true construction concerned only with the nature of what has been distributed and not with the nature of the persons among whom the distribution has been made. If what has been distributed be a reasonable part of the company's income but be of such a nature that it would not be liable to be included in the sur-tax statements of any recipients, the whole income of the company can be made the subject of a direction. If, however, income has been distributed as income no direction can be given merely because all or some of the members are trustees. It is true that in such case the whole amount distributed will not be liable to be included in sur-tax statements of the members. But this will not be because of the manner of its distribution, but because of the nature of the persons amongst whom it has been distributed, and that is a matter with which the subsections are in no way concerned.

E In the present case, for the reasons already mentioned, it must be taken that in the year ending on Apr. 5, 1938, the appellant company did not distribute a reasonable part of its income for that year. It follows that the Special Commissioners were entitled to give a direction under the Finance Act, 1937, s. 14 (2), in spite of the fact that the holders of all the A and B shares were trustees.

H The only other question to be decided is whether, having given such a direction, the Special Commissioners properly exercised their discretion in making the consequent apportionment among the members under sect. 14 (3) of the 1937 Act, instead of in accordance with the members' interests in the company's income. As to this I have little to say. Had the apportionment been made in the latter way the whole income of the company for the year in question would have been allotted to the trustees of the B shares. Whether in that case any income so allotted could have been treated for the purposes of sur-tax

as the income of the appellant is a question that has not been discussed before your Lordships. If it could not, the appellant has, of course, been seriously prejudiced by the way in which the commissioners have exercised their discretion. If, on the other hand, it could be so treated, the appellant has been prejudiced by reason of the fact that an apportionment to the trustees of the B shares would have been subjected to a deduction of the £2,000 gross paid to them as dividends in the year in question. This deduction would have been made under the words introduced at the end of sect. 21 (1) of the 1922 Act by the Finance Act, 1927, s. 31 (2). He has been further prejudiced in that he will not be able to get recoupment of the sur-tax that may be paid by him on the £81,867 as he would have done under the Finance Act, 1938, Sched. III, s. 1, had the apportionment of the whole income of the company been made to the trustees of the B shares. For no income can arise at present under the settlement of the A shares to the trustees or any other person. But I am not prepared to deduce from these circumstances that the commissioners have not properly exercised their discretion. It is reasonably plain from the history of this case that Sir John Ramsden is one of those persons who, rightly or wrongly, exercise much ingenuity in discovering gaps in the nets spread by the legislature from time to time for the purpose of collecting sur-tax for the national revenue, and in so arranging their affairs as to escape through one or more of such gaps. If Sir John sees no impropriety in exercising for this purpose the powers of managing his affairs that are allowed to him by the laws of the country, it does not lie in his mouth to accuse the Special Commissioners of impropriety if they choose to exercise the powers given to them by these same laws in such a way as to defeat Sir John's object, and procure for the national revenue as large an amount from sur-tax as is possible in the circumstances.

My Lords, for these reasons, I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Capel Cure, Glynn Barton & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

Re ANSTEAD, GURNEY v. ANSTEAD.

[CHANCERY DIVISION (Uthwatt, J.), **February 16, 1943.**]

Executors—Order of application of assets—Pecuniary legacies to be paid before testamentary expenses—Incidence of estate duty—Administration of Estates Act, 1925 (c. 23), ss. 34 (3), 53 (3), Sched. I, Pt. II.

The testator by his will gave his wife a legacy of £10,000 free of duty and pecuniary legacies to other persons, not free of duty, amounting to £45,000. He also directed his executors to pay his wife an annuity of £600 after the deduction of tax and to appropriate a sum out of his personal estate in satisfaction thereof, and to hold the residue of his real and personal estate on certain specific trusts. After the payment of his funeral and testamentary expenses and debts, his personal estate was insufficient to set aside the sum required to meet the annuity and to pay the legacies in full:—

HELD: (i) having regard to the Administration of Estates Act, 1925, Sched. I, para. II, the funeral and testamentary expenses and debts were not a first charge on the personal estate, and the whole of the residuary personal estate, other than the part directed to be set aside for the wife's annuity, should be made available for the pecuniary legacies. Estate duty, therefore, would only be payable on such legacies, if, and so far as, the personalty was insufficient to meet them and they had to be satisfied out of the real estate.

(ii) sect. 53 (3) of the Administration of Estates Act, 1925, does not mean that the new order of application of assets directed by the Act will never affect the incidence of death duties, but was inserted merely to preserve the general rules as to the incidence of death duties.

EDITORIAL NOTE. In setting out the order of the application of assets in the administration of a solvent estate, the Act of 1925 speaks in the first two paragraphs of the retention of a fund to meet any pecuniary legacies without in plain terms saying

that these legacies shall be paid first. The question, therefore, arose whether these words displaced the previous rule that testamentary expenses had to be paid first. The matter is only of importance where there is insufficient residuary personality to provide for the testamentary expenses and the legacies. If the testamentary expenses have to be discharged first, a greater part of the pecuniary legacies will be thrown on residuary realty and will, by the well-known rule, have to bear the estate duty so far as they are paid out of realty. It is held, however, that upon the proper construction of the Schedule the pecuniary legacies have to be paid before the testamentary expenses, and thus those legacies are saved the burden of estate duty as far as possible.

A AS TO ORDER OF APPLICATION OF ASSETS WHERE ESTATE SOLVENT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375-377, para. 704; and FOR CASES, see DIGEST, Vol. 23, pp. 473-495, Nos. 5425-5620.]

Cases referred to:

- B * (1) *Re Thompson, Public Trustee v. Husband*, [1936] Ch. 676; [1936] 2 All E.R. 141; Digest Supp.; 105 L.J.Ch. 289; 155 L.T. 474.
 * (2) *Re Owers, Public Trustee v. Death*, [1941] Ch. 17; [1940] 4 All E.R. 225; Digest Supp.; 110 L.J.Ch. 22; 164 L.T. 337.

SUMMONS asking, *inter alia*, whether the pecuniary legacies given by the testator were chargeable with part of the estate duty payable on the residuary real estate, and, if so, to what extent.

C The testator, Oliver Robert Anstead, directed his executors to pay his wife a legacy of £10,000 free of duty, and an annuity amounting, after deduction of tax, to £600, and to set aside out of his personal estate a sum sufficient to satisfy that annuity. He also gave to other persons pecuniary legacies, not free of duty, which amounted to £45,000. He gave his real and personal residuary estate on certain specified trusts. The testator died on Mar. 15, 1940, and his will was proved by his executors on June 17, 1940, the estate being sworn at £110,000, about £90,000 being personality. After the payment of the funeral and testamentary expenses and debts, the personal estate was insufficient
 D to pay the legacies in full and to set aside a sum in satisfaction of the wife's annuity.

L. M. Jopling for the plaintiffs, the executors.

M. J. Albery for the widow.

Meyrick Beebee for W. Anstead.

F. J. Hecksher for the East Ham Memorial Hospital.

G. Cross for the East Ham Corporation.

E *H. O. Danckwerts* for the Attorney-General.

UTHWATT, J.: The question which I have to decide is whether in the circumstances the pecuniary legatees are chargeable with any part of the estate duty leviable upon the residuary real estate, which for reasons which are technical but well-known is not a testamentary expense. It is conceded on behalf of the legatees that, if any part of their legacies are payable out of such real estate in
 F due course of administration, then the proportion so payable must bear estate duty; but it is said that, under the provisions of the Administration of Estates Act, 1925, and the order of administration thereby directed, the whole of the pecuniary legacies ought, in the circumstances of this estate, to be paid out of personality.

Sect. 34 (3) of the Act is in these terms:

G Where the estate of a deceased person is solvent his real and personal estate shall, subject to the rules of the court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Sched. I, Pt. II to this Act.

H This estate is a solvent estate. There are no provisions in the will which assist me on this point, apart from the direction to appropriate a fund out of personality. Nor are the provisions of sect. 35 of the Act as to charges applicable. I turn accordingly to Sched. I, Pt. II, which sets out the order of application of assets towards the estate liabilities in numbered paragraphs. Para. 1 deals with the property undisposed of by the will. Para. 2 is material and is as follows:

Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

Para. 5 is as follows :

The fund, if any, retained to meet pecuniary legacies.

It follows that the first thing to be done in administering a solvent estate is to set aside out of the residue a fund to satisfy the pecuniary legacies. That is the first charge, and it is a charge primarily upon residuary personalty rather than on the residuary real estate: *Re Thompson* (1). The result is notionally to divide the residue into two separate funds, the first to meet pecuniary legacies (and for the purposes of this fund personal estate is the primary fund and only in so far as it is insufficient is there to be any resort to realty) and a second fund consisting of the balance of the residue, including residuary real estate. In meeting debts and testamentary expenses, the second fund must be exhausted before the first is touched. It follows that in the present case the whole of the residuary personalty, other than the part thereof directed to be appropriated to meet the annuity payable to the wife, is to be made available to satisfy the pecuniary legacies, and estate duty will only be chargeable upon such legacies if and so far as such personalty is insufficient to meet them, and they are satisfied out of the real estate. It is, however, urged upon behalf of the residuary legatees that the matter is not quite so simple. It is said, and rightly said, that under the method of administration current before the above Act came into force, the testamentary expenses would have been a first charge on the residuary personalty with the result that the pecuniary legacies would to a greater extent have been thrown on to the residuary real estate, and would have borne a larger share of the estate duty. It is then contended that legacies which would have borne duty under the old law, must still bear an equal amount of duty under the new law, and in support of this argument my attention has been drawn to the following provisions of the Act.

Sect. 53 (3) thereof provides as follows :

Nothing in this Act shall (a) alter any death duty payable in respect of real estate or impose any new duty thereon ; (b) render any real estate liable to legacy duty or exempt it from succession duty ; (c) alter the incidence of any death duties.

Sched. I, Pt. II, para. 8 (b), provides that :

This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

In my view, these provisions are not intended to provide a guarantee that in no case will the new order of application of assets directed by the Act affect the incidence of death duties in a particular case as a matter of administration. The purpose of these provisions—and no doubt they are inserted *ex majore cautela*—is to preserve the general rules as to the incidence of death duties, such as the rule that the real estate bears its own estate duty. In this connection I may perhaps refer to the judgment of SIR WILFRID GREENE, M.R., in *Re Owers* (2), at p. 21 ([1940] 3 All E.R., at p. 229). In applying these general rules to the facts regard must be had to the new directions as to the order of administration of assets contained in Sched. I to the Act.

I arrive at this conclusion with all the more confidence since it is obvious that the practical results of a contrary decision would be most unfortunate. It would necessitate in many cases that the personal representatives should keep two separate sets of accounts in accordance with two different methods of administration, one for the purpose of ascertaining the incidence of death duties and the other for all other purposes. I should be slow to decide that the legislature intended anything so extravagant.

I accordingly declare that the pecuniary legacies in the circumstances of this estate are only liable to bear a proportion of estate duty in so far as the residuary personalty, after deduction of the sums appropriated, but before deduction of any testamentary expenses, is insufficient to satisfy such legacies.

Declaration accordingly.

Solicitors : *E. Edwards & Son* (for the plaintiffs and first two defendants) ; *Pearce & Davis* (for the East Ham Memorial Hospital) ; *C. V. Thornley* (for the East Ham Corporation) ; and the *Treasury Solicitor* (for the Attorney-General).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

COMMISSIONER FOR STAMP DUTIES OF THE STATE OF
NEW SOUTH WALES v. PERPETUAL TRUSTEE CO., LTD.

[PRIVY COUNCIL (Viscount Maugham, Lord Russell of Killowen, Lord
Wright, Lord Romer, Lord Porter), **March 8, 9, 10, April 15, 1943.**]

*Privy Council—Australia—Estate duty—Settlement—Bona fide possession and
enjoyment assumed by donee—Entire exclusion of deceased—Gift to son to be
transferred on the attainment of 21, son being maintained out of income—Stamp
Duties Act (Australia), 1920 (No. 47 of 1920), s. 102 (2) (d).*

In 1917 the deceased executed a settlement of 850 shares, transferring
the shares to trustees, of whom the deceased was one, upon trust to apply
such part of the income as the trustees should think fit to the maintenance
and education of the deceased's son during his minority, to accumulate
the surplus income and upon the son attaining 21 years of age to transfer
the shares to the son as his absolute property. The trustees were given
power to pay any moneys for the maintenance of the son to his natural
or other guardian and absolved from liability in respect of moneys so paid
so long as the son was properly maintained. Shortly after the date of the
settlement the trustees took out a policy of insurance for £10,000 on the
life of the son and paid the premiums out of income of the settlement.
With the exception of the payment of such premiums, no part of the
income was applied to the maintenance of the son, all other income being
accumulated. The deceased died in 1921. The son attained 21 years of
age in 1931, when the property was duly transferred to him. It was con-
tended that the property formed part of the deceased's estate for the
purposes of the assessment of death duties since the *bona fide* possession
and enjoyment of the settled property had not been assumed by the son
immediately upon the gift and thenceforth retained to the entire exclusion
of the deceased :—

HELD : the *bona fide* possession and enjoyment of the property comprised
in the settlement was assumed by the donee immediately upon the gift and
thenceforth retained to the entire exclusion of the deceased or of any
benefit to him of whatsoever kind and death duties were not payable in
respect of the shares, the subject of the settlement.

[**EDITORIAL NOTE.** It was suggested in this case that since the deceased was one
of the trustees and the trustees were to receive and apply the income, the deceased
had not divorced himself from possession of the property as required by the Act of 1920.
A further suggestion of the same kind was that there might be a resulting trust in
favour of the deceased if the son did not attain the age of 21 years. Of these sugges-
tions the second was the more formidable, but it is decided that the matter is covered
by *Re Cochrane* (2) and that the possibility of a resulting trust had not the effect of making
the gift one in which the property was not retained to the entire exclusion of the donor.

AS TO ENTIRE EXCLUSION OF DONOR, see HALSBURY, Hailsham Edn., Vol. 13,
pp. 239, 240, para. 229; and FOR CASES, see DIGEST, Vol. 21, pp. 16, 17, Nos. 82-88.]

Cases referred to :

(1) *Re Ussher, Foster v. Ussher*, [1922] 2 Ch. 321; 44 Digest 1098, 9483; 91 L.J.Ch.
521; 127 L.T. 453.

(2) *Re Cochrane*, [1905] 2 I.R. 626; *affirmed*, [1906] 2 I.R. 200; 21 Digest 17, 83i.

(3) *Grey (Earl) v. A.-G.*, [1900] A.C. 124; 21 Digest 12, 51; 69 L.J.Q.B. 308; 82
L.T. 62; *affg. S.C. sub nom. A.-G. v. Grey (Earl)*, [1898] 2 Q.B. 534.

(4) *A.-G. v. Worrall*, [1895] 1 Q.B. 99; 21 Digest 12, 54; 64 L.J.Q.B. 141; 71
L.T. 807.

(5) *A.-G. of Alberta v. Cowan*, [1926] 1 D.L.R. 29; [1926] S.C.R. 142; Digest Supp.

APPEAL by the Commissioner for Stamp Duties from a decision of the High
Court of Australia. The facts are fully set out in the judgment of the Board
delivered by LORD RUSSELL OF KILLOWEN.

J. H. Stamp for the appellant.

Wilfrid Barton, K.C., and *H. O. Danckwerts* for the respondents.

LORD RUSSELL OF KILLOWEN [delivering the judgment of the Board] :
The question for decision on this appeal is whether certain shares in a company
named R. Hall & Son, Ltd., formed part of the dutiable estate of one John
Richard Hall, deceased. The proceedings were initiated in the Supreme Court
of New South Wales upon a case stated by the Commissioner for Stamp Duties

for that State under the New South Wales Stamp Duties Act, 1920, s. 124. The relevant facts as stated in the case are as follows.

The company was one which carried on a business (originally owned by John Richard Hall) of commission and general merchants, which was managed and controlled by him. By an indenture dated Dec. 7, 1917, he made a settlement of 850 of the shares which he owned in the company, and of which he was the registered holder. These shares (which were fully paid and of the nominal value of £1 each) were transferred into and registered in the names of five trustees of whom he himself was one. The name of John Richard Hall (who will hereinafter be referred to as the settlor) stood first in the register of members.

By the said indenture, which was expressed to be made between the settlor of the one part and the five trustees of the other part, the settlor, in consideration of the natural love and affection which he bore for his infant son John Stuart Hall, declared that the trustees should hold the said shares upon trusts of which the material provisions ran thus :

1. To pay and apply the whole or such part or parts as the said trustees shall think fit of the income and dividends received from the said shares and the investments hereinafter referred to from time to time towards the maintenance advancement benefit and education of the said John Stuart Hall during his minority.

2. To invest any surplus income from time to time in any one or more of the investments hereinafter authorised with full power to vary the same from time to time for another or others of a like nature but so that such accumulation shall always be liable to be applied for the purposes aforesaid as if the same were income arising in the then current year.

3. During the minority of the said John Stuart Hall to apply the said income and/or any accumulations thereof as aforesaid and/or any proceeds of sale of the said shares or any part or parts thereof as the said trustees shall think fit and/or any sum or sums which the trustees may think fit to raise by way of mortgage on the said shares or any part or parts thereof for the maintenance education advancement or benefit of the said John Stuart Hall and for such purposes the trustees shall have power from time to time to mortgage all or such part or parts of the said shares as they may think fit and/or to sell from time to time all or any part or parts of the said shares at such prices on such conditions and either by private contract or public auction or on the Stock Exchange as the said trustees shall in their absolute discretion think fit.

5. Any moneys paid by the trustees for the maintenance education advancement or benefit of the said John Stuart Hall may be paid to the natural or other guardian or guardians for the time being of the said John Stuart Hall by the trustees without the necessity of the trustees seeing to the application thereof or compelling the said guardian or guardians to account for the same or any part thereof provided the trustees are satisfied that the said John Stuart Hall is being properly maintained and educated and that his advancement is not being neglected.

7. Any trustee of this settlement may from time to time with the consent of any other trustee or trustees of this settlement delegate to such other trustee or trustees all or any duty or duties and/or power or powers and/or discretions by writing under his hand only and without the necessity of it being under seal with full power to revoke the same from time to time. No trustee who has so delegated any such duty power or discretion shall be personally liable for any loss incurred by the trust property and occasioned by any act default or omission of the said other trustee or trustees (to whom such delegation has been made) in the exercise of such delegated duty power or discretion.

10. Upon the said John Stuart Hall attaining the age of 21 years to transfer to him as his absolute property all the property and assets whatsoever including the accumulations of income and all investments held by the said trustees under the trusts of this indenture.

The settlor died on June 27, 1921, and the respondent is his surviving executor. The said John Stuart Hall attained the age of 21 years on Nov. 27, 1931, when the assets comprised in the settlement were transferred to him. From the time of the settlement the settlor never exercised any voting power in respect of the said shares. Shortly after the date of the settlement, the trustees took out a policy of insurance on the life of the said John Stuart Hall in the sum of £10,000 and paid the premiums in respect thereof out of the dividends and income received by them as such trustees. With the exception of those premiums, no part of the said dividends and income was paid or applied towards the infant's maintenance, advancement or benefit. Any balance which might have been so applied was accumulated and invested.

The existence of the settlement was not disclosed when the settlor died, and accordingly the said shares were not in any way taken into account when the

final balance of his estate was valued for purposes of death duty. Upon a recent disclosure of the settlement, the commissioner claimed that the said shares formed part of the settlor's dutiable estate and assessed additional death duty in respect thereof at the sum of £165 17s. The respondent paid under protest, and called upon the commissioner to state a case. The questions submitted for the decision of the court were three, but only one is in dispute, viz.: Did the said shares form part of the settlor's dutiable estate?

A One further fact should be added to those stated in the case. Eleven other settlements, in the same form as the one under consideration on this appeal, had been made by the settlor in favour of his infant son. The commissioner made the same claim in respect of each, and notices of appeal in respect of each were served under the said Act. It was, however, agreed between the parties that only the appeal which has brought the matter before their Lordships' board, should be proceeded with, and that the ultimate decision thereon should

B decide the others.
The Supreme Court of New South Wales answered the question in the affirmative. On appeal from that decision the High Court of Australia set aside the judgment and order of the Supreme Court and answered the question in the negative.

C The question is one the answer to which depends partly upon the construction of the settlement, and partly upon the construction of the Act. The Act must be considered in the form in which it stood at the date of the settlor's death, viz., the Stamp Duties Act, 1920, which was Act No. 47, 1920, and was assented to on Dec. 31, 1920.

The relevant provisions of this Act are the following, which occur in Pt. IV, which deals with "Death Duty":—

D 100. In this part . . . unless the context or subject-matter otherwise indicates or requires,—

"Disposition of property" means—

(a) any conveyance, transfer, assignment, mortgage, delivery, payment, or other alienation of property whether at law or in equity;

(b) the creation of any trust;

"Gift" means any disposition of property made otherwise than by will whether with or without an instrument in writing without full consideration in money or money's worth; . . .

E 101. In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in Sched. III to this Act shall be assessed and paid—

(a) upon the final balance of the estate of the deceased, as determined in accordance with this Act; and . . .

F 102. For the purpose of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

(1) (a) All property of the deceased which is situate in New South Wales at his death; and

(b) all property of the deceased mentioned in the next succeeding section to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased . . .

G (2) (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever.

[The lettered paragraphs of sect. 102 (2) other than (d) deal with classes of property which, like (d), could not fall within the class of property described in the first sub-section of sect. 102, not being property "to which any person becomes entitled under the will or upon the intestacy of the deceased."]

H 103. [The estate of a deceased person whether domiciled at the time of his death in or out of New South Wales is also to be deemed to include certain debts and shares notwithstanding that the same were not at the time of the death of the deceased *bona notabilia* within New South Wales.]

104. The estate of a deceased person constituted as provided in the last two preceding sections together with all . . . income due or accruing due or payable in respect thereof, and all accretions to the capital thereof including the progeny of livestock after the death of the deceased and before grant of administration is in this Act referred

to as his dutiable estate.

105. (1) The final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate (except such part thereof as is the subject of a separate assessment under the next succeeding section) after making such allowances as are hereinafter authorised in respect of the debts of the deceased.

(2) Subject to the preceding section the principal value of the property included in his dutiable estate shall be estimated as at the date of the death of the deceased.

Since authorities under the Finance Act, 1894, were cited and relied upon in the courts of Australia, and also before their Lordships' Board, it will be convenient to set out the provisions in that Act which may be said to correspond with the relevant provisions of the Stamp Duties Act, 1920. It must, however, be borne in mind that the two Acts differ in this respect—that while the Stamp Duties Act, 1920, taxes the final balance of the estate of the deceased which is deemed to consist of defined classes of property, the Finance Act, 1894, taxes property which passes on the death of a deceased, and property which is to be deemed to be included in the property passing on his death. Bearing this distinction in mind, the corresponding provisions of the Finance Act, 1894, would seem to be the following :—

2. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

(c) Property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom ;

(3) Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than 12 months before his death where possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.

As is evident, it is necessary also to set out the two sections referred to in the Finance Act, 1894, s. 2 (1) (c). The Customs and Inland Revenue Act, 1881, s. 38 (hereinafter referred to as the Act of 1881), so far as relevant, runs as follows :—

38. (1) Stamp Duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. :—

(a) Any property taken as a *donatio mortis causa* made by any person dying on or after June 1, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise which shall not have been *bona fide* made 3 years before the death of the deceased.

(c) Any property passing under any past or future voluntary settlement made by a person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor . . .

The Customs and Inland Revenue Act, 1889, s. 11 (hereinafter referred to as the Act of 1889), so far as relevant, provides :—

11. (1) The Customs and Inland Revenue Act, 1881, s. 38 (2), is hereby amended as follows :—

The description of property marked (a) shall be read as if the word "twelve" were substituted for the word "three" therein and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise . . .

As a result of this referential legislation, property passing on the death of a deceased is (under the Finance Act, 1894) deemed to include property falling within the words just cited. Under the Stamp Duties Act, the estate of a deceased is deemed to include property falling within the very similar words of sect. 102 (2) (d) of that Act.

There is no dispute, nor could there be any, that the settlement of Dec. 7, 1917, was a gift within the meaning of the Stamp Duties Act, being, as it was, a disposition of property effected by the creation of a trust without full consideration in money or money's worth. The questions to be determined are: (i) What was the property comprised in the gift, was it the shares themselves or only a particular kind of interest in the shares? (ii) Had *bona fide* possession and enjoyment been assumed by the donee immediately upon the gift? and (iii) Had *bona fide* possession and enjoyment been thenceforth retained by the donee to the entire exclusion of the settlor, and to the entire exclusion of any benefit to him of whatsoever kind or in any way whatsoever?

In the Supreme Court, JORDAN, C.J. (with whose judgment ROGERS and ROPER, JJ., concurred) was of opinion (1) that "the property comprised in the gift was the 850 shares"; (2) that, the donee being the trustees, *bona fide* possession and enjoyment of the property given was assumed immediately upon the gift; but (3) the settlor was not after the gift excluded from possession of the property given, because he joined with his co-trustees in the receipt and application of dividends on the shares; nor was he entirely excluded from the enjoyment of the property given and from any benefit, because, owing to the existence of a resulting trust, he obtained, through the settlement, an equitable right to have the property revested in him, to the extent to which the rights of the son did not exhaust it, and to have it protected in the meanwhile.

It will be noticed that the decision of the Supreme Court is based upon the view that the gift was a gift of the shares, and that the donee of the gift was the body of trustees.

In the High Court of Australia other views prevailed, the four judges being substantially unanimous in their opinions.

The opinion of RICH, J., was that what was given was the beneficial interest in the shares created by the settlement and that the donee was the son. "The gift in this case," he said, "was a gift to the son by the creation of a trust for the beneficial interest in the shares." He held that the phrase "possession and enjoyment" was a composite one, meaning beneficial possession and enjoyment, which the son immediately obtained under the trusts. He disagreed with the view of the Supreme Court that the settlor (by reason of his trusteeship) had not been excluded from possession, and (by reason of the resulting trust) had not been excluded from enjoyment or benefit. He considered that:

... possession of the legal interest of the property comprised in the gift by the donor, as one of the trustees and not in his capacity as beneficial owner, was not the possession aimed at by the subsection; and that the settlor having made a gift complete in itself without any reservation or power of disposition over what was the subject of the gift, he was entirely excluded from the enjoyment of the property given and from any benefit of whatsoever kind.

The opinion of STARKE, J., was that the property comprised in the gift was not the 850 shares, but "the subject given or the interests in the property created or limited by the act of disposition of the property." Nor was the settlor in possession in the sense contemplated by the Act, viz., "possession beneficial to himself." He was "entirely excluded by the terms of the deed, and, in fact, from possession of the property in the sense indicated, and from the enjoyment thereof and of any benefit whatsoever to him." The resulting trust was not a benefit within the subsection; the subsection "is not attracted merely because the donor has some interest in the property mentioned in the gifts; he must retain some benefit out of the property he affected to give or obtain some collateral benefit thereby."

The judgment of DIXON, J., was confined to the consideration of two questions, the trusteeship of the settlor, and the resulting trust. As to the first he thought that the words "possession and enjoyment" mean beneficial possession and enjoyment as distinguished from possession and enjoyment in a representative or fiduciary capacity; therefore by naming himself as a trustee a settlor or donor does not necessarily bring the gift within sect. 102 (2) (d) of the Act. That provision, he said:

... appears to contemplate the assurance by way of gift of any recognised estate or interest, whether legal or equitable and whether present, future or contingent, and to require that, according to its nature, the estate or interest should pass into the donee's enjoyment unimpaired by any reservation in fact or law in favour of the donor.

It may go even further, but the provision does not, I think, insist that the donor shall occupy no representative or fiduciary position in relation to the subject of a trust amounting to or involving a gift.

As to the resulting trust, he held that its existence did not mean that there was not an exclusion of every benefit to the settlor. There was no reservation out of the interest given, nor was there any recompense or benefit in reference to the interest given.

The opinion of McTIERNAN, J., was that the property comprised in the gift was the equitable interest in the shares which passed to the son under the settlement, and that it was that interest of which the inquiry, whether *bona fide* possession and enjoyment had been assumed and retained at the time and in the manner required by sect. 102 (2) (d), was to be made. He held that the son had assumed and retained the full and complete possession and enjoyment of which the limited interest he took in the shares was capable, to the entire exclusion of the settlor except as a trustee. He further held that the fact that the settlor was a trustee did not make the section operate to sweep the shares into the settlor's estate; nor did the existence of a resulting trust prevent the settlor from being excluded from all benefit, because he had divested himself of the whole of the limited beneficial interest which he gave to his son.

In Australia the case was apparently argued upon the footing that the interest of the son under the settlement in the shares and accumulations of income was not an absolute vested interest, but was contingent on his attaining the age of 21 years. Before their Lordships' Board, however, it was contended by the respondent that the interest given was an absolute one, and this upon the authority of certain decisions upon the construction of wills, of which *Re Ussher* (1) is perhaps the latest reported sample. It is not necessary to consider in the present case whether these authorities should be applied to the construction of a settlement, for it was conceded that the authorities referred to only apply for the purpose of resolving an ambiguity in the gift. In their Lordships' opinion there is no ambiguity in this settlement. There is no gift of *corpus* to the son except in the direction to the trustees to transfer to him upon his attaining 21 years of age. What have then (and only then) to be transferred are described as "all the property and assets whatsoever including the accumulations of income and all investments held by the trustees" and they are then to be transferred to him "as his absolute property." Until that event had happened they were not, in their Lordships' opinion, his absolute property; until that event had happened he had only a contingent interest. He was only to be absolutely entitled to *corpus* if and when he attained his age of 21 years.

For the reasons hereinafter appearing their Lordships are in agreement with the decision of the High Court in this case. In their opinion the property comprised in the gift was the equitable interest in the 850 shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty.

Did the donee assume *bona fide* possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question, therefore, must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such *bona fide* beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.

Did he assume it and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: viz., (i) the settlor had no enjoyment and possession such as is contemplated by the section; and (ii) such possession and enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants was had by him solely on behalf of the donee. In his capacity

as donor he was entirely excluded from possession and enjoyment of what he had given to his son.

Did the donee retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever? Clearly, yes. In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift. Indeed this was ultimately conceded by the appellants.

A Certain authorities were cited or referred to in the courts in Australia, and these now require consideration.

Reliance was placed in the High Court upon a decision of the courts in Ireland in *Re Cochrane* (2). The facts in that case were these. Sir Henry Cochrane was the mortgagee of two estates in County Mayo, the mortgage being one to secure a principal sum of £15,000 with interest at $4\frac{1}{2}$ per cent. The mortgage debt

B and securities having been vested in trustees, Sir Henry (by an indenture dated Sept. 4, 1902, and made between himself and the trustees) declared trusts of the £15,000. The trustees were to stand possessed thereof and of all interest and the benefit of all securities for the same in trust out of the income to pay each year £575 to Sir Henry's daughter, Mrs. Day, for her life, and after her decease in trust as to the said sum of £15,000 for her issue as she should by deed or will appoint, and in default of appointment for her children who, being

C sons, should attain 21, or, being daughters, should attain 21 or marry. Power was given to Mrs. Day to appoint by will to her husband for his life a yearly sum not exceeding £300 out of the income of the £15,000. If no child of Mrs. Day should attain a vested interest in the trust funds, they were to be held in trust for Sir Henry absolutely. There was also a trust of the balance of the yearly income for Sir Henry absolutely. The trustees regularly received the

D interest, which amounted to £675 per annum. They paid £575 to Mrs. Day and the balance to Sir Henry; but in March, 1904, Sir Henry directed them to pay, in future, the whole income to Mrs. Day. He died in September of the same year. The Crown thereupon claimed that estate duty was payable in respect of the entire sum of £15,000 as property deemed to be included in property passing on the death of Sir Henry within the Finance Act, 1894, s. 2 (1) (c).

E The question at issue was whether the case fell within sect. 38 (2) (a) of the 1881 Act, as amended by sect. 11 of the 1889 Act, in other words was the £15,000 property taken under a gift, of which property *bona fide* possession and enjoyment had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The Court of Appeal held (affirming the

F King's Bench Division) that estate duty was not payable in respect of the £15,000 but only in respect of the values of Sir Henry's interest in the balance of income and his contingent interest in the £15,000. PALLES, C.B., thought that the Crown's contention would be right if the subject-matter of the gift was the entire equitable interest in the £15,000. The question was whether that was correct in law, a question which turned upon the word "gift." Gift in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else

G he retains and does not give; and there is an entire exclusion of the donor from the property taken under the disposition of the gift. Sir Henry Cochrane obtained no benefit either by way of reservation out of the gift, or collaterally in reference to the gift. PALLES, C.B., held, therefore, that estate duty was not payable in respect of the £15,000. KENNY and JOHNSON, JJ., took the same view. In the Court of Appeal, WALKER, L.C., and FITZGIBBON and HOLMES, L.JJ.,

H unanimously affirmed this decision. FITZGIBBON, L.J., after stating that he agreed with and adopted the argument of the LORD CHIEF BARON, pointed out that Sir Henry gave the annuity absolutely to his daughter and the fund to her children absolutely in certain events, "but nothing over that, whether you call it a reversion, a reservation or a surplus, was included in the gift."

If *Re Cochrane* (2) was rightly decided, as their Lordships think it was, it covers the present case. It was, however, contended by the appellants that the decision was wrong and was inconsistent with (i) the decision of the House of Lords in *Grey v. A.-G.* (3), which affirmed the decision of the Court of Appeal in *A.-G. v. Grey* (3), and (ii) the decision of the Court of Appeal in *A.-G. v.*

Worrall (4). To these decisions reference must now be made.

The case of *Earl Grey* (3) was a case of a gift not made by the creation of a trust, but by direct conveyance and assignment to the donee of the donor's real and personal estate. It arose in the following circumstances. The donor was the third Earl, the donee was the heir presumptive who in fact succeeded to the earldom on the death of the third Earl. The donor was absolute owner of some freehold and leasehold estates, subject to certain annuities charged thereon and certain mortgages affecting the same. The gift was effected by an indenture dated Oct. 10, 1885, and made between the donor of the one part and the donee of the other part. This deed is stated (inaccurately) in the Law Reports to have excepted the mansion house from the real property conveyed to the donee, but a reference to the copy supplied to the House of Lords shows that it was included. The relevant contents of the deed were the following. By cl. 4 the donor conveyed to the donee all the donor's real estate and leaseholds to hold the same to the donee in fee simple (subject to the said annuities and mortgages) to the use that the donor should receive during his life an annual rentcharge of £4,000 to be issuing out of the said hereditaments (other than such part as the donor was to occupy under the trusts thereafter declared) and subject thereto and charged therewith to the use of the donee in fee but as to the mansion house at Howick and the premises to be enjoyed therewith subject to the trusts thereafter contained and as to leaseholds for the whole term and interest of the donor therein. By cl. 5 the donor assigned to the donee the furniture and effects in or about the mansion house and (with immaterial exceptions) all other his personal estate. By cl. 6 trusts were declared of the mansion house with the gardens, stables, outbuildings and appurtenances as then occupied and enjoyed by the donor and of the furniture and effects in the words following:

... upon trust to permit him [the donor] to occupy and enjoy the same as freely as heretofore during his life, and all the furniture . . . and other things whatever in or about the said mansion house and premises shall be held upon trust to permit the said Earl to use and enjoy the same in like manner during his life.

It will thus be seen that the whole of the donor's real and leasehold estates were conveyed to the donee, but in his hands they had imposed upon them by the donor an annual rentcharge for the benefit of the donor issuing out of them (but not out of the mansion house and its appurtenances) during the life of the donor, and (as to the mansion house and its appurtenances) a trust for the benefit of the donor during his life. The deed also contained covenants by the donee with the donor (1) to pay the rentcharge; (2) to keep the mansion house insured and repaired, and to stock and manage the gardens; (3) to supply the donor free of cost with farm produce; and (4) to pay the donor's funeral and testamentary expenses and debts to the full exhaustion of the property. The deed further contained a proviso that if the donee died in the lifetime of the donor, or committed a breach of covenant, the donor should have power to revoke the deed wholly or in part. The annual income of the property comprised in the deed largely exceeded £4,000. By an indenture dated Sept. 26, 1894, and made between the same parties, in consideration of a sum of £5,000 paid by the donee to the donor, the donor released the properties conveyed by the former indenture from the annual rentcharge, and from the power of revocation. He also released the donee from his covenant to pay the rentcharge. He died about a fortnight afterwards, viz., on Oct. 9, 1894.

The Crown claimed duty under the Finance Act, 1894, s. 2 (1) (c), alleging that the case fell within sect. 38 (2) (a) of the 1881 Act, as amended by sect. 11 (1) of the 1889 Act, or within sect. 38 (2) (c) of the 1881 Act. In the Court of Appeal A. L. SMITH, L.J., relying upon the covenants by the donee to pay the donor £4,000 per year and to bear other liabilities of the donor, held that the donee had not assumed *bona fide* possession and enjoyment of the estate immediately upon the gift and thenceforward retained possession and enjoyment of the property contained in the deed either to the entire exclusion of the donor or of any benefit by contract or otherwise to the donor. RIGBY, L.J., referred to the rentcharge in favour of the donor, to the donor's beneficial interest in the property which was not subject to the rentcharge, to the covenants by the donee and to the power of revocation, and said that it was impossible to say that the property subject to the deed was held by the donee to the

exclusion of any benefit to the donor. VAUGHAN WILLIAMS, L.J., thought that the case fell within the later words of sect. 11 (1) of the 1889 Act. The covenant by the donee to pay the donor's debts prevented the gift from being one of which the donee assumed possession and enjoyment to the total exclusion of benefit to the donor. The decision of the Court of Appeal is based entirely on sect. 38 (2) (a) of the 1881 Act as amended, and not on sect. 38 (2) (c) of that Act. The last-mentioned provision, they said, they need not consider.

A In the House of Lords, the donee's appeal met with short shrift. The case was disposed of at one sitting, the Crown not being called upon to argue. LORD HALSBURY, L.C., in stating his opinion (which was unreserved in more senses than one) thought the case a very plain one. His actual words are these, at p. 126 :

My Lords, there are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides. In the present case I did not at first quite understand the argument presented to your Lordships, and I am not absolutely certain that I have got much further now ; but at all events, forming my own judgment upon the statute, nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift *inter vivos* should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given *inter vivos*. In this case can anybody doubt that something has been reserved to the settlor ? The settlement itself has reserved £4,000 a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid, and the payment secured by the estate. It seems to me that it is burning daylight to say that is not within the express language of the statute, and I am really wholly unable to understand why these words are not as plain in the statute itself as any explanatory exposition could make them. That, my Lords, is really all I have to say upon the subject. It seems to me it is a particularly plain case, and I move your Lordships that this appeal be dismissed with costs.

D It will be observed that by the use of the word " reserved " LORD HALSBURY, L.C., might perhaps appear to be basing his opinion upon the view that the case fell within sect. 38 (2) (c) as a case of property passing under a settlement whereby an interest in such property for life was reserved to the settlor. If this were so, then (the argument runs) *Re Cochrane* (2) is inconsistent with this decision, because there can be no difference in substance between (a) the case of a gift of property (and its income) to A. coupled with a charge on the property of an annual sum in favour of the donor, and (b) the case of a gift (through the medium of trustees) to A. for life of part only of the annual income of a trust fund, leaving the balance to be paid to the donor either under a resulting trust or an express trust in that behalf. In each case it can be said that the £4,000 per annum, or the balance of income, is excluded from the gift. *Re Cochrane* (2) decided that in case (b) nothing was reserved out of the gift ; but in case (a) *Grey v. A.-G.* (3) decided that the rentcharge was reserved out of the property passing under the gift. Therefore, *Re Cochrane* (2) is wrong. That is the argument.

Their Lordships do not accept this contention. In the first place they do not think that *Grey v. A.-G.* (3) was decided on any ground other than that upon which the decision of the Court of Appeal was based, viz., that the case fell within sect. 38 (2) (a), as amended, because *bona fide* possession and enjoyment of the property taken under the gift had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The whole transaction reeked of benefits to the donor, some arising out of the property actually conveyed and assigned by way of gift to the donee, others arising out of covenants entered into by the donee collaterally and in reference to the gift. LORD HALSBURY, L.C., refers, their Lordships think, to all these benefits as showing that the case fell plainly within the provisions of sect. 38 (2) (a) of the 1881 Act, as amended.

H The judges who decided *Re Cochrane* (2) all thought that *Grey v. A.-G.* (3) was clearly distinguishable and their Lordships agree that it was. There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by sect. 11 (1) of the 1889 Act is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by

the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the subsection requires.

With the suggestion that *Re Cochrane* (2) is inconsistent with the decision in *Re Worrall* (4) their Lordships cannot agree. That was simply a case in which the Court of Appeal held, upon the facts and documents there disclosed, that the donor had obtained a collateral benefit in reference to the gift which he had made. Possession and enjoyment of the property taken under the gift had not been assumed and retained to the exclusion of any benefit to the donor by contract or otherwise.

Only one other case, which was referred to in the Australian courts, need be referred to, viz., *A.-G. of Alberta v. Cowan* (5). In that case the owner of some negotiable securities declared trusts thereof for certain persons, and retained possession as sole trustee. It was held that although his possession was in law the possession of the *cestuis que trust* there had not been an assumption of possession by the beneficiaries sufficient to take the property out of the Succession Duties Act, R.S.A. 1922, c. 28, s. 6 (b), and that, therefore, the property was liable to Succession Duty. DUFF, J., (who delivered the judgment of the Supreme Court of Canada) was of opinion that the section in question contemplated possession by beneficiaries as contradistinguished from possession by the donor, and not a possession which was in fact that of the donor, and was attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries was created. The basis of that decision has no relevance to a case such as the one under consideration, in which the possession of the donor is changed to the possession of a body of trustees. In such a case there is a possession by the beneficiaries as contradistinguished from the possession of the donor, and not less so if the donor is himself one of the body of trustees.

One argument addressed to their Lordships by counsel for the appellant must be noticed. It was contended, first, that the Stamp Duties Act, 1920, s. 102 (1) (a), when closely studied revealed the fact that property vested in a deceased person as trustee for another person under a disposition made by the deceased, was to be deemed included in the estate of the deceased for the purposes of assessment and payment of death duty; secondly, that the only niche into which such property could be fitted was subsect. 2 (d); therefore, thirdly, the Act could not have contemplated that the requirements of subsect. 2 (d) as to excluding the deceased donor from possession and enjoyment would be complied with when the donor was himself a trustee. Their Lordships find it difficult to follow this over-subtle argument, but they think it breaks down in its initial stage. The first proposition is founded on the exception contained in subsect. (1). The exception purports to be an exception from "all property of the deceased . . . to which any person becomes entitled under the will or upon the intestacy of the deceased," words which can only mean property of which the deceased was the owner; the exception, however, is of property of which the deceased was a trustee. The argument is that in order that the exception may not be meaningless, you must attribute to sect. 1 (a) the effect of including in the words cited above, property of which the deceased was a trustee if he was a trustee under a disposition made by himself. Their Lordships, however, feel unequal to the task of holding that the words cited above can refer to trust property at all; they prefer to treat the exception as having no operative effect. Indeed the words seem to have found their way into sect. 102 (1) (a) from the Finance Act, 1894, s. 2 (3), quoted earlier in this judgment. In that setting the words of exception were necessary and proper, because under that Act estate duty was payable, not on "all property of the deceased to which any person becomes entitled under the will or upon the intestacy of the deceased," but on "property passing on the death of the deceased"; and property vested in a deceased person as a trustee would undoubtedly pass on his death. In any event, even if the argument under consideration were sound, the only case which could possibly fit the words would be the case (which is not the present case) when the deceased was sole trustee, for by no stretch of imagination can it be said of property vested in several trustees that, on the death of one, the surviving trustees became entitled to it under the will or upon the intestacy of the one who died.

For the reasons indicated their Lordships are of opinion that *bona fide* possession and enjoyment of the property comprised in the gift which the deceased made by the settlement of the shares was assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever, and that the question in dispute should be answered in the negative.

A Their Lordships will humbly advise His Majesty that this appeal should be dismissed. In accordance with the agreement entered into when special leave to appeal was obtained, the appellant will pay the respondents' costs of the appeal.

Appeal dismissed with costs.

Solicitors: *Light & Fulton* (for the appellant); *Burton, Yeates & Hart* (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

HUGHES v. WILLIAMS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.),
April 6, 7, 1943.]

C *Animals—Escape on to highway—No evidence of vice or negligence—Horses leaving stable yard and escaping to highway through open gate.*

D The appellant was driving his motor car along a public road during darkness. Hearing the sound of approaching horses he pulled up and two horses collided with and damaged his stationary motor car. The horses, the property of the respondent, had spent the night in their stable and a farm servant had let them out into the yard to water. The gate which led from the yard to the road, and which was usually shut at night, was on this occasion open, of which fact the farm-hand was not aware, and there was no evidence how the gate came to be open. The horses went through the gate and down the road, having broken away for some reason which the farm-hand could not explain. The appellant claimed damages in respect of the damage to his motor car:—

E HELD: in the circumstances the respondent was not guilty of negligence either by himself or his servant.

[EDITORIAL NOTE. In *Heath's Garage, Ltd. v. Hodges* (2) the Court of Appeal held that there is no duty on the owner or occupier of land adjoining the highway to prevent animals upon it from escaping on to the highway. There being no such duty, it cannot be negligence if the animals escape on to the highway. This doctrine has been questioned and the Court of Appeal in the judgments herein express strong disapproval of it, but it is held to be binding on the Court of Appeal, though it is said it may be reviewed in the House of Lords. Leave to appeal to the House of Lords was, however, refused on the ground that, apart from the small damages the subject of this appeal, the appellant had no interest in establishing that the doctrine impugned should be overruled. It was said to be contrary to the principles upon which the Court of Appeal acts to grant leave in a case where any damages which might be recovered would be so small in amount.]

G AS TO TRESPASS BY ANIMALS, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 545, 546, para. 936; and FOR CASES, see DIGEST, Vol. 2, pp. 223, 224, Nos. 221-226.]

Cases referred to:

* (1) *Brackenborough v. Spalding Urban District Council*, [1942] A.C. 310; [1942] 1 All E.R. 34; Digest Supp.; 111 L.J.K.B. 100; 166 L.T. 108.

* (2) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K.B. 370; 2 Digest 234, 226; 85 L.J.K.B. 1289; 115 L.T. 129.

* (3) *Ellis v. Banyard* (1911), 106 L.T. 51; 2 Digest 234, 225; 28 T.L.R. 122.

H (4) *Turner v. Coates*, [1917] 1 K.B. 670; 2 Digest 235, 230; 86 L.J.K.B. 321; 115 L.T. 766.

(5) *Jones v. Lee* (1911), 106 L.T. 123; 2 Digest 234, 224; 76 J.P. 137.

(6) *Pinn v. Rew* (1916), 32 T.L.R. 451; 2 Digest 235, 228.

(7) *Deen v. Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.

APPEAL by the plaintiff from the judgment of the Presiding Judge of the Liverpool Court of Passage, dated Sept. 30, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

E. Wooll for the appellant.

G. Glynn Blackledge for the respondent.

Wooll : There was actual misfeasance on the part of the respondent's servant in turning the horses out of a warm stable in the early hours of the morning, in the black-out, and with the gate of the yard left open : *Turner v. Coates* (4). There are a number of authorities which would appear to be against me, but I submit that they are based upon a rule of law which is not applicable to the peculiar facts of the present case. The rule is of doubtful authority and should not be extended. [Counsel referred to *Jones v. Lee* (5), *Ellis v. Banyard* (3), *Heath's Garage, Ltd. v. Hodges* (2), *Pinn v. Rew* (6), *Deen v. Davies* (7), and *Brackenborough v. Spalding Urban District Council* (1).] A

Blackledge : No duty rested upon the respondent. If, however, there was a duty, in the circumstances of the present case, the farm servant was not guilty of negligence having regard to his previous experience of these horses. Counsel referred to *Deen v. Davies* (7).] B

Wooll, in reply.

LORD GREENE, M.R. : The appellant was driving his motor car along a public road in the darkness on the morning of Jan. 22, 1942. Hearing the sound of horses on the road, he stopped. The next thing that happened was that a horse hit or collided with the mask of his headlight, he being stationary at the time. A moment afterwards another horse reared up and dropped down full weight—that is how the appellant put it—on to his radiator. The horses then turned off and a farm-hand came and took charge of them. C

The circumstances in which the horses came out on to the road appeared from the evidence to be these. They had spent the night in the respondent's stable, which led into a yard about $\frac{1}{4}$ acre in extent. From that yard a gate opened on to the highway. That gate was usually shut at night, but on this occasion it was open ; and it was through that gate that the 2 horses escaped into the road. The farm-hand had let them out of the stable in order to water them. That was a regular morning practice. He did not know that the gate was open. The horses had no halters upon them. He apparently followed them out of the stable when they suddenly broke away for some reason which he could not explain. D

There was no evidence as to any special habits or character of either of these horses. They were just ordinary, well-behaved horses. As the farm-hand said, they were as quiet as anyone could wish, and anyone could do anything with them ; and they had never done this before. E

In those circumstances, the appellant claimed damages against the respondent in respect of the damage to his motor car. The Presiding Judge of the Court of Passage held that there was no negligence by the farm-hand and dismissed the action. The appellant has appealed to this court ; and the argument has travelled over ground which is not unfamiliar. F

So far as this court is concerned, much though I dislike it, I do not think that we are able to approach the facts of this case save on the basis that we are bound by a rule of law which has been variously stated. It has been stated or assumed to exist in several pronouncements of this court. I do not propose to examine the authorities in which that rule has been discussed. I take it as stated in the opinion of LORD WRIGHT in *Brackenborough v. Spalding Urban District Council* (1), at p. 41. The rule stated there is this : G

... there is no duty on the owner or occupier of land adjoining the highway to prevent animals upon it from escaping on to the highway.

That rule, as LORD WRIGHT points out, so far as he knew, was " a modern one." He comments upon various matters which affect it and indicates that the existence, meaning and scope of the rule remains open to the consideration of the House of Lords. But, as I have said, so far as this court is concerned, I feel bound to approach this case on the footing that that rule is binding upon us. H

It is a rule which is singularly ill-adapted to the realities of modern conditions. A farmer who allows his cow to stray through a gap in his hedge on to his neighbour's land, where it consumes 2s. 6d. worth of cauliflowers, is liable in damages to his neighbour ; but, if through a similar gap in the hedge, it strays upon the road and thereby causes the overturning of a motor omnibus, with death or injury to 30 or 40 people, he is under no liability at all. I can scarcely think

that that is a satisfactory state of affairs in the 20th century. If it is not open to the House of Lords to deal with that rule, I think that the attention of the legislature might usefully be directed to considering the whole position, with a view to the safety of His Majesty's subjects lawfully using the highway.

A It is recognised in all the cases that there may be instances where special circumstances impose a duty. In the case of a person driving animals along a highway, if the animal driven is one which of its nature, or by reason of some special conditions affecting it, is liable to run wild, or to run amuck, or to rush to and fro, or bite people or animals, or toss them, as in the case of a cow with a calf, a special duty lies upon the person who is in control of those animals. Similarly, I apprehend that, if the owner or occupier of land adjoining a highway chooses to put into it an animal of such a nature or in such a condition that he knows, or ought to know, that if it gets out into the road it will run amuck in some way, he must take special care to prevent it getting into the road. But it would appear that that can only apply to the case of animals which may be expected about to do something, such as to kick, or to bite, or to rush madly about, and it apparently does not apply when the only thing normally to be expected from the animal is to cause a blundering obstruction in the roadway.

As LORD COZENS-HARDY, M.R., put it in *Heath Garage v. Hodges* (2), at p. 376 :

C An animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing.

C That proposition appears strange when one considers the conditions of modern life. The sheep is regarded as being by nature harmless and not likely to collide with a motor car, as, for instance, an unbroken colt might ; but the fact that the motor car is likely to collide with the sheep appears to be regarded in law as a matter of no particular importance. However, there it is : and I cannot, myself, see any ground on which we can depart from the rule.

D It was suggested by counsel for the appellant that there was a difference between the depasturing of animals in a field and dealing with them in an enclosed yard. I, myself, cannot see any reason for that differentiation, nor can I see any reason for drawing a distinction between an open gate and a gap in a hedge. Nor can I see any reason for drawing a distinction between the case where in a roadside field the animals are left to themselves and the case where they are under the control of somebody. Animals being driven into a field are, or should be, under the control of the person driving them. Nevertheless, unless the action of the person driving them is calculated to send them running into the road, I cannot see that the fact that, in the process of driving, an animal happens to escape can be differentiated from the case where an animal happens to stray.

F In the present case, as it seems to me, the only question is whether or not there were present such special circumstances as to import a higher duty in the respondent than that which normally falls upon the owner or occupier of roadside land in which the animals are found or kept. We have to remember that what took place took place at night, when the power of control was obviously less. The animals were set in motion by the farm-hand. He got them out of the stable into the yard. I express no opinion as to what the result of this case might have been if he had deliberately opened the gate leading into the road at the time or just before he let the horses out. It is possible that an inference might have been drawn that the combination of those actions was equivalent to his so dealing with the horses as to make it natural and obvious that they would go out into the road. I express no opinion upon that. There is no evidence as to how the gate came to be opened. It was normally shut. The farm-hand who let the horses out did not open it. Who opened it no one knows. A probable guess might be that it was opened by somebody connected with the farm : but I cannot help thinking that that is merely guessing. The facts are consistent with it having been opened by some unauthorised person.

H In that respect the facts of the present case bear a close resemblance to those in *Ellis v. Banyard* (3). That was a decision of this court in which two members of the court, VAUGHAN WILLIAMS and KENNEDY, L.JJ., were careful to approach the case in a very cautious manner. VAUGHAN WILLIAMS, L.J., said this, at p. 52 :

There is no evidence of any negligence on his part at all. I do not agree that the mere fact of the gate being found open will make the defendant liable unless it was proved that it was left open by his negligence.

Whether that means left open by his deliberate act, or whether the use of the

word "negligence" there by VAUGHAN WILLIAMS, L.J., imports something more, I am not clear. He goes on to say :

On the evidence as it stands the gate was left by the defendant in such a condition that it was quite safe unless somebody out of mischief or mere thoughtlessness did something which would let the cattle out.

At p. 53 KENNEDY, L.J., said :

I desire to reserve the question of law whether there is a right in existence for travellers along the highway not to have proper gates and fences except in special circumstances. He then says there was no evidence of negligence :

The fact that the defendant's gate was open threw no burden on him to show how it was open. The evidence is that it was a good gate and was properly closed at 6 that evening so as to prevent cattle coming out and molesting people.

BUCKLEY, L.J., goes further, because he says, at p. 53 :

... if, in fact, there were evidence that the defendant by his agent had left the gate open, it would not raise any implication of negligence against the defendant.

Without going to the extreme point that BUCKLEY, L.J., goes to, and limiting myself to the view which VAUGHAN WILLIAMS and KENNEDY, L.J., took, it seems to me, in the present case, that there is no evidence that the defendant, by himself or his servants, was responsible for the gate being opened. Whether or not the position would have been different if the evidence had shown that he was responsible must, so far as I am concerned, be regarded as an open question. It does show the illogical nature of the law, as it appears to be at present, that, whereas apparently you are not bound to have a gate, or to keep gaps in your fences repaired, there does seem to be a suggestion in *Ellis v. Banyard* (3) that, if you have a gate, it may be your duty to keep it shut.

However, all those matters I leave on one side. I cannot, on the facts of this case, find sufficient special circumstances to raise a duty on this respondent to see that the gate was shut before the horses were let out of the stable. Anything less than that would not assist the present appellant ; and I can find no such duty, whatever the position might have been if the gate had been deliberately opened.

In the result this appeal, in my opinion, must be dismissed.

MACKINNON, L.J. : I agree. By the statement of claim the plaintiff rests his case upon an allegation of his having suffered damage by reason of the negligence of the defendant. The particulars of negligence specified, which I need not read through, were fivefold. The first being that he was negligent :

... in turning the said horses loose into his yard to water without shutting the gate, or otherwise preventing the horses from getting into the road.

As LORD GREENE, M.R., has pointed out, there was no evidence that the defendant or his servants opened the gate or left it open ; and no evidence as to how it came to be open. In that respect and on the other particulars of negligence relied upon in the statement of claim, I think, upon the authorities which have been referred to the plaintiff did not establish any cause of action.

I agree that the state of the authorities is not a satisfactory one ; and, in particular, that they seem to be very ill-adapted to the conditions of life in the 20th century. It is not for us to alter the settled law as laid down in the authorities. Possibly the House of Lords may be able to review those authorities. Possibly it may need legislation to adapt the common law to the conditions ruling to-day. As it is, I am afraid all we are concerned with is to say that, upon these authorities, the judgment of the presiding judge in the court below was correct and that this appeal fails.

GODDARD, L.J. : I agree. I share the feeling of LORD GREENE, M.R., and MACKINNON, L.J., to the full that the law is unsatisfactory ; and I hope that it may be possible some day for the House of Lords to review it ; and, unless they find the rule of common law is what has been laid down and what is binding on this court, they may be able to bring the law into what one would think would be a more just state. The rule that is binding on this court by reason of the previous decisions, is that by the common law :

An owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway.

That must mean that he is under no duty to the users of the highway. If he is under no duty to keep his animals off the highway, it seems difficult to understand how negligence comes into the picture at all—at any rate, negligence with regard to the opening or shutting of the gate, because a gate is only a part of a fence. If he is under no duty to fence, I, for myself, have the greatest difficulty in seeing how it could possibly be said that he is under a duty to keep his gate shut.

A A different question may arise if he drives animals on to the highway, because there he is doing the deliberate act of taking an animal on to the highway; and it may be—I say no more than that—that thereby he makes himself liable.

In spite of the views expressed *obiter*, as I think, by VAUGHAN WILLIAMS, L.J., I have great difficulty in seeing that the question of opening or shutting the gate can have any bearing on the question of liability if the law is, as this rule lays down, that the owner or occupier is under no obligation to fence. It

B is not only with regard to animals on the highway that I think the law is in an unsatisfactory condition. The law with regard to the trespass of animals is also in an unsatisfactory condition, having regard to the mischief which they may do. In 1906, Parliament passed a Dogs Act, under which the owner of a dog which bites sheep or cattle is liable, whether he knows the propensity of the dog or not; but a dog may still bite a human being, and if the owner can show that he did not know of its propensity, the owner is not liable. Apparently

C Parliament thought that a sheep requires more protection than human beings. If, as LORD GREENE, M.R., stated, a cow strays on to the land of the neighbour of its owner and eats a couple of cabbages, the owner is liable in trespass; but if his dog escapes into a neighbour's house and does damage by wrecking a room, the owner of the dog is not liable, because it was laid down in 1699 (and I think earlier) that "you shall not have trespass for the act of a dog."

D All these matters seem to show how unsatisfactory the law is. It will be remembered that a short time ago in this court a man who, after he had paid to go into a zoo, was bitten by a camel, was held to be unentitled to recover damages because the camel was a domestic animal, and this particular camel was not known to be ferocious.

I hope that when the Law Revision Committee meets again after the war, if no other step has been taken in the meantime, it may be possible to refer to it the law with regard to animals for review, and, if necessary, have it altered by legislation, because, I think, it is high time that something of that nature was done. I agree that we have no option but to dismiss this appeal.

E *Appeal dismissed.*

Solicitors: *J. H. Milner & Son*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *E. R. Hoskinson*, Liverpool (for the respondent).

lied. HOLT v. RHODES & SON,
[1949] 1 All E.R. 478.

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

SPEED v. THOMAS SWIFT & CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.),
April 2, 6, 21, 1943.]

Master and Servant—Duty of master—Provision of safe system of working—Test—Consideration of duty of employer if present—Use of married gear.

G The appellants employed the respondent who received injuries while engaged in assisting in the unloading of cargo from a ship. The starboard rail was broken and it was not protected or removed during the operations. Moreover, the port winch was defective and the danger arising from these matters was increased by the presence of dunnage lying on the deck. Owing to a hook catching the rail, either the rail or part of the cargo fell upon the respondent who was working in a barge alongside the ship. The appellants contended that they had provided a safe system of working and that the accident was due to the failure of a fellow-servant of the respondent to carry out the system properly and, therefore, they were exonerated from liability by the doctrine of common employment:—

H HELD: the employers had failed to provide a safe system of working, and the accident was due to that failure and not to the failure of a servant to carry out a proper system. The employers were, therefore, liable in damages.

[EDITORIAL NOTE.] Where the work is regular and uniform, it is reasonably simple to define what falls within the system of working and what is mere casual negligence of an employee. Where, as in the present case, the system of working must vary with the circumstances of each particular job, the question where system ends and casual negligence begins is infinitely more difficult to answer. It includes, in the words of LORD GREENE, M.R., the physical lay-out of the job, the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions. The last shows the difficulty of the position. The theory of liability in such a case is based upon the supposition that the master is an individual who lays down the general system of working. In practice the employer today is a limited company and there is a hierarchy of officials whose duties vary in infinite gradation from those of the master to those of the mere labourer and the result is that it has become increasingly difficult to say whether the negligence proved is the negligence of the master in not providing a proper system of working or that of a servant in failing to carry out the system.

AS TO PROVISION OF SAFE SYSTEM OF WORKING, see HALSBURY, Hailsham Edn., Vol. 22, pp. 189, 190, para. 317; and FOR CASES, see DIGEST, Vol. 34, pp. 196-203, Nos. 1602-1657.]

Cases referred to:

- * (1) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406; *affg.* [1936] S.C. 883.
- (2) *Fanton v. Denville*, [1932] 2 K.B. 309; Digest Supp.; 101 L.J.K.B. 641; 147 L.T. 243.
- * (3) *Wilson v. Merry* (1868), L.R. 1 Sc. & Div. 326.
- (4) *Priestley v. Fowler* (1837), 3 M. & W. 1; 34 Digest 202, 1647; 7 L.J.Ex. 42.
- * (5) *Smith v. Baker & Sons*, [1891] A.C. 325; 34 Digest 202, 1657; 60 L.J.Q.B. 683; 65 L.T. 467.
- (6) *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K.B. 669; Digest Supp.; 103 L.J.K.B. 17; 149 L.T. 587; 26 B.W.C.C. 230.
- (7) *Bain v. Fife Coal Co., Ltd.*, [1935] S.C. 681; Digest Supp.

APPEAL by the defendants from a judgment of the assistant presiding judge of the Liverpool Court of Passage, dated Sept. 15, 1942. The facts are fully set out in the judgment of MACKINNON, L.J.

G. Glynn Blackledge for the appellants.

E. Wooll for the respondent.

LORD GREENE, M.R.: The assistant judge in his careful judgment found that in the operation on which the respondent was engaged there were three elements of danger, namely, (1) the defective working of the port winch, (2) the condition of the starboard rail, (3) the presence of a quantity of dunnage on the deck beside the rail. I need say no more than a few words with regard to each of these matters. Wilson, whose job was to check the cargo, described the port winch as a bad winch, apt to slack away too fast so that when steam was put on the starboard winch in order to gather up the slack, the fall was apt to "dig" along the deck. He gave further details when he was recalled later in the case. The starboard rail had been cut by an oxy-acetylene cutter with the result that one end of it was in the air instead of being attached to the adjoining section of rail in the usual way. Parsons, a cargo superintendent of 31 years' experience, said that a movable section of rail would be more likely to come away if it was not fastened to the rail next to it. Palin, the driver of the starboard winch, had tried unsuccessfully to remove the rail, but his reason for doing this does not appear to have been connected in his mind with the possibility of danger so much as with the fear that, if the rail was caught up by the hook, it would have been "twisted all shapes" and so would have given additional work to the welders. With regard to the dunnage, Parsons said that "the hatch boss would take steps to get it removed." Weston said that the bad condition of the port winch was specially dangerous on account of the dunnage lying on the deck.

There was, therefore, ample evidence on which the assistant judge could find as he did with regard to these dangers, and I find no reason for differing from his conclusion upon them. As I read his judgment, it was the existence of these dangers which made it imperative to remove or protect the rail and the failure to do so made the system of working adopted for this particular job unsafe. I do not think that he meant to say that in all cases where married gear is used the rail should be removed or protected. Had he said so, I should not have agreed with him, for the evidence does not appear to me to warrant

such a conclusion. In working married gear, the danger of the hook catching on the rail is minimised by the fact that the position of the outboard derrick is such as to lead the hook away from the top of the rail. It is true that there is always some danger that the hook may catch, but, provided that the winches are working satisfactorily and the men in charge of them possess the customary skill, the risk is slight and I do not think that failure to remove or protect the rail can be said in all cases to make the system of working unsafe.

- A The real question is whether or not, in the particular circumstances of this case, failure to remove or protect the rail constituted the system of working an unsafe one. On the one hand, it was said that the system of working married gear is one under which the rail is not removed or protected: that, if in any particular case special reasons exist for removing or protecting it, the decision must rest with the foreman in charge of the job; and that, if he fails to remove it or protect it, the fault is his alone, due to his casual negligence in working the system. On the other hand, it was said that the duty of providing a safe system must be considered, not generally, but in relation to the particular circumstances of each job and that in the present case the circumstances were such as to call for the removal or protection of the rail.

- B In my opinion the latter view is the correct one. What exactly is meant by "a safe system of working" has never, so far as I know, been precisely defined. The provision of such a system falls within the master's province of duty: C if he delegates it, he remains responsible for any inadequacy in the system just as much as if he had personally provided it and he cannot excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty (*Wilsons and Clyde Coal Co. v. English* (1)). The nearest approach to the definition of system of which I am aware is that contained in the judgment of the Lord Justice Clerk in the Court of Session in the case just mentioned. It is to be found in [1936] S.C., at p. 904, and is as follows:

- D What is system and what falls short of system may be difficult to define, and it may be often far from easy to say on which side of the line a particular case falls, but, broadly stated, the distinction is between the general and the particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which E he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand. This distinction as bearing on the master's liability, however difficult it may be to define, has been uniformly recognised in the practice of the Scottish courts.

- F I do not interpret this as meaning that the duty of an employer is performed by laying down a general system of working for a type or class of job, leaving it to the discretion of the person in charge of a particular job to decide what modifications should be made in the system to meet special circumstances or eventualities which may exist or arise. If this is what the passage means, it does not appear to me to be in accord with the reasoning of the House of Lords. In cases where the work to be performed is regular and uniform as in the ordinary factory or mine, provision of a safe system for the type or G class of work and provision of a safe system for the individual job will in general be the same, although a particular occurrence or emergency may call for special precautions. But in many kinds of work there is no such regularity or uniformity and what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time. A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. For example, one H element may be the sequence in which a particular job ought to be carried out, e.g., in a combined job of demolition and excavation it may be dangerous to begin to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first appears to me to lie within the master's province and to be a matter of system. It is part of the lay-out of the job. It is the master's duty to decide what the lay-out of the job shall be and in doing so he must pay proper regard to the conditions affecting the safety of his men. The lay-out of the job is logically prior in time to the commencement of the work although, of course, it may have to be modified as the work

proceeds, e.g., if in the course of the work a neighbouring bank threatens to collapse upon the workmen, the taking of proper steps to shore it up is, it appears to me, a matter of system—it is logically prior in time to the continuance of the work and is concerned not with the work itself, but with the safety of the conditions in which it is performed. I do not venture to suggest a definition of what is meant by system. But it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job—the setting of the stage, so to speak—the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise: such modifications or improvements appear to me equally to fall under the head of system.

The examples which I have given are not intended in any way to be an exhaustive list. I give them merely to bring out the point that the safety of a system must be considered in relation to the particular circumstances of each particular job. If the master is unable to give such close attention to every job which he undertakes as will enable him to provide a safe system for all of them and is thus compelled to leave its provision to others, he cannot escape responsibility. The way to test the correctness of my view is to consider the case where the master is present himself. In such a case, if he lays out the job in a way which is not reasonably safe and sets his men to work in dangerous conditions which could be eliminated by the exercise of due skill and care, it appears to me impossible for him to say that he had not failed in a duty which lies upon him and upon no one else.

Applying these principles to the present case, I am of opinion that in laying out the job it was the master's duty to take what in the circumstances would have been the reasonable step of removing or protecting the rail: that by leaving to the foreman the decision (if indeed it was left) whether or not the rail should be removed, the master was in fact delegating the duty of providing a safe system of working and that, accordingly, this appeal fails and must be dismissed with costs.

I would like to add a word of thanks to the assistant judge for his admirable note of the evidence and argument before him.

MACKINNON, L.J. [read by GODDARD, L.J.]: It is not difficult to enunciate in general terms the principles laid down in various cases, and particularly by the House of Lords in *Wilsons v. English* (1). They seem to be these: (1) It is the duty of an employer towards his servants to provide a safe system of working in the operation the servants are to carry out. (2) The employer may, and in many cases must, delegate the provision of such a system to an agent, but in such a case the employer is responsible for any failure of such agent to provide such a system. (3) If injury to a workman is caused by the failure of the employer, either personally or vicariously, to provide such a system of working, the employer is liable to pay damages to the workman for such injury. (4) If, however, the employer has fulfilled, either personally or vicariously, the duty of providing such a system, and a workman is injured by the failure of a fellow-workman (even though he may be in a superior and commanding position towards the injured man) to carry out the system properly, the doctrine of common employment absolves the employer from liability to the injured workman.

It is, I say, not difficult to enunciate these general principles. The difficulty is to apply them to the facts of a particular case. In *Wilsons v. English* (1) the House of Lords was not involved in that difficulty. The facts had been found by the jury in their answers to 8 specific questions (pp. 58, 59), of which the first 5 were conclusive. The questions in dispute in the appeal were mainly directed to the establishment of No. 2 of my above propositions, and its affirmation involved the overruling of *Fanton v. Denville* (2).

In a case like the present where the judge, or this court, has to find the facts, as well as apply those principles of law, the task is one of extreme difficulty. With good reason LORD WRIGHT said, at p. 85 ([1937] 3 All E.R. at p. 644):

It may be difficult in some cases to distinguish on the facts between the employer's failure to provide and maintain and the fellow-servants' negligence in the respects indicated.

This is obvious, for at once these questions arise : (i) What is meant by "the provision of a system of working" ? (ii) What differentiates the function of the agent by whom the employer provides the system and the fellow-workman who is charged with carrying out a system that has been provided, and (iii) What is the dividing line between the provision of a system of working and acts which are involved in carrying out a provided system ?

A The only guidance I can discover as to what is meant by "providing a system" is in some of the cases. In *Wilson v. English* (1), where the jury found that a reasonably safe system had not been provided, that was apparently because such a system would require that haulage work should be stopped from 1.30 p.m. to 2 p.m., when the day shift men were leaving the pit and proceeding along the underground ways for that purpose. By contrast, in *Wilson v. Merry* (3) the system involved was that of the ventilation of the mine. The employers had provided a proper system of ventilation. The pursuer was injured at a time when the system of ventilation was defective. It was defective because B one Neish, who was the underground manager of the mine, had interfered with its proper working by having a scaffolding erected in order to open up from it a new seam. It was held that the case fell within the fourth of my propositions, that the pursuer was in common employment with Neish, and the mine owners were not liable. In other words, the employers had provided a proper system, but the injury was caused by the failure of Neish to work that system properly. C And, in other words again, Neish, though he was so high up in the hierarchy of servants as to be underground manager of the mine, was not to be treated as the agent of the employers delegated to provide the system of working, but as a fellow-employee of the pursuer who had failed to carry out properly the system provided by the employers. In *Wilson v. English* (1) LORD WRIGHT said at pp. 84, 85 ([1937] 3 All E.R. at p. 644) that the immunity of the employer who has fulfilled his duty is not

D . . . broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow-servant . . . or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foreman, or other employees.

E Having regard to the status of Neish in *Wilson v. Merry* (3) and the nature of his interference with the ventilation system, I find it difficult to think that his action could be reasonably called "a casual departure from the system of working," and "casual negligence" on his part. But these considerations, I dare to think, emphasise how difficult it is to find proper answers to the 3 questions I have propounded above.

F In the present case the plaintiff was injured during his work for the defendants. The assistant presiding judge came to the conclusion upon the facts that his injury came within No. 3 of the principles I propounded at the beginning of this judgment, and the defendants were, therefore, liable to compensate him. The defendants in this appeal contend that the proper conclusion upon the facts is that they bring the case within my fourth proposition. The problem set for us is to decide between these two views.

G The work that was being carried out by the defendants when the plaintiff met his injury was that of loading drums brought in a barge alongside the ship into the hold of that vessel. The plaintiff was one of the men in the barge who had to attach the slings of a chain to the drums so that they could be hoisted up the side of the ship, over the deck to the region above the hatchway and lowered into the hold through the hatch. The motive power for this operation was provided by the ship's derricks. The derricks were worked by employees of the defendants who were fellow-employees of the plaintiff. They and the plaintiff were under the orders of another employee, a foreman who was H called the hatch boss.

The accident that resulted in the plaintiff's injury was that, when the slings were being brought back from the hold over the side to be let down again into the barge, a hook at the end of the chain caught in the ship's rail and pulled it from its sockets. This also disturbed some dunnage wood that was piled on the deck within the rail. Either the rail, or some of the wood, fell into the barge, hit the plaintiff and injured him.

As regards the system of working that ought to have been provided and carried out, the evidence for the plaintiff was solely that of the plaintiff and of a

fellow-workman named Dempsey. They both said that what was wrong was that the ship's rail ought to have been removed, and that they had previously protested to the hatch boss that it ought to be removed, but he had not had it done. They also said that in this work it was the invariable practice to remove the ship's rail, and the accident occurred because that practice was departed from by the supineness of the hatch boss upon this occasion.

That being the plaintiff's case, it seems to me that it only went to show that the point in which the system of working was improper or unsafe was the failure to have the ship's rail removed. The plaintiff said that on various occasions of similar work it had always been removed. Dempsey said :

If a rail is removable, it is the practice to remove it.

And they both spoke to having protested to the hatch boss about his failure to have it removed. Upon this case, if the defendants had called no evidence, I should have thought the proper conclusion was that my proposition 4 was applicable, namely, that the defendants had provided a proper system under which a ship's rail was invariably removed, and the accident happened through the failure of a fellow-workman, the hatch boss, to carry out that system. If, as the plaintiff and Dempsey said, it was the proper and invariable practice to remove the rail, I cannot think that my proposition 3 could be applied, in the sense that the hatch boss was the delegated agent of the defendants to provide a proper system of loading this ship, and he had, by failing to remove the rail, failed in the duty of providing such a system. It would seem to be, in the words of LORD WRIGHT, at pp. 84, 85 ([1937] 3 All E.R. at p. 642) "a casual departure by the hatch boss from the system of working."

The defendants did call evidence, and that told the court a good deal more about this sort of business, and how it was usually carried out. Their witnesses were the cargo superintendent, one of the winch drivers, the hatch boss, a cargo checker at the hatch in question, and the foreman stevedore in charge of the ship. They only agreed with the plaintiff and Dempsey as to the necessity of removing the rail if the operation was being performed by single gear, i.e., by one derrick only. On this occasion it was being done by married gear, i.e., by both derricks, and they all agreed that with married gear it was not the practice to remove the rail, except perhaps in exceptional circumstances. They also testified that removing the rail, though necessary with single gear for the protection of the men in the barge, was by itself likely to create danger for other men working on deck who, by the absence of the rail, might fall overboard. With married gear they explained that the risk of the hook catching the rail (very constant with single gear) was so rare that it was the practice not to remove it. There was also evidence that this particular disaster was due to the faulty working of one of the derricks. This developed a defect, which in ordinary working had to be remedied by a simple operation performed by the ship's engineering staff who had to be applied to to carry it out.

Upon all these facts I find myself again acutely faced by the question I propounded earlier : What is meant by the provision of a system of working ? When that is asked as regards work in a particular factory, or in a mine (as in *Wilsons v. English* (1), or in *Wilson v. Merry* (3)) the answer is comparatively easy. The work going on is always the same, and the system must be provided for that uniform operation. By contrast, suppose the work in hand is that of contractors erecting a factory. The system of doing that must be relative to the particular design, and the special circumstances of the building which may well be completely without precedent.

In this case the business in hand approximated more to the first type, in that all steamers are more or less alike ; they all have hatches, derricks, and bulwark rails. There is, no doubt, some difference between any one steamer and another, and theoretically the system might need to vary by reason of the particular type of steamer. In this case much reliance was placed on the fact that part of the rail in question had been previously removed or broken off, and it was said that this exceptional circumstance made it desirable to depart from the usual practice of not removing the rail when working with married gear.

As I have said, the question for us is whether the judge was right in holding that the case came within No. 3 of my propositions at the beginning, or whether the appellants are right in saying that No. 4 of those propositions is properly

to be applied. My mind has fluctuated constantly during the argument and in subsequent consideration. That uncertainty arises from my inability to give myself satisfactory answers to the 3 questions I have propounded. Upon the whole I come to the conclusion that there was evidence on which the judge could come to the conclusion to which he did, and, further, having read the judgments prepared by LORD GREENE, M.R., and GODDARD, L.J., I have, with hesitation, come to the conclusion that he was right in coming to that conclusion.

A I, therefore, agree with them that the appeal fails.

I am tempted, I hope not improperly, to add some reflections which have been impressed on me by the anxious consideration I have devoted to this case. The existence of the common law doctrine of "common employment" was revealed by LORD ABINGER in 1837 in *Priestley v. Fowler* (4). It is a doctrine which lawyers who are gentlemen have long disliked. Its unfairness has been mitigated by many modern cases, most of which are decisions of the House of

B Lords. But those decisions, necessarily laying down general propositions, involve such subtleties that the task of inferior tribunals in applying their principles to particular facts is one of immense difficulty. As a member of such a tribunal, I cannot help entertaining a regret that, by the exigencies of Parliamentary procedure, the House of Lords has had to pursue its mitigating and ameliorative task by judicial decision rather than by legislation. I suppose I shall

C not live to see it, but I hope my successors in such tribunals will some day be able to hail with relief a short Act of Parliament that abolishes the doctrine of common employment altogether.

GODDARD, L.J. : The doctrine of common employment still remains a part of the law of master and servant, though recent decisions of the House of Lords have done much to mitigate and circumscribe the rule which in modern times has always been regarded as based on somewhat artificial reasoning. Such

D justification as there was for it is out of keeping with present day conditions when employers are so often corporate bodies who can only act through individuals employed by them, but when it applies, it is the duty of the courts to act upon it. In English law there are two cases which are the important authorities for what we have now to consider. The first is *Smith v. Baker & Sons* (5), in which LORD HERSCHELL, at p. 362, stated the duty of the

E employer :

... so to carry on his operations as not to subject those employed by him to unnecessary risk.

and LORD WATSON said, at p. 353, that :

... a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety.

F I think nowadays the words "of a dangerous character" might be omitted from this passage, for from the next case that I will cite I think that it is plain that all reasonable precautions must be taken whatever the character of the work. That is *Wilsons & Clyde Coal Co., Ltd. v. English* (1), where it was expressly laid down that the provision of a safe system of working is the obligation of the employer from which he cannot escape by appointing a competent

G agent to perform it : if the agent does not perform his duty the master remains liable. It was, however, recognised in that case that it may be difficult to distinguish between the employer's failure to provide or establish a proper system and the temporary departure from or casual negligence of managers or foremen in working the system. It is, indeed, not easy to determine in many cases what is meant by, or can properly be called, "system." In the case cited

H it was, I venture to think, comparatively easy, for the allegation was that it was contrary to the usual and recognised mining practice in Scotland for the haulage on the main roads in the pit to be continued at a time when the day shift men were being raised from the pit, and this the jury must be taken to have found by their verdict. Here we have to consider the case of the loading of a ship, a process in which, one would suppose, so many different circumstances may be present that it would be impossible to lay down hard and fast rules, but much must necessarily be left to the judgment and common sense of the men on the job.

It is not suggested that the defendants issued any particular set of instructions to their foremen. It is also clear that there are two well-recognised systems of loading, in one of which single gear is used and in the other married

gear. Which of the two is the method appropriate to a particular ship depends on a variety of circumstances, but I understand married gear is used when possible. The defendants must be taken to know and approve of this, and also of the fact, upon which there was general agreement, that, if single gear is used, it is the right and proper thing for the protection of the lightermen that the ship's rail should be removed, or, if that is impossible, other precautions taken to obviate the danger of the hook on the gear catching on the rail. So much is this an integral part of the system of single gear loading that it must be conceded that it is part of the employer's duty to see that it is performed, or, in other words, it is a duty from which he cannot escape liability if it is not performed. To use the words of LORD WRIGHT, it is to be performed *per se* or *per alios*: it is his personal duty, whether he performs or can perform it himself, or whether he does not perform or cannot perform it save by servants or agents. It is the details which make up the system, and, if those which are necessary for its safe working are ignored or not provided, it appears to me impossible to say that a safe system has been provided. If then a gang were proceeding to load by the single gear method and the foreman failed to remove the rail, or, if that were impossible, to protect it, the employer would be liable if injury were caused thereby; but, if in the course of loading he or another of the gang temporarily or carelessly removed the protection, I think that this would be an act of casual negligence and the employer would be entitled to rely on the doctrine of common employment. My reason for this is that it appears from the statement of the law by LORD WRIGHT, at p. 78 ([1937] 3 All E.R. at p. 640) in *Wilson & Clyde's* case (1), that there is this difference between a statutory duty and a common law duty, that the former is absolute, while the latter:

... is fulfilled by the exercise of due care and skill, but it is not fulfilled by entrusting its fulfilment to employees . . .

If the master were himself in charge of the operation and saw that the rail was properly protected, he would be fulfilling his duty of providing a proper system: if, when his back was turned or he had gone to another job, one of the men removed the protection and an accident happened, I cannot see that it could be said that the master had failed in his duty; on the other hand, as the duty of fencing machinery is imposed by statute, if a workman removes a fence provided by the master, the latter is liable to a workman injured in consequence: *Wheeler v. New Merton Board Mills* (6).

When one turns to the use of married gear I think the case presents great difficulty, partly because of the nature of the evidence, and also because I am not altogether clear as to the findings of the assistant judge. First comes the question: What is meant by defective system? The most helpful explanation I can find is that of the Lord Justice Clerk, in *Bain v. Fife Coal Co., Ltd.* (7). He says that in the Scottish courts it has been taken to include defects of a relatively permanent and continuous kind—of which the master must be presumed to have knowledge—as distinct from those of a transitory kind which may emerge in the day's working, and which are not part of the regular system or method of working. He instances the defective lay-out of a railway or mine contrary to established practice. Precautions which are necessary for the safety of workmen seem to me to be necessary parts of any system, for, if neglected, the system is at once unsafe. The allegation as to defective system in the present case is to be found in para. B of the particulars of negligence, but I do not think I need read them. The evidence for the plaintiff left the matter in a condition far from satisfactory, and, indeed, I doubt if on his case there was any evidence of a defective system. It was not disputed that the use of married gear was proper on this ship. No one was called to explain the method, nor to offer any opinion as to the propriety of removing the rail; the only evidence was that of Dempsey, a dock labourer, who said that, if the rail is removable, it is the practice to remove it. The evidence for the defence was first that of an experienced cargo superintendent. He said that when using married gear it is not necessary to remove the rail. If it is possible to remove it, it is advisable. Later he said that a movable section would be more likely to come away if it was not lashed to the rail next to it. He explained that with single gear, if you cannot remove the rail, you lash it to an eye bolt, and also said that there is always a risk of catching on the rail. In answer to the judge he said that, if a rail

was rusted in, with married gear he did not think it necessary to remove it; that it was optional with married gear and a matter of discretion, depending on the circumstances. The next witness, Palin, worked the starboard winch. He evidently thought the rail ought to have been removed, because the next section had been burnt off by the moulders, and consequently one end was, so to speak, in the air. He, in fact, tried to remove it but failed to do so, though his object in so doing was apparently that he thought there was a risk of further damage to the ship if the hook caught the rail; he did not attempt it as a precaution for the safety of the gang. He agreed that as a rule with married gear the rail is not taken off, but on this occasion he tried as the after end was bare and it was better to move it if he could. He took, however, no steps to protect the rail. Pegler, the foreman in charge, never thought about it at all, but his view was that it was never necessary to remove the rail when using married gear, though he had known hooks to catch in rails and had seen them come off. He thought it was safer to leave the rail as exposing the workmen to less risk. Weston, a foreman checker, thought it more dangerous to remove the rail than to leave it, as anything, such as the hatch beams, might be caught by the falls and carried over. He agreed that if the railing was loose it should be taken up. He was emphatic that it was not dangerous to leave it, but it does not appear that he applied his mind to the matter on this day, even after he realised that the winch was defective, so that the winchmen did not have as much control of the falls as they ought to have had. Slater, the foreman stevedore, did inspect the rail and thought it immovable, and he thought it quite safe to leave the rail on when using married gear. Now, here we find a rail, the after part of which was not attached to the next section, a defective winch, and considerable dunnage on the deck which, if caught by an empty fall, might strike on the rail, which, though rusted into the sockets, could have been got out, as the accident showed. The assistant judge, after a careful review of the evidence, said:

During this particular operation where there was a special danger of the section of the rail being lifted by the hook, it ought to have been removed, or, if that could not have been done owing to rust, the alternative method of placing boards alongside should have been adopted, and that the system adopted was not a proper system.

Then towards the end of his judgment he says that it was the defendant's duty to provide a proper system of work during the process of loading this ship, and, by failing to remove or protect the section of rail, they had failed to do so. He goes on:

I do not think that the general system of leaving the section of rail in position when using married gear was sufficient. I think it should have provided for the removal of the rail if possible, and that the special circumstances on board the ship made it necessary so to do or to protect the rail.

I am left in some doubt whether, in this otherwise most helpful judgment, he meant to hold that the removal of the rail is always as necessary when using married gear, as it is admittedly when using single gear, or whether it was necessary because of circumstances special to this particular ship. If he meant the former I do not think that the evidence justified the finding. But, in my opinion, his judgment can be upheld because, I think, the proper inference from the evidence is this—in using married gear it is necessary to consider the circumstances of each particular ship in deciding whether one can safely proceed with the rail in position. You cannot lay down a hard and fast rule, but the married system does require the removal as much as the single fall system in certain circumstances, and a careful employer must decide whether there is danger in leaving the rail in position according to the circumstances which are present. The decision to remove or leave the rail is thus part of the system. Had the employer been present himself on this occasion, there was evidence on which the judge could find that it would have been his duty, in order to make the married system on this operation safe, to order the removal or protection of the rail. If he did not order either of these precautions, he would not, as it seems to me and in the words of LORD HERSHELL, quoted above, have been so carrying out his operations as not to expose his workmen to unnecessary risk.

In my opinion, therefore, the appeal fails. Not only with regard to loading ships but in many other classes of work, such as works of construction or demolition, it must be impossible to lay down definite rules as to how the work is to be conducted or to proceed so as to afford safety to the workmen. The employer

must lay out the job and take precautions according to the conditions which obtain and may vary from time to time, and whether his duty is discharged adequately in any particular case is a question of fact. But it is not discharged merely by leaving it to the discretion of another, be he ever so competent.

Appeal dismissed with costs.

Solicitors: *Gregory, Roucliffe & Co.*, agents for *Barrell, Son & Co.*, Liverpool (for the appellants); *J. H. Milner & Son*, agents for *Silverman & Livermore*, Liverpool (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

BROWN v. ROBINS.

[COURT OF APPEAL (Scott, du Parc, L.J.J. and Croom-Johnson, J.). April 8, 1943.]

Landlord and Tenant—Rent restriction—Rent including use of furniture—Tenant retaining small quantity of furniture—Whether house controlled—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2) (i); Rent and Mortgage Interest Restrictions Acts, 1923 (c. 32), s. 10 (1); Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (2) (b).

A house which was admittedly within the Rent Restrictions Acts if let unfurnished was let on an agreement by which the tenant selected and retained for her use a small number of articles of furniture from a substantial quantity delivered by the landlord and did not exercise her right under the original agreement to call for the delivery of the rest of the furniture. The tenant, who was in arrears with her rent, contended that the rental value of the furniture she retained was too small to take the house out of the scope of the 1939 Act, and that the rent was in excess of the rent permitted by that Act:—

HELD: the provisions exempting a furnished house from control applied only when the portion of the rent payable in respect of the use of the furniture is substantial in comparison with the whole rent and regard must be had to the value of the furniture to the tenant.

[EDITORIAL NOTE. Originally it was held that quite small payments in respect of the use of furniture were sufficient to take a letting out of the scope of the Rent Acts, but in 1923 it was enacted that the rent fairly attributable to the use of furniture must form a substantial portion of the whole rent. It is possible for a landlord to rent a furnished house and for the tenant at his own risk to remove that furniture and replace it by his own. Tenancy agreements in respect of furnished houses do not usually envisage such a procedure and in many cases it would be a breach of covenant, but it is a possibility and might perhaps lead to evasion of the provisions of the Rent Acts. In the present case, according to the view adopted by the majority of the Court of Appeal, after a letting of a furnished house which would clearly be outside the Acts, the parties agreed to the removal of the bulk of the furniture since the tenant desired to use her own furniture. It is held that in such a case it must be decided as a question of fact whether the payment that can properly be taken to be made in respect of the landlord's furniture left upon the premises is a substantial portion of the whole rent, regard being had to the value of the same to the tenant. CROOM-JOHNSON, J., viewed the position from a different angle and adopts the view that the right to call for furniture to be used on the premises is not the same thing as paying a rent for the use of the furniture. He has reserved his opinion as to the law applicable where the tenant of his own motion removes the furniture let with the house. Though the fact that this was an appeal from a county court makes it difficult to found definite propositions as resulting from the decision, it is clear at any rate that the position must be such that a substantial portion of the rent must be attributable to the use of the furniture and that the use of the furniture means the use in fact enjoyed by the tenant according to the ultimate agreement between the parties.]

AS TO RENT INCLUDING USE OF FURNITURE, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7079-7082.]

APPEAL by the defendant from a decision of His Honour JUDGE POCKOCK, at the Hitchin County Court, dated Jan. 11, 1943. The facts are fully set out in the judgment of SCOTT, L.J.

Lionel A. Blundell for the appellant.

J. C. Llewellyn for the respondent.

SCOTT, L.J.: This is an appeal by the tenant of a house at Baldock, who was the defendant in an action by the landlord for arrears of rent, the arrears having

arisen by reason of the view taken by the defendant that the rent of the house was controlled by the Rent Restrictions Acts and that she had been asked to pay a larger rent than was lawful under those Acts.

The house was let under an agreement of tenancy dated Apr. 30, 1941. The first clause provided as follows :

The landlord agrees to let to the tenant who agrees to take the dwellinghouse known as 43, Bygrave Road, Baldock, Hertford, together with the garden and appurtenances thereto and the furniture and household effects now in the said premises set out in the schedule hereto for a tenancy at the rent and upon the terms hereinafter mentioned.

The term was from May 3—that is, 3 days later—for the period of 1 year, and thereafter from quarter to quarter until either party should give to the other one quarter's notice in writing to determine the tenancy. The rent was payable in advance. There were certain repairing clauses, which I do not think matter, and then cl. 8 provided as follows :

At the determination of the tenancy the tenant shall deliver up to the landlord the said dwellinghouse and furniture in as good a state of repair and decoration as the same are now in (fair wear and tear excepted).

The schedule referred to was a long schedule containing furniture for a lounge, dining room, first and second bedroom, and we were told there was a third bedroom also, a kitchen, landing, stairs and hall.

Immediately after execution of the agreement correspondence passed between the parties because the tenant only wanted a very little out of that long list of furniture, since she was bringing her own furniture into the house, as was known, I think, to the landlord and his solicitor before the agreement was made. On May 2, 1941, the day before the term began, the solicitor wrote to her saying :

There are two points on which I want you and your husband to be satisfied. (1) Furniture. The several articles set out in the schedule to the agreement which you have signed will be delivered at the house, and you can then decide which of them you really need to keep, and the others, if you feel it essential, can be returned to the landlord. You should, of course, write to him specifically on this point.

On June 16, in answer to another letter which is irrelevant for present purposes, the defendant wrote :

Your agreement to hand, for which I thank you, but there is, as you know, the question of the articles I retained ; the rest in the schedule are not being required at present. Would you kindly give the confirmation desired in putting this matter in full and good order.

Then she gave a list, quite a short list, of the articles retained :

Lino, stair carpet (used), three piece suite (used) with small patch, two chairs (used), small table (used), curtains, coal scuttle, two brooms, coconut-matting, two small mats, and seven paper shades.

Two days later the landlord's solicitor replied :

We thank you for your letter of yesterday's date. It is clearly understood by Mr. Brown, as your landlord, that at your request some part of the furniture listed in the tenancy agreement has been returned, and that the only articles retained by you are as follows [he repeats the list]. The clauses relating to the furniture in the agreement will therefore be limited to the above listed pieces.

That, I think, was in legal language a counter-offer. On June 23, Mrs. Robins replied :

I am in receipt of your letter for which I thank you. It all appears now very satisfactory, and I am grateful for your handling of this matter . . . Enclosed please find my cheque value £6 16s. 10d. in settlement.

That was an unqualified acceptance of the counter-offer. As such we required an undertaking by the appellant's solicitor to pay for stamping.

In that state of affairs I think the effect was that the list of furniture included in the tenancy was reduced from the long list, which included bedroom furniture, to a very small list of a few odd things, which, for instance, included no bedroom furniture and no tables and practically no chairs. The lady paid the rent of £2 per week required by the agreement for a considerable time, and then as from May 23, 1942, to Jan. 11, 1943, some 33 weeks, she did not pay any rent, contending that the house was within the Rent Restrictions Acts and that she was entitled to deduct those amounts by way of recovery for overpayments in the past.

It is common ground between the parties that, if the house was an unfurnished house, it would be within the 1939 Act, and that the standard rent of the house would be 8s. per week, the house having been let some years before at that

figure, which, therefore, under the 1939 Act, became the standard rent. The question in the case depends on a consideration of the relevant provisions about furniture in the Rent Restrictions Acts. At the time when the 1939 Act was passed the house was not a controlled house, but it was brought within that Act by reason of the rateable value of the house being within the limits of that Act. The whole question is whether the house was or was not a house which, to use the abbreviated expression, was a furnished house, and, if so, what is the position with regard to the specific provisions relating to such houses?

The 1920 Act, to which I refer first because it was the earliest provision on the point, by sect. 12 (2), proviso (i), provided that the Act should not, save as otherwise expressly provided, apply to a dwellinghouse *bona fide* let at a rent which included payments in respect of board, attendance or the use of furniture. Shortly after that Act was passed there were decisions in the courts to the effect that any payment in respect of board, attendance or the use of furniture, even though small, so long as it had some substance, took the house outside the scope of the Rent Restrictions Act. Consequently, in 1923, by the Act of that year, it was provided in sect. 10 (1):

For the purposes of proviso (i) to sect. 12 (2) of the principal Act, a dwellinghouse shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

The only other section bearing upon this topic is one contained in the 1939 Act, sect. 3 (2), which enacted:

The principal Acts shall not, by virtue of this section, apply . . . (b) save as is expressly provided in the said Acts, as amended by virtue of this section, to any dwellinghouse *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture.

The words "save as is expressly provided in the said Acts," include sect. 10 of the 1923 Act, which I have read. That section does not exempt a house from the purview of the Acts by reason of its being a furnished house or a partly furnished house, unless the portion of the rent payable in respect of the use of furniture is "substantial" in comparison with the whole rent, and regard must be had to "the value of the furniture to the tenant."

In this case it was obvious that, as the tenant was bringing in her own furniture, the great bulk of the articles in the schedule were of no use to her and of no value to her. She contended that the rental value of the furniture included in the reduced schedule was too small to bring it within the scope of the provisions which except what I call furnished houses. If it was not a furnished house within the meaning of those provisions, then the Rent Restrictions Acts applied, and she was entitled to recover the over-payment of rent which she had made during the period in question, and I gather that the amount in issue in the court below was one which had been fixed on that assumption. The deputy county court judge decided that the house was a furnished house and that, therefore, the tenant had no right to deduct anything from the agreed rent, that consequently the arrears which were owing down to the date when proceedings were instituted were truly owing and that she had no defence in respect of them. By agreement between counsel on both sides it was arranged that the weeks from the initiation of the proceedings down to the date of judgment should be treated as covered by the judgment and should be included in it. Those, broadly, are the questions which arise.

Evidence was called, but very little of the evidence is, in my opinion, relevant to the questions of law which we have to decide. I will deal, first, with the question of the comparative proportion borne by the weekly value of the furniture left to the total rent of the house. Evidence was given about that and the deputy county court judge came to the conclusion that that value was irrelevant, on the ground, as he held, that under the tenancy agreement, together with the letters, the tenant could, on the view that he had formed, at any time ask for the balance of the furniture which she had returned to the landlord to be brought back to the house; and that, by reason of that right, she had "the use" of the whole of that furniture within the meaning of the sections of the Acts which I have read. In my view, the deputy county court judge was in error, for two reasons. First, the correspondence which passed after the agreement quite

clearly treated the balance of the furniture, beyond the short list in the letters, as returned and excluded from the letting, with the complete assent of the plaintiff's solicitor, so that it no longer formed a part of the schedule to the tenancy agreement. The deputy county court judge held that the value of all the furniture included in the schedule to the agreement was 16s. 6d. per week, and the value of the house was 16s., and that, therefore, what he called "the normal rental" would be £1 12s. 6d. In my view it is quite clear that the only furniture the use of which could be taken into account, at any rate, after the modification of the agreement, coupled with the actual absence of the furniture, was that comprised in the short list of articles and nothing else, which, on the evidence, was said to be worth 5s. per week.

The second consideration is this. I think one has to look at a house within the Rent Restrictions Acts, whether from the point of view of its standard rent or of the provisions about furniture, attendance or board, from the point of view of its *status*. The Acts interfere drastically with contractual arrangements, and impose a certain status on the house, which binds both landlord and tenant. That is one reason why I think that the furniture covered by the statutory provisions about furniture must be furniture in the house. I do not mean to say that, if it is absent for 1 or 2 days and then brought in, that that would make any difference. But it is because the rent is in part payable in respect of the use of furniture in the house, that the Acts except a furnished house from their scope. The deputy county court judge was wrong and the case must go back to the county court in order that the judge may consider what the annual or weekly value of the furniture in the house was to the tenant, and, therefore, what proportion of the rent was properly attributable to the use of that furniture. I think it is better to express no view upon the meaning of the word "substantial." It is not an unusual word, but a common word of the English language; it is in the Act, and the deputy county court judge must apply it, after hearing the evidence.

The only other question is one which may have to be dealt with on the rehearing, but does not call for consideration by us. If the deputy county court judge finds that the *quantum* of rent attributable to the furniture is "substantial" within sect. 10 of the 1923 Act, he will have to apply sect. 9 of the 1920 Act, as modified by the 1939 Act, which brings in a question of profit to the landlord in connection with the rent payable to him in respect of his furniture. As we are sending the case back, I think that is all that it is necessary to say. The judgment must be set aside and the case remitted to a county court for rehearing. The appellant will have the costs of the appeal; the costs of the first hearing below will be in the discretion of the judge who retries it.

DU PARCQ, L.J.: I agree that this case must go back to the county court or a county court judge. The deputy county court judge, in my opinion, was wrong in his construction of the letters by which the terms of the original agreement were varied. I feel quite clear that the true effect of those letters is that the tenant ceased to have any right to call for the delivery of, or to have in the house, any of the furniture other than that which is described in what has been called the short list attached to the letter of June 16, 1941. It is quite true that in that letter the writer of it, who, I think, was Robins, the defendant's husband, said that the rest of the articles in the schedule were not required at present, but I do not attach very much importance to those words in all the circumstances. It is quite plain from the letter of May 2, that it was never expected that the tenant was going to keep the whole of the articles mentioned in the schedule. The letter said: "You can decide" after they have been delivered, "which of them you really need to keep," and this offer was then made: "and the others, if you feel it essential, can be returned to the landlord." I think that suggestion of returning them to the landlord meant a return to him out and out, and the words "at present" are less significant than they might be when one considers that this, after all, was only a tenancy in the first instance for 1 year, although it was renewable from quarter to quarter. I do not want to say more about the vital letters of June 18 and June 23, except that I agree with SCOTT, L.J., that they really result in their own words in limiting the clauses relating to the furniture in the agreement to "the above listed pieces," or, to put it in another way, in substituting the short list for the long list which originally appeared in the schedule. I would only add that, if it was the intention of the

parties that the tenant was to be entitled at any time to call for the delivery of the rest of the furniture, it would be very surprising that there was no provision made for the notice she must give, as to what was to be done with the furniture meanwhile, at whose risk the furniture was to be, or for the very difficult question which might arise, as to whether she was entitled to have it delivered in sections as and when it occurred to her that she wanted more of it. However, even if I am wrong about that, as has already been pointed out by CROOM-JOHNSON, J., it would really make very little difference because it seems to me to be quite clear that, if parties agree that some of the furniture shall not be delivered for a time and it is not delivered for a time—in this case the whole time so far of the extended tenancy—then it is quite impossible to say that the rent being paid during that period is being paid for the use of the furniture. There is a very clear distinction between having the use of furniture and having a right to call for its delivery so that you may use it.

I think, therefore, that the case, as SCOTT, L.J., has said, must go back and the deputy county court judge must deal with it, not on the footing that the articles in the original schedule are those to be considered, but only those in the short list, which has taken the place of that longer schedule, and it may or may not be necessary for him to go further and consider the question which may arise under sect. 9 of the 1920 Act, as amended by the 1939 Act.

CROOM-JOHNSON, J. : I am of the same opinion, but I have reached it by a slightly different road. Considering the correspondence which followed after the written agreement in the case, I am not able, myself, to see that the tenant abandoned, as a result of those letters, her right to call for the furniture, to be put into the house at any time thereafter. The fact that the parties did not work out the result of the arrangement to which they came, which was that all of the furniture should not be delivered to the house at once, does not lead me to think that the agreement to which I have referred could not have been made. Parties frequently do not work out in detail the consequences of agreements which are made, which is, perhaps, to the great benefit of the legal profession, but which adds to the difficulties of the courts. I do not think that that finding of mine as to the proper construction of this supplemental agreement really makes any difference. I am unable to see that the solicitor, writing his letter of June 18, clearly under a misapprehension, was making a counter-offer, and I am unable to see that the language of the lady in her reply of June 23 : "It all appears now very satisfactory," can be taken to be an unequivocal acceptance of a counter-offer. But I think that must be tested by the language of sect. 3 (2) (b) of the 1939 Act, and I agree with SCOTT and DU PARCQ, L.J.J., that it is impossible to say upon the language of that paragraph that a right to call for furniture to be used under an agreement is the same thing as paying a rent in respect of the use of furniture, and, that being so, one must look broadly at the position which arose from the time that the original tenancy agreement was made. Taking the house in question in this case, for very nearly, if not more than, a year, would it be right to say that the rent included payments in respect of the use of more furniture than that which was in the short list ? I do not think it did. I construe this paragraph, and, indeed, this subsection, as being an exception grafted upon the general policy of these Acts, and, therefore, I think that that exception should be construed strictly.

I only want to add one other word. I do not at the moment assent to the idea that the use of furniture in the house, once it has been handed over to the tenant, is a necessary element in considering the rights of the parties. I mean by that, that, if the landlord lets to the tenant a house full of furniture and *bona fide* observes and performs all the other provisions of the Acts which deal with these matters and the tenant chooses to take the furniture out of the house and store it somewhere else, I should like to reserve the question as to what effect, if any, that has upon the question of what is compendiously but not very accurately called a furnished letting under the Rent Restrictions Acts.

SCOTT, L.J. : I should like to say that I entirely agree with that last observation of CROOM-JOHNSON, J.

Appeal allowed with costs. Case remitted to county court judge for rehearing.

Solicitors : Harry Chandler (for the appellant); Bower, Cotton & Bower, agents for Hartley & Hine, Hitchin (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

**Re A DEBTOR (No. 6 OF 1941, NORTHAMPTON COUNTY COURT),
Ex parte THE DEBTOR v. THE PETITIONING CREDITOR AND
THE OFFICIAL RECEIVER.**

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.),
March 22, 23, 1943.]

Bankruptcy—Receiving order—Petition presented by secured creditor—Credit not given for value of security—Receiving order rescinded—Bankruptcy Act, 1914 (c. 59), ss. 4 (2), 167.

The appellant applied to set aside a receiving order which had been made upon a petition presented by the petitioning creditor. The petition was based upon a judgment debt, judgment having been obtained under R.S.C., Ord. 14, upon a specially indorsed writ issued on Oct. 18, 1939. The appellant had agreed with the petitioning creditor that he would, within a limited time, find a purchaser for 40,000 shares of 10s. each in a public company for which shares the petitioning creditor had subscribed. Having failed to find a purchaser, the appellant, on Aug. 14, 1939, wrote a letter to the petitioning creditor as follows: "in consideration of your extending until Sept. 30, 1939, the time for payment of £20,000, being the amount for which I agreed to sell your preference shares in . . . , I hereby undertake to pay to you the said sum of £20,000 by the before-mentioned date." That undertaking not having been carried out, the petitioning creditor sued for the purchase price of the shares and obtained judgment without any reference to the position with regard to the shares, and he did not state in the bankruptcy petition that he held any security over the property of the debtor. The petitioning creditor claimed that he had a debt in respect of which he could prove against the assets in competition with the other creditors without bringing into the pool the value of the shares. The appellant contended that the registrar ought to have inquired into the nature of the debt and that it ought not to have been treated as a good petitioning creditor's debt and that consequently no receiving order should have been made:—

HELD : (i) since the contract was one for the sale and purchase of specific shares the property in them passed to the purchaser in equity with the result that, if the debtor tendered the purchase price, the petitioning creditor would be bound to deliver the shares. The petitioning creditor was a secured creditor within the meaning of the Bankruptcy Act, 1914, s. 167, and, as he had claimed the full purchase price and had not given credit for the value of the shares, the receiving order ought not to have been made and it must be rescinded.

(ii) the case was not one where an amendment of the petition should in the exercise of the discretion of the court be allowed.

[EDITORIAL NOTE.] In the proceedings in the Chancery Division, this case was decided upon the question that the petitioner had a debt which in any event would eventually be proved at well over £50 and was, therefore, if not technically a good petitioning creditor's debt at the moment, one which the court could in the exercise of its discretion allow to proceed since it would be found to be so at the proof stage. Before the Court of Appeal, however, a further objection was taken on the ground that the petitioning creditor was a secured creditor and that he ought not to be allowed to found his petition upon a secured debt without stating how he proposed to deal with his security. The real point at issue was the exact nature of the debt. A contract for the purchase of shares can only be completed by transferring the shares in exchange for the purchase price. Here the petitioning creditor had obtained a judgment for the purchase price without any reference to a transfer of the shares and the question arose whether he could treat this judgment debt as an unsecured debt for the purchase price or whether he was bound in law to treat it as a secured debt and either to release his security or value it and prove for the balance. The Court of Appeal have decided that such a judgment must be treated in law as creating a secured debt.

AS TO PETITIONING CREDITOR'S DEBT IN CASE OF SECURED CREDITOR, see HALSBURY, Hailsham Edn., Vol. 2, pp. 63-65, para. 75; and FOR CASES, see DIGEST, Vol. 4, pp. 356-363, No. 3334-3382.]

Cases referred to:

(1) *Paine v. Hutchinson* (1868), 3 Ch. App. 388; 9 Digest 357, 2263; 37 L.J.Ch. 485; 18 L.T. 380.

* (2) *Re Burr, Ex p. Clarke* (1892), 67 L.T. 465; 4 Digest 343, 3220.

APPEAL by the debtor from an order of the Chancery Division Divisional Court (FARWELL and UTHWATT, JJ.), dated Feb. 1, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

W. Summerfield for the appellant.

S. Seuffert for the respondent.

LORD GREENE, M.R.: This is a curious case. Three points have been taken on behalf of the appellant debtor. The third, which is based on the Courts (Emergency Powers) Acts, we have not found it necessary to consider. The Divisional Court, apparently, dealt only with the first. We have no transcript of any judgment, and we are told that no reasoned judgment was delivered, but the impression that both counsel had of the decision of the Divisional Court leads to the conclusion that the only point which that court dealt with was the first. For reasons which will appear, I am of opinion that on the first point the decision of the Divisional Court was right; but the second point, which does not seem to have been taken into consideration, is one upon which I think that the appellant is entitled to succeed.

The appellant applied to set aside a receiving order which had been made upon a petition presented by a petitioning creditor. The petition was based upon a certain judgment debt, judgment having been obtained under R.S.C., Ord. 14, upon a specially indorsed writ issued on Oct. 18, 1939. It appears that the petitioning creditor had subscribed for 40,000 preference shares of 10s. each in a public company; and it also appears from the evidence that the debtor had agreed with the petitioning creditor to find a purchaser for those shares within a limited time. He did not succeed in doing so, and on Aug. 14, 1939, a written agreement was entered into between the parties, and it was upon that agreement that the claim in the action was based.

The agreement is in the form of a letter signed by the debtor and addressed to the petitioning creditor. It is headed with the name of the company in which the shares were held, and it is to the following effect:

In consideration of your extending until Sept. 30, 1939, the time for payment of £20,000, being the amount for which I agreed to sell your preference shares in the above company, I hereby undertake to pay to you the said sum of £20,000 by the before-mentioned date.

Now that agreement, upon its true construction, in my opinion, is a contract of sale which is to come into existence when the debtor fails to find a purchaser for the sum mentioned by the date mentioned, and he thus became under an obligation to take over the shares himself and pay the purchase price. That is the view of the contract which he sets out in his affidavit, and it is not seriously suggested before us that that is not the true effect of the document.

The other point to notice about the document is that it is a contract for the sale and purchase of specific shares. It refers to "your preference shares," and that makes it not a contract to buy shares which the vendor is to buy on the market before the date of completion, but a contract for the sale and purchase of specific shares which at the date belonged to the vendor and which are still held by him.

The petitioning creditor on Oct. 18, 1939, issued this writ and in it he claimed the sum of £20,000. On the face of it, the relief that he was there seeking was, in my opinion, misconceived. He was suing for the purchase price; he was not suing for damages for breach of the contract, nor was he suing for specific performance, but he obtained his judgment without any reference at all to the position with regard to the shares. He then presented the petition and did not in that petition state that he held any security over the property of the debtor. If he held security it was his duty to state the fact in the petition and comply with the provisions of the Bankruptcy Act, 1914, s. 4 (2), which are as follows:

If the petitioning creditor is a secured creditor, he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor.

In sect. 167 of the Act "secured creditor" is defined as meaning:

... a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor.

The attitude of the petitioning creditor, both in his affidavit and before the county court registrar and in this court, was that he was entitled to the benefit of the judgment, and was, at the same time, entitled to keep the shares. True it is that he appears to have indicated a willingness to hand over the shares, but his case is that he is under no legal obligation to do so—that he is entitled to hold his judgment for £20,000 and, at the same time, to keep the shares for his own benefit. Any more unjust result I cannot imagine and I should be surprised if the law was such as to entitle him to do so.

The judgment, in point of fact, was, on the face of it, one which, in my opinion, ought not to have been given. The vendor could have sued for damages, in which case he would have treated the contract as at an end, or he could have affirmed the contract and sued for specific performance; instead of doing either he took the wholly unprecedented course of merely suing for the purchase price, and obtained a judgment for the purchase price without any of the corresponding directions which ought to appear in a specific performance order.

The first point which was taken on behalf of the appellant was that this judgment on the face of it was one which justified an inquiry and, having regard to its very peculiar nature, the judgment debt ought not to be treated as a good petitioning creditor's debt. It was said that the judgment can be regarded, or ought in bankruptcy to be regarded (this was the first argument, to which I have already referred) as though it had been a judgment for damages, and, as the amount of the damages has not yet been ascertained, no receiving order ought to have been made and the existing order ought to be rescinded.

The Divisional Court appears to have taken the view that if the judgment were attacked in that way the proper time to deal with it would be at the stage of proof, and not at the stage of petition. In my opinion, they took the right view, for this reason, that the evidence shows that damage had in fact been suffered and that if this judgment were regarded as a judgment for damages and sealed down in bankruptcy, it would nevertheless leave a good petitioning creditor's debt. If that be so the court, in its discretion, ought not, in my opinion, to have said that the petition ought to have been dismissed and the receiving order rescinded, but ought to have left the matter to be dealt with at the stage of proof.

On the basis that the judgment ought to be regarded in bankruptcy as a judgment for damages and that such a judgment could have been given in appropriate proceedings, it is not disputed that the amount of the damages would have been a good petitioning creditor's debt. If it had been a case where the judgment, regarded as a judgment for damages, had been obtained in circumstances of some unfairness, or some fraud, or one of the other grounds which in bankruptcy afford justification for examining a judgment, the position would have been different. On the first point, in my opinion, the view of the Divisional Court is one which it was entitled in its discretion to take and with which we ought not to interfere.

The second point, in my opinion, is a much more serious one. The petitioning creditor claims that he has a debt in respect of which he can prove against the assets in competition with the other creditors without bringing into the pool the value of the shares, which he maintains are his absolute property and in respect of which the other creditors have no interest whatsoever.

The whole question depends upon whether or not, at the date when the petition was presented, the petitioning creditor was a secured creditor within the meaning of the section. The true nature of the contract being what I have stated, namely, a contract for the purchase of specific shares, the effect, in my opinion, was that the property in the shares in equity belonged to the purchaser, with the corresponding obligations on the part of the purchaser, which, for instance, would have arisen if these had been partly paid shares, to indemnify the vendor against calls and all the consequential results which follow upon a contract of sale.

The position with regard to a sale and purchase of shares is this. Unquestionably in the normal case, and certainly in the case of a contract for the sale and purchase of specific shares such as this is, the Court of Equity has always exercised jurisdiction to order specific performance and, moreover, the property in equity in the shares passes to the purchaser. SIR W. PAGE WOOD, L.J., sitting in this court, in *Paine v. Hutchinson* (1), in reference to the facts of the case then before him, said, at p. 390 :

The shares stood in Cruse's name, but, from the moment they were bought by the plaintiffs, they became the property in equity of the plaintiffs, and Cruse was a mere trustee for them.

In *FRY ON SPECIFIC PERFORMANCE*, 6th Edn., at p. 678, the author says this:

The vendor or purchaser of shares may generally, as we have already seen, maintain an action for specific performance of the contract: he will be entitled to a direction that the defendant execute a proper deed of transfer and concur in all steps necessary to procure its registration, and also, in the case of the vendor being plaintiff, to a declaration of his right to indemnity in respect of calls on the shares accruing after the purchaser has become the owner in equity.

That clearly recognises the fact that the purchaser becomes the equitable owner of the shares and the vendor is entitled accordingly to an indemnity in respect of calls which are made after the date when the purchaser's equitable interest arises.

The vendor in the present case, the petitioning creditor, has not elected to treat the contract as discharged and to sue for damages for its breach; by the issue of his writ for the purchase price, he was affirming the contract. Having obtained judgment for the purchase price, what is his position with regard to the shares? It seems to me quite impossible to say that he can keep the benefit of that judgment for the purchase price without acknowledging at the same time that the contract to purchase still subsists carrying with it the obligation to transfer the shares when the purchase price is tendered. It would be open today, as I view it, to the debtor, if he had the money, to go to the petitioning creditor with the amount of the judgment and offer it to him against a transfer of the shares, and the petitioning creditor would be bound to transfer the shares. The contract has never ceased to exist notwithstanding the fact that judgment for the purchase price has been obtained, and it does not appear to me that the petitioning creditor can say that he is entitled to hold a judgment for the purchase price without, at the same time, admitting that the purchaser's equitable interest in the shares under the contract of sale remains in existence. If the position were otherwise, the result would be, in my judgment, a fantastic one. It would be that for which the petitioning creditor contends, namely, that he is entitled both to hold the benefit of his judgment and to keep the shares.

That being the position as I see it, what is the result on the true construction of the Act? If I am right in thinking that the equitable property in the shares is vested in the purchaser and that the vendor is entitled to refuse to transfer the shares until the purchase money which is comprised in the judgment has been paid, the vendor, it seems to me, within the meaning of the definitions clause, is a secured creditor, because he is entitled to keep what in equity is the property of the purchaser until the purchaser pays the purchase price, and, accordingly, he has security over the equitable interest of the purchaser. If the vendor had treated the contract as at an end and sued for damages, all he would have got would have been £2,000, or some such figure as that—that seems to be the most probable figure—and that would have been his judgment; and that would have been the sum upon which he could have based his petition and in respect of which he could have proof in competition with the other creditors. But now he says that by virtue of this judgment he is entitled to proof in competition with the other creditors for the full amount of the judgment without, as I have said, bringing into the pool the shares which, on satisfaction of the judgment, the debtor is entitled to have transferred to him. If the claim of the petitioning creditor is right, it would mean not merely that in the petition he is entitled to say nothing about the shares, but that when he comes to the stage of proof he is entitled to put in a proof for £20,000 and keep the shares. In my opinion, that is the very thing which the section of the Act was aimed to prevent, and the only possible question is whether in the circumstances the petitioning creditor is a secured creditor.

I have no doubt that he is, and the reason that he is, is that he has elected to take this most irregular and unusual course of obtaining a judgment for the purchase price, and certainly as from that date it is not competent to him in one and the same breath to say that he is entitled to the purchase price and is not under any liability to treat the shares as belonging in equity to the purchaser.

In those circumstances, in my opinion, the receiving order ought never to have been made.

We were referred to one case which I should mention, *Re Burr* (2). That was an entirely different case, because there a creditor attempted to prove in the bankruptcy for a debt which was alleged to arise under an order for specific performance of a contract to sell a policy of insurance. The order for specific performance was in the usual form and contemplated the simultaneous transfer of the policy and payment of the purchase price. Such an order on the face of it does not give rise to a debt; it is an order for specific performance, which is a totally different thing. The proof was objected to on the ground that the alleged creditor had omitted to mention and value his policy, and he then sought to withdraw his proof. It was held that he was entitled to do so, on the ground, as I read the judgment, that he had not got a debt at all in respect of which he could prove. At p. 465, LORD ESHER, M.R., said:

The judgment for specific performance did not create a judgment debt. . . . and that there never was a debt at all. True it is, he said, that:

. . . the contract did not pass the property in the policy or create a debt.

I should have thought, with respect, that it did pass an equitable interest in the policy, but it was not necessary to deal with that matter in the judgment because the reason for the judgment, and the conclusive reason, was that there was never any debt at all in respect of which a proof could be tendered.

In the present case the position is entirely different. There is a debt; there is the judgment debt, which is unquestionably a debt, and the only question is, what are the conditions upon which the petitioning creditor is entitled to rely upon that? He can only rely upon it, in my opinion, by conceding at the same time that the shares are shares in which the debtor has an equitable interest and for which he is entitled to call, and ever since the judgment, has been entitled to call, if he tenders the purchase money.

In those circumstances, I am of opinion, as I have said, that the receiving order ought not to have been made.

It is suggested that the court ought to exercise its discretion and allow an amendment of the petition in which the shares should be valued and the conditions of sect. 4 (2) of the Act complied with. It is perfectly true that in a case of inadvertence, or if there is some reasonable excuse, the court has jurisdiction to allow an amendment so as to enable the subsection to be complied with. In the present case I do not think we ought to allow an amendment, for this reason. There was no inadvertence here. There is no mistake of fact. There is a deliberate assertion by the petitioning creditor who has persisted throughout in maintaining the position that he holds no security at all and that he is entitled to disregard the shares. In those circumstances, I do not suggest for a moment that there is any bad faith about it or anything of that kind; it was, no doubt, a genuine belief that that was the legal position; but, nevertheless, we have to consider the matter, and, in view of what I venture to submit is a very unfair attitude to take, I do not think we ought to allow an amendment.

In the result, therefore, the appeal is allowed, the receiving order is rescinded, and, I apprehend, the petition dismissed.

MACKINNON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal allowed with costs. Receiving order rescinded and petition dismissed.

Solicitors: *Cronin & Son* (for the appellant); *Simmons & Simmons* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

HALCYON STEAMSHIP CO., LTD. v. CONTINENTAL GRAIN CO.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard L.JJ.),
March 19, 22, 1943.]

Shipping—Charterparty—Construction—Varying rates for neutral and belligerent trading—Ship proceeding to neutral port—Whether calling at belligerent port to bunker was belligerent trading—Bills of lading—Duty of master to sign within reasonable time.

By a time charterparty dated Nov. 28, 1939, the appellants chartered a ship owned by the respondents, one of the terms of the charterparty being "That the charterers shall pay for the use and hire of the said vessel at the rate of \$3.40 if neutral trading, \$3.70 if trading belligerent Mediterranean and \$4.00 if trading belligerent other than Mediterranean." It was further provided that "Charterers are to insure vessel at their expense with Lloyd's of London against war risk on valuation of £65,000 if trades neutral or belligerent Mediterranean, but if trades to other belligerent areas, valuation is to be £80,000. Under the charterparty the vessel carried a cargo to Havre and after discharging it, was required to proceed to Boston, U.S.A., to load a cargo and to bunker at Port Talbot en route. The owners contended that from the time the vessel left Havre until it left Port Talbot in convoy, namely, from Apr. 5 to Apr. 16, the charterers were liable to pay at the rate of \$4.00 for use and hire and to hand over cover notes for insurance on a valuation of £80,000 before the vessel left Havre. Also, while the ship was being loaded at Boston, the charterers presented bills of lading in respect of part of the cargo loaded. The master declined to sign these on the ground that a full cargo had not been loaded. Thereupon the charterers discontinued loading. The ship was idle for some days after which bills of lading were signed. The charterers claimed damages for loss sustained through the delay:—

HELD: (i) while proceeding from Havre to Boston, which was then a neutral port, the vessel was trading neutral, and calling at Port Talbot, a belligerent port, for bunkers did not alter the character of the voyage. Therefore the rate of hire in respect of the period from Apr. 5 to Apr. 16 was \$3.40, and the insurance was on a valuation of £65,000.

(ii) the master was bound to sign bills of lading for goods already shipped within a reasonable time of their being presented to him and was not entitled to delay signing until all the cargo had been shipped.

[EDITORIAL NOTE.] Ships trading to the ports of belligerent countries generally incur greater risks than when travelling to those of neutral countries and the rate of hire will consequently be higher in the former case. In the present case, the ship, though bound for a neutral port, called at a port in a belligerent country for bunkers. This call was not an emergency matter, but had been arranged before the commencement of the voyage. The question thus arose whether the higher rate of hire was payable until she left the port in the belligerent country. This question is here decided upon the terms of the particular charterparty in question, but its provisions were probably those which would generally be used in such a case. The Court of Appeal have, however, placed some reliance upon cl. 34 of the charterparty and clearly, if any other result is wished for, this clause would have to be omitted or altered.

AS TO HIRE IN TIME CHARTERS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-310, para. 500; and FOR CASES, see DIGEST, Vol. 41, pp. 357, 358, Nos. 2060-2065.] Case referred to:

- (1) *Re an Arbitration between Sea and Land Securities, Ltd. and William Dickinson & Co., Ltd., The Abresford*, [1942] 1 All E.R. 503.

APPEAL by the charterers from an order of ATKINSON, J., dated Feb. 8, 1943. The facts are fully set out in the judgment of MACKINNON, L.J.

A. T. Denning, K.C. and *A. W. Roskill* for the appellants.

Patrick Devlin for the respondents.

Denning, K.C.: The Halcyon was a neutral ship and had neutral owners and was only liable to seizure if carrying contraband. If a neutral ship carries cargo to a belligerent destination she becomes liable to seizure. If she trades neutral the charterers guarantee that the cargo has not a belligerent destination. If the cargo affected the neutrality of the ship a higher rate was payable and there was a higher insurance. If the ship was trading between two neutral countries and called at a belligerent port to bunker, that would not alter the

fact that the ship was trading neutral. Calling at a belligerent port to bunker would not alter the character of the trading. Trading belligerent means carrying cargo to a belligerent port. Therefore, under the charterparty in the present case the charterers were not liable to pay the higher rates in respect of the time required by the ship going to Port Talbot to bunker before proceeding to Boston, U.S.A. As regards the refusal of the master to sign bills of lading before the ship was completely loaded, when part of a cargo has been placed on board, the shipper is entitled to bills of lading for the goods. By the Carriage of Goods by Sea Act, 1924, and also by the Harter Act, bills of lading are required to be signed on demand.

Devlin : Trading does not merely mean carrying a cargo. It means something wider such as operating under the charterparty. Putting into a belligerent port to bunker alters the nature of the trading. In the present case, immediate destination must be the test as to whether the higher or the lower rate is payable. The test must be as to where a vessel is and not what her occupation is at the time. It is not for the master to determine where the ship is to bunker. It is for the charterers to say what the vessel is to do. In the present case they required the vessel to bunker at a belligerent port. With regard to the additional words which were inserted by the judge when answering question (c), the war clauses give a discretion to the master not to sign bills of lading to a port which he considers dangerous. The mere fact of a refusal to sign bills of lading does not entitle the charterers to recover damages. There must be a wrongful refusal.

Denning, K.C., in reply : On the refusal to sign the bills of lading, the charterers were entitled to discontinue loading. The damages would be for the loss of the use of the ship and the services.

LORD GREENE, M.R. : *MACKINNON, L.J.*, will deliver judgment first.

MACKINNON, L.J. : This is an appeal from a decision of *ATKINSON, J.*, upon a special case under the Arbitration Act, 1934, s. 19 (1) (a). The matter arises out of a time charterparty of Nov. 28, 1939, between the Halcyon S.S. Co., Ltd., as owners of the steamship "Halcyon" and the Continental Grain Co., an American company, as charterers. It is a time charterparty in the familiar form by which the charterers hire the use of the steamship for a period of about 3 to 5 calendar months within institute warranty limits, not north of Holland, excluding inter-European trading and British North America, the vessel being placed at the disposal of the charterers at Piraeus in Greece. The charterparty is of the usual inordinate length, but the more material clauses in it are parts of cl. 4 and 38. Cl. 4 provides as follows :

The charterers shall pay for the use and hire of the said vessel at the rate of \$3.40 if neutral trading, \$3.70 if trading belligerent Mediterranean, and \$4.00 if trading belligerent other than Mediterranean, all United States currency.

Cl. 38 provides that :

Charterers are to insure vessel, at their expense, with Lloyd's of London against war risk on valuation of £65,000 British sterling if trades neutral or belligerent Mediterranean but if trades to other belligerent areas, valuation to be £80,000.

In these clauses and elsewhere in this lengthy charterparty the draftsman appears to have entertained a great devotion to the words "trade" and "trading." He first uses it in line 10 of the charterparty, where the vessel is described as "now trading," which can only mean "now fulfilling another contract of affreightment," and he uses the verb "trade" and the present participle "trading" over and over again in cl. 4, 30, 34 and 38.

The special case deals with disputes which arose between the parties, and propounds 6 questions which purport to be questions of law. The first 2 questions depend upon some findings of fact in paras. 2 and 3 of the special case, which are as follows. :

2. Under the charterparty, the steamer carried a cargo from Norfolk, U.S.A., to Havre. Discharge at Havre was completed on Apr. 4, 1940. The vessel was then ordered by the respondents to proceed to Boston, U.S.A., to load a cargo, and to bunker at Port Talbot en route, as bunkers were not available at Havre. She accordingly proceeded in ballast to Port Talbot for bunkering, which was completed on Apr. 13. From that time, the vessel waited at Port Talbot for convoy, and left on Apr. 16 to join convoy.

3. The claimants claimed in respect of the period Apr. 5-16 hire at the rate of \$4.00 per ton mentioned in cl. 4 of the charterparty. The respondents denied that such rate was applicable. The contest between the parties was as to the true construction of cl. 4, 30, 34 and 38 of the charterparty, and particularly as to the meaning of "trading," "trading belligerent," and "ready to receive cargo" as used in those clauses. From Apr. 5 the vessel was ready to receive cargo, in the sense that she was in all respects fit for the reception of a cargo.

Thereupon two questions, (a) and (b) are asked :

(a) Whether on the true construction of the charterparty and the facts found in paras. 2 and 3 hereof, the rate of \$4.00 per ton was payable from Apr. 5-16 or part of such period . . .

(b) Whether on the true construction of the charterparty and the facts found in paras. 2 and 3 hereof, the respondents were bound to hand over cover notes for insurance on a valuation of £80,000 before the vessel left Havre.

Those two questions have been answered together by ATKINSON, J. As to (a) and (b) his order reads :

On the facts found, the rate of \$4.00 per ton was payable and the ship ought to have been insured on a valuation of £80,000.

These questions raise solely the question of the proper construction of cl. 4 and 38 in the charterparty. The judge has said in regard to both claims of the shipowners that they are right. I cannot agree with his conclusions. The use of the verb "trading" by the draftsman is constant, and almost everywhere vague, but I think the reasonable view is that between Apr. 5 and 16 this vessel was trading to Boston, U.S.A., and her visit to Port Talbot was only an incident in that adventure.

The view of ATKINSON, J., is that, if on that voyage to Boston, U.S.A., she calls at a belligerent port to bunker, or even I suppose for orders, she is trading to that belligerent port. That view I cannot accept. The cogent test is provided by imagining the converse case, as was suggested by LORD GREENE, M.R., during the argument. If she were loaded at Boston, U.S.A., with a cargo deliverable at Bordeaux, she would be clearly "trading belligerents" and the charterers must pay the higher rate; but, if they added directions that she should call at Lisbon for orders, or for bunkers, she would, on the view of ATKINSON, J., be "trading neutral" all the way from Boston, U.S.A., until she left Lisbon, and the charterers would get off with the lower neutral trading rate for nearly the whole of the voyage to Bordeaux. It is impossible to discuss this question at any length. I think ATKINSON, J., was wrong in his view, and that the answer to questions (a) and (b) in para. 6 should be :

On the facts found the rate of hire from Apr. 5-16 was \$3.40, and the insurance ought to have been based on a valuation of £65,000.

The remaining 4 questions of law propounded depend upon some meagre findings of fact in para. 5, which are as follows :

At Boston, U.S.A., loading commenced, and when part of the cargo was on board the respondents presented bills of lading in respect of such cargo for signature by the master, who refused to sign them when presented. In consequence of this refusal, the respondents discontinued loading, and declined to put more cargo on board until the bills of lading tendered for signature in respect of the cargo loaded were signed. The vessel lay idle for some days, after which bills of lading were signed. The respondents claimed damages for loss sustained by the matters aforesaid. The dispute involved the question whether the master was bound to sign bills of lading until all the cargo to be loaded at the particular port was on board, and whether the words "as presented" referred to the form and contents only, particularly having regard to the words "in conformity with Mate's or Tally Clerk's receipts," or whether such words meant "as and when presented."

Then there is a reference to some cases, which does not seem to be a matter of fact. So meagre did ATKINSON, J., feel these findings to be that he seemed to have been eager to supplement them, and was apparently allowed to do so with the help of some affidavits, although neither side has sought to renew that irregularity before us. He also devoted attention to the war clauses added to the charterparty, especially to cl. 1 which provides that :

The master shall not be required or bound to sign bills of lading for any blockaded port or for any port which the master or owners in his or their discretion consider dangerous or impossible to enter or reach.

Having regard to his consideration of the war clauses, ATKINSON, J., has answered questions (c) and (d) with that war clause very much in mind. Question (c) is :

Whether on the true construction of the charterparty, the respondents were entitled to present and require the master to sign bills of lading for each parcel of cargo as and when shipped.

and question (d) is :

A Whether the refusal of the master to sign bills of lading for cargo loaded when they were presented entitled the charterers to discontinue loading until bills of lading for cargo already loaded were signed.

Those questions ATKINSON, J., has answered thus :

As to (c) : Yes, subject to the master's rights and the owners' rights under cl. (1) and (2) of the war clauses. As to (d) : If the master was justified in his refusal under cl. (1) or (2), the charterers were not entitled to discontinue the loading at the ship's expense.

B The answer to (d) in particular seems to be unhelpful to the inquiring umpire, for it does not tell him whether, if the master was not justified under the war clauses, the charterers were entitled to discontinue loading at the ship's expense.

C With all respect to ATKINSON, J., I think he has failed to observe the very narrow nature of the questions raised. Of course, there must be some possible bills of lading which the master would rightly refuse to sign. The limits of trading for the 3 or 5 months of this charterparty are institute warranty limits, not north of Holland. If the charterers shipped a cargo in America and then tendered bills of lading to the captain under which he was to deliver at Copenhagen or Danzig, he would rightly refuse to sign, and, similarly, if he was asked to sign a bill of lading for a blockaded port coming within No. 1 of the war clauses.

D The wording of para. 5 of the case, I think, makes it clear that the bills of lading tendered were properly tendered under the charterparty, and were such that the captain was bound at some time to sign them ; and the sole and narrow question raised is, when was he so bound ? Was it as each bill of lading was tendered after its relevant parcel was shipped, or could the master rightly claim to delay the signature of all the bills of lading until all the parcels were shipped ? I think that is clear from this passage in para. 5 of the case :

The dispute involved the question whether the master was bound to sign bills of lading until all the cargo to be loaded at a particular port was on board.

E It may seem surprising that the umpire should propound such a question, since the answer to it seems so obvious. I think that answer is that the captain was bound to sign bills of lading for parcels already shipped within a reasonable time of their being presented to him, and was not entitled to delay signing any until all the cargo was shipped and the whole batch of bills of lading had accumulated. I therefore think that the answer to question (c) should be "Yes."

F Question (d) does not seem to me to raise a question of law which can be answered as such. If the charterers never loaded any cargo at all they would commit no breach of the charter for which the owners could claim damages. In truth, I suspect the implied meaning of question (d) is : "Did the charterers act reasonably in stopping the loading as they did ?" ; but that is a question of fact, and not a question of law. In truth, question (d) seems only to be asked as concerning a matter which may be relevant in the consideration of the remaining questions, (e) and (f). Those are directed to the question whether the charterers can claim to be relieved from payment of hire during the period while the master was refusing to sign bills of lading and the charterers stopped the loading.

H It was pointed out in *The Alresford* (1) that under such a time charter the charterers can only be relieved from the continuous payment of the agreed hire in two events, first, if the cesser of hire clause applies to the facts, and secondly, if they can set off or counterclaim hire for a certain time as the whole or part of their claim for damages caused to them by a breach on the part of the shipowner of his duties under the charterparty.

The usual cesser of hire clause appears in this charterparty as cl. 15, and I need not read it. Clearly its terms do not cover the time when the loading was discontinued, and, therefore, question (e) was rightly answered, "No." There remains question (f), that question being :

Whether, in assessing the damages, if any, to which the charterers are entitled in respect of the said delay in signing bills of lading, sums representing the loss of use

of the ship or of the ship's services, or expenses incurred under the charterparty by the charterers during the period of the said delay, should be included or taken into account.

In my view, this does not raise a question of law which can be answered as such. The master committed a breach of the charterparty by refusing to sign bills of lading for a certain period. The measure of the damages recoverable by the charterers for that breach must depend on the general rules of law as to the assessment of damages, and these inevitably involve questions of fact, for example, as to the reasonableness of the action of the claimants in regard to the breach and its results, whether they inflamed the damages unnecessarily or reasonably mitigated them, and so forth.

In other words, the answer to question (f) involves a knowledge of all the facts, when we know none of the facts. The court cannot write a treatise as to the rules to be applied in the assessment of damages, and in this question the court is asked a so-called question of law which is not one which can be so answered. In the result, I think, the order below should be varied, and should read thus :

(a) No, only \$3.40. (b) No, only £65,000. (c) Yes. (d) Does not appear to the court to be a question of law capable of being answered as such. (e) No. (f) This also does not appear to the court to be a question of law capable of being answered as such.

The order of ATKINSON, J., left the costs below in the discretion of the umpire, which seems to be the proper order in a consultative case. This part of his order should stand. In this court the charterers have succeeded to a material degree, and the owners not at all, and the charterers, therefore, should have the costs in this court.

LORD GREENE, M.R. : I agree, and I only wish to add an observation of my own upon questions (a) and (b). It is clear from cl. 4 of the charterparty that the whole period of the charter is divided into periods of neutral trading and belligerent trading, which itself is divided into trading belligerent Mediterranean and trading belligerent other than Mediterranean. In other words, at any given moment the vessel must fall within one or other of those categories. The question is, how is the period of neutral trading or the period of belligerent trading to be defined ? Is it to be defined by reference to the commercial purpose and destination of the voyage at a particular moment, or is it to be determined by a *de facto* destination without taking into account the fact that that *de facto* destination may be entirely incidental and fortuitous, such as calling for bunkers or calling for orders ?

In my opinion the first is the true test, and I find that opinion strongly confirmed by the language of cl. 34, which provides as follows :

If steamer trades to belligerent port or ports, it is understood that the belligerent rate so provided for herein is to count from the time vessel is ready to receive cargo until she sails from the discharging port.

That clause does not deal with every particular case, but it shows upon its language quite clearly that a period of "trading belligerent" is regarded as the period which elapses between the time when the vessel is ready to receive cargo and the time when she sails from the discharging port. During the whole of that period, under cl. 34, she is "trading belligerent."

Supposing that during such a voyage she puts in to a neutral port for bunkers, it would be impossible to argue that the period elapsing from the time when she was ready to receive cargo to the time when she left the neutral port, having bunkered there, must be treated as neutral trading ; that would fly in the teeth of the clear language of cl. 34. I find in that clause what appears to me to be a quite conclusive argument in favour of the appellants' view. I have thought it worth while just adding those words to the judgment of MAC KINNON, L.J., because I have myself gained great assistance from those considerations.

GODDARD, L.J. : I agree with the judgment delivered by MAC KINNON, L.J., and also with the observations of LORD GREENE, M.R. I think that the key to the answer of questions (a) and (b) is to define as he does what is to be found in cl. 34. I agree, therefore, with the order which has been proposed.

Appeal allowed.

Solicitors : *Sinclair, Roche & Temperley* (for the appellants) ; *Stokes & Micalfe* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

IDEAL LIFE ASSURANCE CO., LTD. v. HIRSCHFIELD.

[COURT OF APPEAL (Scott, Luxmoore and du Pareq. L.J.J.), **March 24, 25, April 9, 1943.**]

Emergency Legislation—War damage—Insurance—Contribution—Mortgage of a number of properties—Whether mortgagee liable for share of contribution—Mortgage created “in connection with . . . more than one contributory property” —War Damage Act, 1941 (c. 12), s. 25 (4) (5).

A The respondent acquired a number of small houses of less than £150 contributory value and mortgaged each of them by a separate mortgage to the appellants. From the mortgage interest due in June and July, 1942, the respondent deducted the share of War Damage contribution payable by a mortgagee under the provisions of the War Damage Act, 1941, s. 25. The appellants disputed the respondent's right to make the deductions on the ground that the mortgages were created in connection with more than one contributory property and, therefore, came within the proviso to subsect. (5) of the section, but it was contended for the respondent that this proviso applied only to cases in which more contributory properties than one were included in the same mortgage :—

B
C **HELD :** where, as in this case, the interest in a number of houses had been purchased in a single transaction and money had been borrowed on a separate mortgage on each of the houses, the mortgage was “created on the occasion of and in connection with” the acquisition of the interest in each of the other houses, and the mortgagor was excluded by the terms of the proviso from the benefit of the section. The mortgagees were, therefore, not liable to pay any part of the instalment of the contribution.

D [EDITORIAL NOTE. The question here is purely one of the construction of the subsection, but it is one which has been the subject of no little discussion. It was agreed that, if several properties are included in the same mortgage, the mortgagor does not get the advantages of the subsection, but it was thought possible that upon a proper construction of the section the mortgagor might be entitled thereto if several properties were charged by separate mortgages. The Court of Appeal have held, however, that if these separate mortgages are contemporaneous and entered into on the occasion of the purchase of the properties—which does not mean on the same day as the purchase but about the same time and as part of the transaction—the mortgagor does not get the advantage of the subsection; that is, the mortgagee is not liable for any part of the contribution.

E FOR THE WAR DAMAGE ACT, 1941, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, pp. 478-480.]

APPEAL by the plaintiff company from a decision dated Oct. 12, 1942, of His Honour JUDGE DALE, sitting at Birmingham county court.

F The respondent's father acquired a 99 years' lease of certain land on which in due course were built a number of small houses of less than £150 contributory value. He entered into negotiations with the appellant company for a mortgage of about £6,000 on the property and with a view to facilitate the transaction respondent, who in turn mortgaged each of them by a separate mortgage to the appellant company. Subsequently 2 of the houses were sold. From the mortgage interest due in June and July, 1942, on the remaining 10 plots the respondent G deducted the share of the war damage contributions payable by a mortgagee under the provisions of sect. 25 of the 1941 Act. The appellants disputed the respondent's right to make the deductions on the ground that the mortgages were created in connection with more than one contributory property within the meaning of the War Damage Act, 1941, s. 25 (5), and that taken as a whole the property was beyond the £150 limit of contributory value set by the Act.

H In an action in the county court for the balance of the interest deducted by the respondent the county court judge held that the properties were covered by the Act and the deductions properly made.

It is provided by sect. 25 (4), (5) of the War Damage Act, 1941, as follows :

(4) This section applies to a contributory property, the contributory value of which does not exceed £150 and which consists of or comprises premises used or suitable for use for residential purposes, and to a contributory property the contributory value of which does not exceed £500 and which consists solely or mainly of agricultural land or agricultural buildings or of such land and such buildings :

Provided that this section shall not apply to a contributory property by

virtue of its comprising premises used for residential purposes if their use for those purposes is connected with, and subsidiary to, the use for other purposes of those premises or of some other part of the property.

(5) This section applies to a mortgage of the interest of a direct or indirect contributor which was created to secure a capital sum (whether with or without interest) on the occasion of, and in connection with, the acquisition of that interest by the contributor or a predecessor in title of his, or on the occasion of, and in connection with, the execution of any works of construction or improvement for the benefit of the contributory property, or was substituted for a mortgage so created.

Provided that this section does not apply to a mortgage which was created on the occasion of, and in connection with, the acquisition by a person of an interest in, or on the occasion of, and in connection with, the execution of any such works as aforesaid for the benefit of, more than one contributory property, or was substituted for a mortgage so created.

Sir Norman G. Touche for the appellants.

Harold B. Williams for the respondent.

DU PARCQ, L.J. [delivering the judgment of the court]: This appeal raises a question of some difficulty as to the construction of a few words in the War Damage Act, 1941, s. 25.

Before the question can be decided it seems to be desirable to ascertain the purpose of the section. That purpose must be inferred from the language and tenor of the Act. The legislature has singled out a particular class of mortgagors on whom to confer the benefit which sect. 25 provides.

In order that a mortgagor may be included in this class, the following conditions must be fulfilled: (1) The mortgage must be a mortgage of an interest in a dwelling-house or in agricultural land and buildings; (2) The premises which are the subject of the mortgage must be of a value not exceeding the values specified in the section; (3) The mortgage must have been "created" both "on the occasion of and in connection with" the acquisition of that interest in the premises which is the subject of the mortgage or "on the occasion of and in connection with" the execution of works for the benefit of the premises.

If one stops at this point and considers the section apart from the proviso, it is, we think, reasonably plain that one object of the section is to relieve the purchaser of a dwelling-house or farm of moderate value, who in order to acquire the premises, finds it necessary to borrow part of the purchase money on mortgage. A person who, having purchased a house, subsequently mortgages it to raise money for other purposes gets no assistance from the section, unless his purpose is the execution of such works as are defined therein. The mortgage must be created not only "on the occasion of" but also "in connection with" the acquisition of the interest. The words "in connection with" were probably inserted because, without them, the section might be read as benefiting a mortgagor who, shortly after the purchase, mortgaged the premises in order to provide money for some purpose unconnected with the purchase of the premises. Without those words, the expression "on the occasion of" would not have been adequate to prevent such a construction. That expression is not equivalent in meaning to the phrase "on the same date as." An "occasion" is not a period of 24 hours. If we say that a man took out an insurance policy on the occasion of his marriage, we do not mean "on the day of his marriage," but rather "at or about the time of his marriage," with the implication that the coincidence in time was designed and not accidental. The words "and in connection with" emphasise the fact that it is not sufficient to show that the mortgage was created at or about the time of the acquisition. A connection between the mortgage and the acquisition of the interest must be established.

So far the legislature has brought within the ambit of the section those who borrow on mortgage in order to buy their houses or farms, but it has done nothing to exclude the man who buys a number of houses or farms at one time and borrows money on one or more of them. It is easy to understand, especially if regard is had to the fact that only premises of less than a certain value are within the section, that Parliament would not wish to give relief to such a mortgagor. On the other hand, Parliament might well think it wrong to shut out from the benefit of the section a man who, at or about the time when he bought a house, was also buying other premises by way of an entirely different transaction—for example, buying a shop in which to carry on business.

If this interpretation is right (and no other was suggested which would give a logical basis to the section) the intent and meaning of the proviso become intelligible. The words "on the occasion of and in connection with", which reappear in the proviso, no doubt present a difficult problem of construction, but the problem is less baffling when viewed in the light of what we conceive to be the intention of the legislature.

When, as in the present case, the interest in a number of houses has been purchased in a single transaction and money has been borrowed on mortgage on each of the houses, we are of opinion that each mortgage was "created on the occasion of and in connection with" the acquisition of the interest in each of the other houses.

We find it impossible to say, looking at the facts of this case, that each house was the subject of a separate and distinct transaction, in the sense that there was no connection between the several transactions. The granting or "creation" of the mortgages and the acquisition of the interest in all the houses were in truth part of one transaction and the period of time covered by that transaction was an "occasion." If, as we think, the transaction is rightly to be regarded as one, then its constituent parts are necessarily "connected." The words "in connection with" are not a term of art. They must be construed in accordance with their ordinary meaning and, if that criterion be applied, we are of opinion that the required connection must be held to be established.

It was conceded by counsel for the respondent that, if the first-named defendant had mortgaged all the houses together to secure repayment of the total sum advanced, the proviso would have been applicable. He contended, however, that the proviso applied only to cases in which more contributory properties than one were included in the same mortgage.

While we appreciate the force of his submission, which in substance repeated the reasoning of the county court judge, we are unable to accept it. If Parliament had meant to say only that the section was not to apply where more properties than one were included in the mortgage, we cannot doubt that it would have said so in language at once simpler and more apt to express its meaning. Further, it is pertinent to observe that, if that were indeed what Parliament intended, no intelligible reason for the proviso could be suggested.

There may be many cases in which it will be difficult to say whether the necessary "connection" has been established and the question may sometimes resolve itself into one of fact. In the present case counsel for the respondent frankly conceded that, if the view which we have expressed were adopted, no conclusion would be possible on the admitted facts except that the proviso was applicable to them.

For the reasons stated, we have come to a different conclusion from that of the county court judge. If, as we think, he was in error, the error was admittedly an error in point of law.

The appeal will be allowed and judgment entered for the plaintiffs for the sum of £52 5s. 8d., with costs here and below.

Appeal allowed. Judgment entered for plaintiffs for £52 5s. 8d., with costs Leave to appeal to the House of Lords.

Solicitors: *Ward, Bowie & Co.*, agent for *Duggan, Elton & James*, Birmingham (for the appellants); *Sweepstones*, agents for *Parkhouse & Allee*, Birmingham (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

PROCTOR v JOHNSON AND PHILLIPS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard L.JJ.),
April 9, 12, 13, 1943.]

Factories—Dangerous machinery—Failure of automatic safety devices—Contributory negligence—Failure to use earthing rod in compliance with works regulations—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy, 1908 (S.R. & O., 1908, No. 1312), reg. 4.

The appellant was the widow of a workman who met his death as the result of his coming into contact with a high voltage testing and research apparatus. The evidence showed that the employers had installed auto-

matic safety devices, and that these had failed. The employers had also issued certain instructions and one of these was that the workman when operating high voltage apparatus should use an earthing rod. The workman had failed to make use of the earthing rod and was killed. The issues raised in this appeal were (a) whether the respondents were in breach of the statutory duty imposed by the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy, 1908, reg. 4, and (b) whether there had been contributory negligence on the part of the workman :—

HELD : (i) on the true construction of reg. 4 the respondents had complied with their duty.

(ii) the omission of the workman to use the earthing rod was negligence of such a character as to deprive him of any right to assert that the accident was due to a breach of statutory duty on the part of the employers.

EDITORIAL NOTE. It has been said that, if a machine is one which cannot be completely guarded from danger, the effect of the Factories Act and the regulations thereunder is to prohibit its use. The regulations relevant to the present case do not deal with machines but with operations. The operations are testing and research, and the regulations envisage that testing and research must go on and it is, therefore, impossible to construe the regulations as a total prohibition of testing and research. The other question involved was whether there was contributory negligence on the part of the workman. It has been pointed out by the House of Lords that, in general terms, mere thoughtlessness or inadvertence or forgetfulness does not amount to contributory negligence when set up in answer to breaches by an employer of his statutory duty. The workman in a factory or mine cannot be expected to take the same care of himself as might be taken by an ordinary man not exposed to the noise and confusion, the long hours, the fatigue and the slackening of attention which naturally comes from the repetition of the same operation. This is essentially a matter of degree, but in this case, although there were automatic devices and regulations designed to ensure the workman's safety, there was a regulation which, if obeyed, made his safety certain. This was the use of the earthing rod—a last precaution which could not fail. It is held that in omitting to use this rod the workman was guilty of such contributory negligence as might be pleaded to a claim for breach of statutory duty.

AS TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-603, paras. 1130-1146; and FOR CASES, see DIGEST, Vol. 24, pp. 908-913, Nos. 62-85.]

Cases referred to :

**(1) Davies v. Owen (Thomas) & Co., Ltd.*, [1919] 2 K.B. 39; 24 Digest 908, 68; 88 L.J.K.B. 887; 121 L.T. 156.

(2) Lewis v. Denye, [1940] A.C. 921; [1940] 3 All E.R. 299; Digest Supp.; 109 L.J.K.B. 817; 163 L.T. 249.

**(3) Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; [1939] 3 All E.R. 722; Digest Supp.; 108 L.J.K.B. 779; 161 L.T. 374.

(4) Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd., [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; on appeal, [1936] A.C. 206.

APPEAL of the plaintiff from a judgment of HILBERY, J., dated Oct. 7, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

Sir Walter Monckton, K.C. and *Montague Berryman* for the appellant.

G. J. J. Lynskey, K.C. and *J. Alun Pugh* for the respondents.

LORD GREENE, M.R. : The appellant's case was formulated before HILBERY, J., on two alternative grounds, namely, breach of statutory duty and breach of the common law duty to provide a safe system of working. HILBERY, J., held, on the evidence, that the system of working was one which was in accordance with the common law duty, and it has not been argued before us that that finding was wrong. Accordingly, the questions which we have to consider are confined to the first alternative. They are, first, whether or not a breach of statutory duty was committed and, secondly, if so, whether the act or default of the workman himself materially contributed to the accident, and, if so, whether that act or default was one which was of such a nature as to constitute contributory negligence within the meaning of the authorities.

There is no question as to how this unfortunate man met his death. He can only have met it by coming into contact with an exposed portion of the apparatus which was alive at the time. The portion in question was a terminal in No. 5 area leading from No. 4 transformer. Of the two pieces of apparatus in the area—No. 4 and No. 6—No. 6 was dead. No. 4 was alive and it was in contact with that terminal that the workman must have come. A test lasting for a number of days had been carried out and it was not quite concluded at the

time. That particular installation was still in use. The safety arrangements in use in the respondents' factory in connection with this area are of two kinds. First, there are electrically-operated safety devices. Secondly, there is a set of instructions with which the workmen were unquestionably familiar. The necessity of having both types of safety provision is obvious. Electrically-operated devices may fail in which case other arrangements are required. The respondents adopted a combination of the two. It is quite obvious that whatever automatic safety devices are used, there is always a possibility of their failure, and whatever instructions are given, there is always a possibility that they will be disregarded. In an operation of this kind it must be quite impossible to ensure an absolute standard of safety. There must always be an element of risk.

The first question is whether or not the steps taken by the respondents were an adequate compliance with the statutory regulations in force. Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy, 1908, reg. 4, provides as follows :

Nothing in these regulations shall apply to any process or apparatus used exclusively for electro-chemical or electro-thermal or testing or research purposes, provided such process be so worked and such apparatus so constructed and protected and such special precautions taken as may be necessary to prevent danger.

The apparatus in question here was used exclusively for testing or research purposes and, accordingly, that regulation applies. The first part of the regulation exempts the apparatus from the provisions of the regulations. The second part of the regulation puts a qualification upon that exemption. Regarded as a pure matter of English, the proviso certainly suggests that the exemption is only to operate if the requirements of the proviso are complied with, for it says "provided such process be so worked." It is argued that, on the true construction of the proviso, it introduces a positive rule for those processes which are exempted by the earlier part of the regulation, and that anyone who relies upon the exemption must comply with the requirements set out in the proviso. It seems to me that that would be the commonsense construction, and I shall assume that it is correct.

The question then arises : What is the obligation which the proviso imposes upon the person in charge of the process or operation ? If the proviso is read literally it imposes an obligation to take such precautions as may be necessary to prevent danger. In operations of the kind contemplated, the complete elimination of danger must, on the face of things, be an impossibility. Danger may arise from the failure of some electrical operation or through some error or carelessness on the part of some member of the staff. It seems to me that, if the regulation is read in such a way as to impose an absolute obligation to eliminate any possibility of danger, it would result in making any use of the apparatus in question quite impossible. It is suggested that, if that be so, so much the worse, and that, if the regulation says that it must be complied with and if the apparatus is one which cannot be completely guarded from danger, its use must be prohibited. Reference was made to the judgment of *SALTER, J.*, in *Davies v. Owen (Thomas) & Co., Ltd.* (1) (discussed in the House of Lords in *Lewis v. Denye* (2), at p. 932 ([1940] 3 All E.R., at p. 305)), where he said, at p. 41 :

... if a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use.

So it is said here that, if testing or research cannot be carried out with the entire elimination of danger, it is prohibited. The question, whether or not the opinion of *SALTER, J.*, is correct, does not arise in the present case. He was dealing with regulations which referred to machines in general and he took the view that, if a particular machine cannot be securely fenced, it cannot be used at all. The present case does not deal with machines but with operations, namely, testing and research. Those operations may involve a multitude of apparatus, some of it of a novel kind for which no regulation could provide. The regulation contemplates that testing and research is going to continue, and to construe it so as to make testing and research impossible would be going a great deal further than *SALTER, J.*, went.

In my opinion, a sensible construction must be put upon this regulation which will not prevent testing and research with this highly dangerous apparatus

from being carried out. It seems to me that the precautions required to prevent danger can only be those which comply with the highest standard of safety which can reasonably be provided. It may, of course, be that a particular piece of apparatus for research is in itself so highly dangerous that no safety precautions can introduce any reasonable measure of safety at all. That is quite a different question, and it may be that in such a case the regulation could not be complied with. I express no opinion upon this. The case with which we have to deal is that of an ordinary and known operation as carried out in many establishments in the country with regard to which precautions can be taken which make it perfectly safe, provided they are complied with. The precautions were these. So far as regards the automatic precautions, the dangerous area was furnished with two lights, one green and one red. The automatic devices were directed to ensure that, while either of the two potentially live sets of apparatus was in fact alive, the red light would show over the gate. If both were alive a red light alone would show. If both were dead a green light would show. If one was dead and the other alive both the green light and the red light would show. But the lights may fail. A man in a hurry may not notice them. Accordingly, there is a second device which should ensure that when the gate is open both sets of apparatus are immediately made dead. That is effected by a device called the no-volt release coil which is set in operation by the opening of the gate. It has a plunger which moves upwards in a tube and makes contact with a trigger, with the result that the switch is thrown out and the apparatus thereupon becomes dead. In the present case there is sufficient evidence to support the view that the only light that was showing at the moment when the deceased man went into the room was the green light. What certainly did fail was the apparatus automatically worked by the opening of the door. How it failed and why it failed is a mystery. One thing is quite certain, and that is that No. 4 apparatus remained alive because the main switch was not thrown out. It was suggested that this was because some small extraneous substance had become wedged in some way between the inside of the tube and the plunger. That was merely a theory. There was no evidence to support it, and the matter remains a mystery. Nevertheless, the fact remains that the apparatus did fail, because the workman was killed by coming into contact with a high tension cable which was alive at the time, and, if the apparatus had worked, the cable would have been dead.

It may well be that, if the only safety precautions which the respondents had taken had been the installation of these automatic devices, the provisions of reg. 4 would not have been adequately complied with. It would have been said that the respondents ought to have known that automatic devices are liable to go wrong, and, therefore, they ought to have made some provision to deal with that eventuality. In the present case the further precaution which the respondents provided was a set of regulations which were to be complied with by their employees in connection with this highly dangerous area. The second of these regulations provides that :

... the staff member in charge of tests is responsible at all times for the procedure of the work and for the safety of personnel and all persons engaged within the enclosures are strictly subject to his direction.

In the present case the deceased man had gone to the staff member in charge of the work and had obtained from him instructions for the day and it was agreed that his duties, sooner or later, would take him into this particular area. HILBERY, J., took the view that this regulation meant that nobody was to go into this enclosure without obtaining a direction specifically from the staff member in charge of the test. If that is what it means it is a pity that the regulation is not better drafted. It seems to me that to interpret it in that way is to put a strain upon the language. It seems, however, to have been the practice to obtain such directions, but, if that was the intention of the regulation, it ought to have said so more clearly. Without expressing dissent from the view of HILBERY, J., it seems to me that the respondents might reconsider these regulations and see that they are properly expressed to carry out what is the intention. I am prepared to assume in favour of the appellant that no breach of reg. 2 can be attributed to this workman. Reg. 3 is as follows :

Earthing rods are provided for the purpose of safeguarding operators who handle

high voltage connections. These devices are located in positions conveniently to hand immediately inside the test enclosures, and are to be used without fail.

That direction is clear and is not susceptible of any misunderstanding. It is directed to the case of anyone who handles high voltage connections. It is dealing with the case where a man is of necessity in the area where these connections are found, and, if the automatic devices are working properly, he can only be in that area (except for observation during a test) when the connections

- A are dead. It may well be that, if the current has been switched off, there may remain a certain residuum of energy in the apparatus which may be dangerous. The use of the earthing rod for that would, of course, be particularly important. I am, however, quite unable to construe this regulation as limited to that case. It seems to me to be directed to anyone who handles a high voltage connection and requires that he must use the earthing rod. Even if no test is about to take place, a mere accidental or inadvertent use of a switch might make a high voltage connection alive when it ought to be dead and the man who was handling it might lose his life. I, therefore, consider that this regulation requires that an operator, whose duty it is in any circumstances to handle a high voltage connection, is to use the earthing rod and is not to consider it safe to handle the connection without it.

- B
- C Reg. 4 lays down what is to be done in a test. It says how the earthing rod is to be used and how it is to be removed when the test is done. I cannot read reg. 4 as in any way limiting the generality of reg. 3. Reg. 4 also provides for the sounding of a warning gong. When the test is about to begin the gong is sounded once and when it is over the gong is sounded twice. In the present case there was no sounding of the warning gong twice, for the reason that the test had not been completed when the deceased man entered the enclosure. The test had been going on for some time. The first warning gong must have
- D been sounded hours before. It was said that the workman was not to know that a test was taking place or that there was any necessity for him to wait for the double sounding of the gong. I do not find it necessary to go into that question. This type of test, running all night and finishing at any time between 9 and 9.30 a.m., had apparently been going on for some days, and the workman appears to have assumed that on that particular morning the test was over and there was no necessity for him to wait for the gong. He might well have assumed
- E that the gong had sounded before he got there. At any rate, he would no doubt be led into that state of mind by the circumstance, which I think must be accepted, that the only light showing over the gate was a green light and that may very well have led him to forget all about the gong or to think that the gong had already sounded.

- F The crucial direction, in my opinion, is that relating to the earthing rod. The earthing rod is a movable piece of apparatus properly insulated and fitted with a permanent earth connection, and provided with a hook by which it can be hooked over a live terminal or an exposed piece of cable. The effect of doing that is to divert the current to earth and to make the rest of the apparatus safe. In the present case the evidence is quite clear that had this workman carried out the instructions of reg. 3 he would not have met his death, and, indeed,
- G although he might have been frightened by what would have been equivalent to a flash of lightning, he probably would not have received any injury. In other words, the use of the earthing rod is an effective safety device and, if the instruction is complied with, will render the handling of high voltage connections a perfectly safe operation. The workman is warned by this regulation to use that device on every occasion when he handles a high voltage connection. In effect he is being told that, in addition to the automatic safety devices with which he was familiar, he must, in order to safeguard his life, use this additional
- H device which is provided for him, and which, if used, will be perfectly effective. Without going into the question of the gong and considering only the combination of the automatic devices and the instruction as to the earthing rod, I am of opinion that the respondents in this case complied with the requirements of reg. 4 of the above statutory regulations. The evidence satisfies me, although HILBERY, J., did not find it necessary to decide the point, that danger had been eliminated as far as it was possible to eliminate it, consistent with carrying out the usual normal recognised method of testing electric cables.

There were two particulars in which the adequacy of what the respondents

did was challenged. First, it was said that tests of the apparatus ought to have been made periodically. That seems to me to be answered conclusively by the fact that the best possible test of the working of an apparatus of this kind is the regular working of it. It was in continuous use. No further daily test or anything of that kind would have helped matters. It does not seem to have been suggested that the whole of this elaborate apparatus should be taken down and stripped and examined, unless there was a defect in its working which suggested that something was going wrong. In the present case there was nothing of the kind; and, in fact, when the apparatus was taken down nothing was found which could suggest the reason of its failure.

The other matter which was relied upon arose out of the suggestion that there is (as undoubtedly there is) a type of automatic device which by means of an electromagnet locks the door while any apparatus is alive and makes it impossible to open the door without breaking it down. It was said that such a type of device ought to have been used and that, if it had been used, the workman in this case could not have got into the enclosure while there was any live apparatus there. Quite apart from the possibility that such a type of device itself would be liable to the same curious failures as those to which any automatic device is liable, its use in connection with this class of operation is, I think rightly, regarded by those best qualified to know as dangerous, so far as the evidence goes, by reason of the fact that it would make it impossible for an engineer or some other person who required to be in the enclosure while the test was going on ever to get out of it. It is necessary in these tests for persons to go in, for instance, for the purpose of observing the temperatures of the cables. If such a device were in use, a person so going in would cut the current, of course, when the door was opened, since the current would have to be cut before he could open the door; when he got inside and closed the door in order that the current might be started again the door would be automatically closed and he would be unable to open it. The only way he could get out would be by calling for the current to be switched off at the switch-board, in which case the door could be opened. The danger of such a device is manifest. The workman or engineer who was inside a dangerous enclosure of this kind while all the apparatus was alive might find it necessary to get out quickly—he might feel faint or anything might happen to him—and he would find it impossible to get out without giving instructions to someone outside. The idea of locking a man in a dangerous place of this kind without any possibility open to him of letting himself out, unless he obtains outside assistance, is one which I must confess seems to me to be highly undesirable. I can well understand it being said that, if in a case of that kind a man was killed because he was unable to get out, a device of that kind was not one which really ought to be adopted in this class of operation. However, it is not necessary in this case to express, and I do not express, any opinion upon that matter.

What is important here is that on the evidence the non-adoption of that type of locking device does not constitute a failure on the part of the respondents to provide the safety precautions which are required by reg. 4. The type of precaution which they use is one in common use and no defect has been shown, so far as the evidence goes, except that on this one occasion, for some totally unexplained reason, it failed to function. It is because of possible failures of that kind that the necessity for the precautions in the respondents' reg. 3 arises, because that is the final safeguard which will be effective whatever failure may take place in the safety apparatus. In my opinion, therefore, there is no evidence in this case that the respondents failed in their duty. In fact I put it higher. The evidence satisfies me that, on the true construction of the above statutory regulations, the respondents complied with their duty.

But I cannot leave the matter there. HILBERY, J., took the view that, whatever the true measure of the obligation imposed by reg. 4 might be, the deceased workman in this case was guilty of such contributory negligence as to deprive the appellant of any right to claim against his employers. In my opinion, HILBERY, J., was perfectly right in taking that view; and even if I be wrong in my construction of reg. 4 and even if I be wrong in holding that upon my construction of it it has been complied with, I am satisfied that in the present case the omission of the workman to use the earthing rod was negligence of such a character as to deprive him of any right to assert that the accident

was due to a breach of statutory duty on the part of the employers. I do not propose to burden a judgment already too long by referring at any length to authority upon this matter, but I take for my guidance one or two very short paragraphs in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (3). LORD ATKIN said, at p. 166 ([1939] 3 All E.R., at p. 731) :

A I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances. But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances ; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine.

B Then he quotes a well-known passage from the judgment of LAWRENCE, J., in *Flower v. Ebbw Vale Steel, Iron and Coal Co., Ltd.* (4), and expresses his agreement with it. LORD WRIGHT said, at p. 176 ([1939] 3 All E.R., at p. 738) :

It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins.

I apprehend that the words "thoughtlessness, inadvertence or forgetfulness" were not intended to be exhaustive, but they show with great clarity the type of act or omission on the part of the workman which falls on one side of the line. Then LORD WRIGHT said, at p. 178 ([1939] 3 All E.R., at p. 739) :

C What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety.

Then he said at pp. 179, 180 ([1939] 3 All E.R., at p. 740) :

D The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury. This follows, I think, if the rules of contributory negligence in road accident or collision cases are suitably adapted to deal with breaches by an employer of his statutory duty.

E Founding myself as best I can upon the principle of those observations, I have to ask whether the omission of the deceased workman to use the earthing rod in accordance with the directions was of a character which falls within the general category of thoughtlessness, inadvertence or forgetfulness, or whether it is of such a kind as to preclude the workman from complaining. It seems to me that the omission to use the earthing rod cannot be put into the lower category.

F This workman was—I suppose in fact every workman is—perfectly well aware of the very great risks which in the absence of proper precautions an apparatus of this kind entails. He has the instruction that he is not to rely on the safety devices alone but is to use a piece of apparatus effective for the purpose with a view to protecting himself, and that he has to use that in all circumstances whenever he is handling a high voltage connection. It seems to me that the omission to comply with that direction must be regarded as a deliberate omission on the part of the workman which cannot be characterised as inadvertence or anything of that kind. It is a deliberate omission on his part to use the safety device provided for him. I come to that conclusion without reference to the circumstance that he had on at least one previous occasion been reprimanded for not complying with that instruction and, therefore, quite apart from his general knowledge of the necessary steps to take by way of precaution,

G H it had been brought specifically to his mind that his omission to use the earthing rod on that occasion was something which was a breach of the regulations. I cannot resist the conclusion that he must have known perfectly well when he went in there that his duty was to use the earthing rod, that, if he used it, he would be perfectly safe, that, if he did not use it, there was always an element of risk, and that in not using it he chose to ignore those considerations and to run the risk. It was said, and rightly said, that he may well have been misled—in fact, the probabilities all point in that direction—first of all, by the green light ; secondly, by his knowledge that when the door was opened the automatic

device would throw out the switch. When he stepped into that room it is impossible to suppose that he did not do so with every confidence that it was safe and that the whole of the apparatus was dead. That does not seem to me to excuse his failure to use that extra and certain device provided to meet such a possibility as the failure of the automatic devices or some error or inadvertence on the part of some other employee. The respondents have said in effect : There are two methods by which your life is safeguarded ; one is the automatic device, the other is in your own hands, you must use it. He preferred to rely on the automatic device and to discard the device which is put into his hands to use.

The result, therefore, is that in my opinion HILBERY, J., took the right view on the subject of contributory negligence ; and, for the reasons which I have given, this appeal must fail.

MACKINNON, L.J. : I agree. I think that on the evidence the death of this unfortunate man was caused by his failure to use the earthing rod, and I think that, by reason of that failure, this man did not exercise that degree of care which an ordinary prudent workman would have shown in the circumstances, in the words of LAWRENCE, J., approved by LORD WRIGHT in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (3), at p. 174 ([1939] 3 All E.R., at p. 736). I think it is also within LORD WRIGHT's own definition at p. 178 ([1939] 3 All E.R., at p. 739) :

... blameworthy conduct on the man's part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident . . .

That view is, of course, based on the assumption that the danger in the area was created by the failure of the defendants to comply with the requirements of the order made under the statute, namely, that the process was so worked and such apparatus was constructed and protected and such special precautions taken as might be necessary to prevent danger. I say I make that assumption, but I am not satisfied that in the circumstances of this case it was established in fact.

I agree, therefore, that this appeal fails.

GODDARD, L.J. : I agree with LORD GREENE, M.R., especially in that part of his judgment in which he has said that there has been no breach here by the respondents of reg. 4. The regulation obliges them to take such special precautions as may be necessary to prevent danger. It is quite clear that here they did take special precautions such as they deemed, and such as were generally deemed in the trade, to be necessary to prevent danger. They provided an elaborate automatic device which, up to this time, had never failed and had never been known to fail, and they also provided another precaution which required the workman to do something for his own protection. I cannot think that it is a fair reading of this regulation to say that the mere fact that an accident happened, the cause of which no one can explain, shows that they had neglected their obligation to take such special precautions. There are many occasions in life, or many situations in life, when people take special precautions which are necessary to avoid danger. A careful *pater familias* in his own house with small children takes special precautions necessary to prevent danger to his children. The provision of adequate fire-guards, the provision of bars at the nursery window, or a gate at the top of the stairs to the nursery, are special precautions necessary to prevent danger to the children. But no precaution has ever yet been taken which will entirely eliminate the risk. I cannot think that this regulation can be construed as meaning that, if an accident does in fact take place, that of itself is proof that the special precautions necessary to prevent danger have not been taken. In most cases of this nature it is possible to obtain expert evidence that something else might have been done. The only two suggestions which were made in this case have been sufficiently dealt with by LORD GREENE, M.R., and I entirely agree with them. I think on this evidence it would be quite wrong to hold that there has been any breach by the respondents of the obligations imposed upon them by the statute.

I accordingly agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : W. H. Thompson (for the appellant) ; Carpenters (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

PRUDENTIAL ASSURANCE CO., LTD. v. REVILLE.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.J.J.). March 29, 30, April 13, 1943.]

Emergency Legislation—War damage—Notice of retention—Reduction of rent—Part of premises capable of beneficial enjoyment—Whether tenant entitled to reduction of rent as from date of damage or from date of service of notice—Landlord and Tenant (War Damage) Act, 1939 (c. 72), ss. 10 (1) (b), (c), 15 (5)—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (c. 41), s. 2 (5), Sched.

The appellants are the holders of a multiple ground lease for a term of 99 years at a rental of £2,000 per annum. The premises suffered war damage in 1940, but part remained capable of beneficial enjoyment. After the Landlord and Tenant (War Damage) (Amendment) Act, 1941, came into operation, the appellants served on the respondents, who were the landlords, a notice of retention in respect of the premises. The parties agreed that the rent payable in respect of the part of the premises which was capable of beneficial enjoyment was £1,600 per annum. The appellants contended that they were entitled to the reduction of the rent as from the date when the damage occurred. The respondents contended that, although they made their original application both under sect. 15 and sect. 10 of the Act, they were entitled to abandon their application under sect. 15 and to rely solely on sect. 10 :—

HELD : (i) the appellants were entitled under the Acts to a reduction of rent only from the date of the service of the notice of retention.

(ii) although it is open to a plaintiff in the county court to abandon part of his claim in an action, it is not open to him in an application where the duty of the court is to make an order fair to both parties to base his application on one section to the exclusion of any other.

[EDITORIAL NOTE.] The main point in this case is purely one of the construction of the relevant provisions of the Landlord and Tenant (War Damage) Acts, and upon this it is decided that the reduction of rent can operate only from the date of the service of the notice of retention and that it cannot take effect from the date on which the war damage occurred. Incidentally, the Court of Appeal decides a subsidiary matter which is of some importance. A plaintiff may abandon a part of his claim and in the county court he may be forced to do so because some part of the claim is beyond the jurisdiction of the court. This principle or practice cannot, however, be extended to an application such as the present so as to restrict it to the provisions of one particular section of the Acts to the exclusion of other sections which are relevant to the issue. The duty of the court upon such an application is to do justice between the parties having regard to all the relevant provisions of the Acts and the applicant cannot base his application solely on the provisions of one particular section or subsection and thus prevent the court taking into consideration the other relevant provisions.

AS TO THE LANDLORD AND TENANT (WAR DAMAGE) ACTS, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 982, and Vol. 34, p. 156.]

Cases referred to :

- (1) *Westminster Bank and Another v. Edwards*, [1942] A.C. 529 ; [1942] 1 All E.R. 470 ; Digest Supp. ; 111 L.J.K.B. 284 ; 167 L.T. 5.
- (2) *Hildebrand v. Lewis*, [1941] 2 K.B. 135 ; [1941] 2 All E.R. 584 ; Digest Supp. ; 110 L.J.K.B. 570 ; 165 L.T. 178.

APPEAL by the tenants from a decision dated Oct. 9, 1942, of His Honour JUDGE HURST sitting at Westminster County Court, on the consideration of the date from which a reduction of rent is operative where property has suffered war damage. The facts are fully set out in the judgment.

M. Turner-Samuels for the appellants.

A. T. Denning, K.C., and *Gilbert Dare* for the respondents.

The Landlord and Tenant (War Damage) Act, 1939, s. 10 (1), provides as follows :

(b) Subject to the powers of the court under the following provisions of this subsection, no rent shall be payable by the tenant under the lease in respect of the period beginning with the date when the notice was served or is deemed to have been served and ending with the date on which the land is rendered fit.

(c) Where the court is satisfied, on the application of the landlord made at any time before the land has been rendered fit, that part of the land is capable of beneficial

occupation, the court may direct that there shall be payable by the tenant such rent, at such times and in respect of such period as the court may fix.

The Landlord and Tenant (War Damage) Act, 1939, s. 15 (5) as amended by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 2 (5) and Sched. provides as follows :

If on such an application the court, having regard to the matters referred to in subsect. (3) of this section, is not satisfied that it is equitable to allow the tenant to exercise the right of disclaimer or retention as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, the court shall direct that the land comprised in the lease shall not be deemed to be unfit for the purposes of this Part of this Act and that any notice of disclaimer, notice of retention or notice to elect relating thereto shall cease to have effect :

Provided that the court may, if having regard to the extent of the war damage suffered by the land it considers it equitable to do so, order that the rent reserved by the lease shall, until the war damage is made good, be reduced to such extent as may be specified.

DU PARCQ, L.J. [delivering the judgment of the court]: The appellants are tenants under a lease for 99 years of premises in Oxford Street. The lease is a ground lease and is also a "multiple lease" within the definitions in the Landlord and Tenant (War Damage) Act, 1939, s. 24, hereafter referred to as "the principal Act." In Sept. and Dec., 1940, the premises suffered damage which was "caused by enemy action," so that it was "war damage" within the meaning of the same section. At that date it was not open to the appellants to give to the lessors (the respondents to this appeal) a "notice of retention." Sect. 13 (2) of the principal Act expressly precludes the giving of such a notice. The appellants did not seek permission to disclaim the lease under that section. The position thus was that, while the appellants (the repairing covenants in the lease notwithstanding) were under no liability to make good any war damage (sect. 1 (1) of the principal Act), they remained liable to pay the full rent of £2,000 per annum. It appears that they did not in fact pay it, but the liability to pay it remained, and, unless subsequent legislation has exonerated them, still remains. On Aug. 7, 1941, the Landlord and Tenant (War Damage) (Amendment) Act, 1941, became law. It is hereafter referred to as the amending Act. It is to be construed as one with the principal Act (sect. 19).

The amending Act (by sect. 10) made the principal Act apply to ground leases, and for the first time gave a tenant holding under a ground lease the right to serve a notice of retention. The appellants were naturally enough in no hurry to exercise that right, as the premises were apparently still in a seriously damaged condition, and the covenant to render the land fit which sect. 10 (1) (a) of the principal Act would have caused to be implied in the lease might have been extremely onerous. The premises were, however, requisitioned by the Crown early in 1941, and the greater part of the war damage seems to have been put right at the public expense in order to make the premises suitable for the purpose for which they were requisitioned. A compensation rent became payable in respect of the requisitioned part, which made it advantageous to the appellants to hold the premises on the terms which sect. 10 of the principal Act would import into the lease, and a notice of retention dated Nov. 19, 1941, was accordingly served.

If the respondents had taken no step, the result of the notice would have been that, as from its date, no rent would have been payable by the appellants until the land had been rendered fit, the obligation to render it fit "as soon as reasonably practicable" after service of the notice resting upon the appellants. It is common ground that the appellants could not justly expect to enjoy such favourable terms. There was correspondence between the parties, from which it appears that they were agreed that a large part of the premises was capable of beneficial occupation, and that the rent properly payable in respect of that part was £1,600. The appellants were contending, however, that the reduction of rent from £2,000 to £1,600 should operate retrospectively as from the date of the damage, while the respondents refused to agree to a reduction for any period before the date of the service of the notice of retention. The parties, therefore, found it necessary to resort to the county court.

Inasmuch as the lease was a "multiple lease," it was open to the respondents to apply to the court, within 1 month of the service of the notice, to determine

the question whether the appellants should be allowed, and, if so, to what extent, to exercise the right of retention. On such an application :

... the court may, if having regard to the extent of the war damage suffered by the land it considers it equitable to do so, order that the rent reserved by the lease shall, until the war damage is made good, be reduced to such extent as may be specified. That is provided by sect. 15 (5) of the principal Act, as modified by the Schedule to the 1941 Act.

A On Dec. 18, 1941, and so just within the month allowed them by sect. 15, the respondents made an application under that section. At the same time they thought fit to apply alternatively under sect. 10 (1) (c) of the principal Act for a direction, on the footing that part of the land was capable of beneficial occupation, that there should be payable by the tenant such rent at such times and in respect of such period as the court might fix.

B The appellants (then respondents) intended to rely at the hearing of the application on the proviso to sect. 15 of the principal Act (as amended) which has already been quoted. They were prepared to contend that the effect of the proviso was to give the court power to reduce the rent reserved by the lease as from the date of the damage, and, apparently, had been advised that it would be more difficult to argue that the rent could be thus retrospectively reduced under sect. 10 (1) (c) of the principal Act. It is not surprising, therefore, that when,

C at an early stage of the hearing, counsel for the applicants (now respondents before us) intimated that he would abandon the application under sect. 15 and ask for an order under sect. 10 of the principal Act (with a view, apparently, to excluding the proviso to sect. 15 from the attention of the court), the announcement was not welcomed by the present appellants. It was argued on their behalf before the county court judge that the respondents could not, by purporting to withdraw an application under sect. 15 at the last moment, deprive the

D court of its jurisdiction to make an order upon the application which would be beneficial to the appellants. The county court judge eventually rejected this contention of the appellants. He expressed the view that counsel for the respondent was "entitled . . . by the County Court Rules, Ord. 15," to withdraw the first relief applied for by the summons. That part of the application having been withdrawn, the county court judge further held that he could not deal with the rights of the parties by reference to sect. 15, and added : "That being the position, the application before me is simply an application under sect. 10" (of the principal Act). As the county court judge had used language which, whether he intended it to be so understood or not, had been taken by the appellants to indicate that he would have been in favour of their main contention if he had felt at liberty to consider sect. 15, they not unnaturally felt a sense of grievance.

E In our opinion, the county court judge was wrong in refusing to consider sect. 15. Counsel for the respondents was not prepared to argue that a withdrawal at the hearing of an application by a landlord under that section prevents the tenant from asking the judge to consider its bearing upon the rights of the parties under it. It is, indeed, manifest that, if the view taken by the judge on this point were right, injustice might result in many cases. The county court judge felt that he was bound to come to this decision because of the construction

G which he placed on C.C.R., Ord. 15, r. 6, but, with great respect to him, we are of opinion that this rule had nothing to do with the application before him. The rule refers to actions, and to the right of a plaintiff to abandon part of his claim in an action—a course which it is sometimes desirable to take in the county court where there is a doubt about the jurisdiction of the court to deal with the whole of the claim. It has no relevance to a case like the present where, on an application being made by one party, it becomes the duty of the judge to

H make an order which is fair to both parties in the light of all relevant legislation. Counsel for the respondents submitted, however, that, if the county court judge had dealt with the application under sect. 15, and the result had been that the court was not satisfied that it was equitable to allow the appellants to exercise the right of retention and so had ordered that the notice of retention should "cease to have effect," the court would still have had no power to order that the rent should be reduced except from the date of the notice of retention. If this submission is sound, clearly the appeal should be dismissed, as on that view the order of the county court judge was right.

If we correctly understood the argument of counsel for the appellants, it may be summarised as follows :

1. He preferred to rely on the proviso to sect. 15 (as amended in 1941) which, he said, was plain and unambiguous and gave the court power, and, indeed, made it the duty of the court, to reduce the rent from the date of the damage. He contended that sect. 10 of the principal Act was, in the circumstances of this case, irrelevant.

2. He contended that, if the county court judge had held that the notice of retention was "of no effect," the notice would have disappeared for ever from the case, so that its date could not be taken as the terminus from which the reduction in rent could be ordered.

3. Alternatively, he submitted that the county court judge was wrong in his construction of sect. 10 of the principal Act, and that his powers were as ample thereunder as under sect. 15.

It thus became necessary for this court to consider not only the two sections directly in question, but the framework of the Act and such other sections as throw light upon the problem. Counsel for the appellants was very reluctant to allow our attention to be diverted from sect. 15. Indeed, he concentrated his argument on the proviso in that section with a single-minded devotion which led him to ignore the rest of the section and of the Act, but counsel for the respondents in a valuable argument directed our attention to every part of the Act which could assist us.

We have come to the conclusion that, whether sect. 15 or sect. 10 is to be regarded as the source of the appellants' rights, no order could properly have been made which would have been more favourable to them than that which is the subject of this appeal. Before dealing more particularly with the two sections, two observations of a general character should be made.

First, it is by no means self-evident that justice requires that the tenant should be relieved in respect of his rent as from the date of damage which occurred before the service of a notice of retention and (as in this case) before the passing of the amending Act. The tenant may well think that it is hard to be obliged to pay a full rent for premises which may have lost all, or much of, their value. On the other hand, a landlord who has been paid rent, possibly under a judgment of the court, to which he was unquestionably entitled, might well feel a sense of grievance if he were compelled by retrospective legislation to repay it. Secondly, it is impossible to read the Act as having this retrospective operation in the absence of clear language showing that it was the intention of the legislature that it should be so construed.

When sects. 10 and 15 are read with these observations in mind, we find it impossible to accept the appellants' contention. Sect. 10 is no doubt so drawn as to give large powers to the judge, but the best that the tenant can get under it is an order that no rent shall be payable :

... in respect of the period beginning with the period when the notice was served. and when subsection (1) is read as a whole, it is, we think, impossible to hold that, while under sect. 10 (1) (b) the notice is the terminus from which no rent is to be payable, under sect. 10 (1) (c) the court may fix a period for the payment of a reduced rent beginning at some earlier date.

Further, it is important to notice that, if the court is satisfied that the notice of retention should stand, the tenant will take both the benefit and the burden which the Act prescribes. He will for a time escape payment of rent ; but he will at once come under an obligation to repair, though the performance of the obligation will in some cases be deferred. The argument for the appellants necessarily supposes that, from the date of the damage, the appellants may be put in the position of enjoying the benefit without having borne the burden, which might be a substantial burden, because in certain cases it was "reasonably practicable" to render land fit even in 1940 and 1941. We cannot suppose that the legislature intended this result to follow. Nor can we believe that a provision for repayment of rent paid after the occurrence of war damage can be implied in the section. It may be observed that, in a case where Parliament intended to make rent recoverable, its intention was plainly expressed (sect. 13 of the amending Act).

All the considerations mentioned in relation to sect. 10 apply equally to sect. 15, which has to be read with it. The contention of counsel for the appellants that

the circumstances in which the proviso to sect. 15 applies are such that the notice of retention must be wholly disregarded, and that the proviso must be interpreted as if there had never been a notice of retention seems to us to be wholly erroneous. The words in subsect. (5) which precede the proviso make it plain that the application before the court is the foundation of the court's power under the proviso. The occasion of the application is the notice of retention, and we can find nothing in the Act empowering the court to interfere with the rights and liabilities of the parties during the period antecedent to the notice. A provision that a notice "shall cease to have effect" is not equivalent to a provision that it is to be regarded as a nullity for all purposes.

For these reasons we are of opinion that the county court judge rightly construed sect. 10; that, if he had founded his decision on sect. 15, he would, or ought to, have come to the same conclusion, and that his order was right and must be affirmed.

It was suggested during the course of the argument that it might be open to a judge, in ordering a reduction of the rent from the date of the notice, to take into account in assessing the amount of rent payable the fact that for some time prior to the notice the tenant had paid the full rent for premises the value of which was much diminished. Counsel for the appellants did not adopt this argument, and in this we think that he was right. It could not have assisted him, because the parties in the present case had agreed that the rent payable as from the date of the notice should be £1,600 per annum, and it was not open to him to submit at this stage that the amount payable from that date should be reduced. We mention the point because it was not fully argued, and in order to say that we reserve the question whether it is open to the judge, in a proper case, to have regard to conditions prior to the notice of retention when he fixes the reduced rent payable after the notice of retention. Our inclination at present is against this view, but we express no final opinion upon it.

The appeal will be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Cohen & Cohen* (for the appellants); *C. Howe Browne* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

DUNTHORNE AND SHORE v. WIGGINS AND ANOTHER.

[CHANCERY DIVISION (Bennett, J.), April 7, 1943.]

Sale of land—Agreement for sale—Payment by instalments—Conveyance on completion of payment of instalments—Purchaser let into possession—Purchaser to be tenant at will—Tenancy within Rent Acts—Right of landlord to possession—Right to tenant to reduction of instalments to standard rent.

The plaintiffs, a firm of builders who had built a number of houses at Drayton entered into an agreement with the defendants which purported to be an agreement for the sale of a freehold house subject to a mortgage to a building society. The purchase price was stated to be £445, but, since there was a sum of £328 10s. 5d. outstanding on the mortgage, the terms were that the purchaser was to give a promissory note for £100 and to pay weekly instalments of 25s. which were to be applied to the payment of the monthly sum of £2 7s. due under the mortgage, such sums as should become due for rates, water rates, and insurance, interest at 5 per cent. per annum on the outstanding balance of the £100 secured by the promissory note and the surplus to the reduction of the principal sum of £100 due on the promissory note. When the sum due under the promissory note had been fully discharged, the purchase was to be completed by a conveyance of the equity of redemption. Pending completion the purchaser was to be allowed entry as tenant at will provided the payments were duly made. If any of the weekly payments were more than 14 days in arrear the premises were to be vacated and all interest of the purchaser in the property was to cease. It was contended that this agreement created a tenancy subject to the Increase of Rent and Mortgage Interest Restrictions Acts:—

Held: the agreement created a tenancy subject to the Increase of Rent

and Mortgage Interest Restrictions Acts and the weekly payment thereunder was limited to the amount of rent permitted by the Acts.

[EDITORIAL NOTE.] The more usual way of purchasing property in England where the purchase price is not wholly paid at once is by paying a deposit and giving a mortgage for the balance. The property is conveyed to the purchaser at the time of the purchase. There is a second method whereby the purchase price is paid by instalments and the conveyance is made only on the payment of the last instalment. Where this method is adopted the purchaser is generally let into possession and is to remain in possession so long as the instalments are paid. Often he is declared to be a tenant at will of the vendor. This method has many practical disadvantages and it is here shown that it has the further disadvantage of creating a tenancy within the Rent Restrictions Acts. The instalments are, therefore, limited in amount to the permitted rent under the Acts. In the case here reported it was suggested that this arrangement was adopted to avoid the operation of those Acts and in effect to secure a higher rent for the property than the Acts allowed.

AS TO THE CREATION OF RELATIONSHIP OF LANDLORD AND TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 5-13, paras. 1-8; and FOR CASES, see DIGEST, Vol. 30, pp. 342-344, Nos. 1-28.]

ACTION to recover possession of premises on the ground that the defendants had failed to perform the obligations which were included in an agreement for the sale of the premises by the plaintiffs to the defendants. The defendants counterclaimed (i) for a declaration that the agreement created a weekly tenancy at the rent permitted by the Rent Restrictions Act; and (ii) for the repayment of rent paid in excess of the permitted rent. The agreement in fact stated the purchase price to be £545, but it was agreed that this was an error for £445 and in this report the figures have been amended.

Harold A. H. Christie, K.C., and *Hector Hillaby* for the plaintiffs.

J. Platts Mills for the first defendant.

Ingram J. Linder for the second defendant.

BENNETT, J.: This action was commenced in the Uxbridge County Court. The plaintiffs' claim was to recover possession of property situate at 12a, Dell Road, West Drayton, Middlesex. The plaint was issued on Sept. 10, 1941. Rose Caroline Wiggins was a widow, and Frederick Wiggins, her son, was sued as an infant, and the registrar of the county court was appointed the guardian *ad litem* of the infant defendant Frederick Wiggins. After some proceedings in the county court, the action was transferred, by an order of that court, to this division.

The claim is to recover possession of 12a, Dell Road, upon the footing that the defendants have failed to perform the obligations which were included in an agreement dated Feb. 10, 1941, for the sale, by the plaintiffs to the defendants, of the premises in question at a price of £445.

There is a defence to the action in which, it is said, that if the agreement set out in the statement of claim was entered into, it was not a genuine sale agreement, but was a device adopted by the plaintiffs with the object of avoiding the Rent Restrictions Act. Counsel for the defendants contends that the agreement was that the plaintiffs should let the premises to the defendants on a weekly tenancy at a rental of £1 5s. per week. That rent would be above the rent of the premises permitted by the Increase of Rent and Mortgage Interest (Restrictions) Acts, which was 21s. 6d. per week. Upon the basis of that allegation there is a counterclaim asking for a declaration that the defendants, or the female defendant alone, have or has a weekly tenancy of the premises at a rent of 21s. 6d. per week; and asking for the repayment of all sums paid by them in excess of the permitted rent, in accordance with the statutory provisions.

The facts are that, either towards the end of 1940 or the beginning of 1941, the defendant, Rose Caroline Wiggins, left Leigh-on-Sea, where she was living when war broke out, because of the fear of being blitzed if she stayed there. She left with four children who were then living with her, a daughter, Bessie, the defendant Frederick Wiggins, who was then an infant, and two other boys, who were both then of school age, and went to live in the house of a Mrs. Harris, a married daughter of the defendant Mrs. Wiggins. Mrs. Harris was expecting to have a baby, and the house in which she was then living would have been grossly overcrowded when the baby arrived; and it was thought that 12a, Dell Road would shortly become vacant. It is one of a number of houses erected by the plaintiffs, who are builders and contractors, on a building estate

at West Drayton, with the assistance of money which they borrowed from building societies. Mrs. Wiggins' only means of support in 1941 were: her widow's pension of 12s. per week, a sum of 7s. per week which was paid to her by a son who was serving abroad in the Army; £1 per week from the infant defendant, Frederick, who was employed and earning money; and 3s. per week from the unmarried daughter Bessie, who was also earning money. Her total sources of income in Feb., 1941, amounted to 42s. per week, out of which she had to maintain herself, her son Frederick, and the two boys Eric and Arthur; Eric, I think, being just over 14 and Arthur being under 14.

Those being her means, early in Feb., 1941, she saw the plaintiff Shore with a view to becoming the tenant of the house in question, 12a, Dell Road. The standard rent of 12a, Dell Road is 21s. 6d. per week, the landlord paying the rates. When Mrs. Wiggins saw Shore, he said: "I will not rent the house; the only terms upon which you can go into possession of it are as a purchaser"; and he read to her the agreement which he said would be the only agreement under which she would be allowed to go into possession of the house in question. The agreement was signed by both defendants, Mrs. Wiggins and her son, on Feb. 10, 1941. These are the terms of the agreement:

(1) An agreement made Feb. 10, 1941, between Dunthorne Estates, Ltd., whose registered office is at 23, Bathurst Walk, Iver, Bucks (hereinafter referred to as the agents) on behalf of Dunthorne and Shore (hereinafter referred to as the vendors) and Mrs. Rose Caroline Wiggins and Frederick Wiggins, of 74, Sipson Road, West Drayton (hereinafter referred to as the purchaser) whereby it is agreed as follows: (2) The vendors agree to sell and the purchaser agrees to buy the house known as 12a, Dell Road, West Drayton. The purchase price shall be the sum of £445 to be paid as follows: A building society advance of £345 and a promissory note for £100 signed by the purchaser as set out below. In consideration thereof the purchaser will pay weekly to the agents the sum of 25s. on the Monday morning in each week (the first payment to be made on the signing hereof) until the promissory note is redeemed, out of these payments the agents shall retain for the vendors 5 per cent. on the unredeemed balance of the promissory note, make the due payment to the St. Paul's Building Society, discharge the rates (exclusive of any rates on outbuildings) water and insurances on the appropriate dates and the balance shall be credited as a reduction of the promissory note. In the event of default the vendors shall have absolute discretion to divert sums in hand to any one of the payments named herein. (3) The purchase shall be completed on, but not before, the date the promissory note is redeemed and pending completion the purchaser shall be allowed entry as Tenant at Will provided he pays to the agents the sum of 25s. per week from the date of possession on to the actual date of completion. Out of the above mentioned sum of 25s. the sum of 18s. shall be retained by the agents on behalf of the vendors, as interest on the outstanding balance of the promissory note and for payment of the building society instalments, rates (except as hereinafter mentioned) water and insurance and the balance subject to cl. 2 hereof shall be credited as a reduction of the promissory note. (4) It is the desire of the vendors that the tone of this estate shall be maintained at a high level, this object will be much facilitated if gardens are kept trimmed and flowers planted in due season. (5) It is agreed between the parties that if at any time after 12 months' occupation the house is vacated and the keys handed over to the agents on behalf of the vendors and provided that no payments are in arrear, this contract shall be regarded as null and void, the promissory note shall be cancelled and any interest the purchaser might have had apart from this clause in the property shall cease and be extinguished. (6) It is also agreed that if any of the said weekly payments is more than 14 days in arrear of the agreed date, then the purchaser shall forthwith vacate the premises and deliver them up to the agents on behalf of the vendor and any interest the purchaser might have had apart from this clause in the property shall cease and be extinguished. All arrears of the said weekly payments shall be recoverable by the agents on behalf of the vendors and on payment of such arrears the promissory note shall be cancelled. (7) Any increase in the rates or other statutory payments that may arise during the currency of this agreement shall be met by an increase in the weekly payments of an amount sufficient to cover such increases in the rates or other statutory payments.

Then there is a promissory note in this form:

We, Rose Caroline Wiggins and Frederick Wiggins promise to pay Dunthorne & Shore the sum of £100 for value received by weekly instalments of 7s. each Monday morning, the first payment to become due on Monday, Feb. 10, 1941, and weekly thereafter until the debt is discharged in the event of default in payment of any instalment the balance outstanding shall become payable forthwith. As witness our hands the day and year before written.

That document, in that form, was put by Shore into the hands of Mrs. Wiggins some time before Feb. 10, 1941—a day or two before—in order that she might

sign it and might get the signature to it of Mr. Wiggins, and it was signed, "Mrs. R. C. Wiggins" and "Mr. F. W. Wiggins" in the presence of Mrs. Wiggins' daughter, Mrs. Harris, and handed to Shore on Feb. 10, 1941.

On that day the defendant, Mrs. Wiggins, went into occupation of 12a, Dell Road. At that time, the house in question was subject to a mortgage created by a limited company, Dunthorne Estates, Ltd., in favour of the St. Paul's Building Society. The sum originally advanced to Dunthorne Estates, Ltd., I think in Dec., 1938, or at any rate some time in 1938, was £350, repayable as regards principal and interest at 5 per cent. per annum, over a period of 20 years, by monthly instalments of £2 7s. per calendar month. On Jan. 1, 1941, rather more than 1 month before this contract was entered into, the amount secured in favour of the St. Paul's Building Society was £328 10s. 5d.; the borrowers being Dunthorne Estates, Ltd.

Mrs. Wiggins seems to have paid the weekly sum of £1 5s. regularly from Feb. 10, 1941, until June 23, 1941. About that time she had occasion to complain about the state of repair of the house, and the fact that it was infested with bugs. The outcome of it was that on Aug. 14, 1941, Mrs. Wiggins wrote to Shore a letter in these terms:

Dear Mr. Shore, I am sending you the note. Please will you send a man to see to the tank as it keeps over-flowing and making our curtains wet and also a waste of water and also the front window I cannot shut and when it rains the bedroom floors get soaked with rain. And also what about doing something about my bedrooms to get rid of the bugs. I have got all the rent and I will not pay until these things are done and not before.

Upon receipt of that letter Shore appears to have consulted a firm of solicitors in Uxbridge, for on the day after, Aug. 15, 1941, Messrs. Turberville Smith & Co. wrote two letters, both letters being addressed to Mr. and Mrs. Wiggins. The first one is:

Dear Sir and Madam, With reference to your letter of the 14th instant addressed to Messrs. Dunthorne Estates, Ltd., please inform us under what clause of your agreement Messrs. Dunthorne Estates, Ltd., are liable for repairs to your property.

The other, a registered letter, is to Mr. and Mrs. Wiggins:

Dear Sir and Madam, We hereby on behalf of Dunthorne Estates, Ltd., give you notice to quit and deliver up possession of premises known as 12a, Dell Road, West Drayton, Middlesex, on Aug. 29, 1941, or other the day on which the first complete week of your tenancy shall expire after service of this notice upon you.

The rent not having been paid, or the 25s. per week not having been paid, the plaint in the county court was issued.

There is only one other matter on the correspondence that I want to refer to, and that is concerned with the stamping of the agreement of Feb. 10, 1941. It was left for stamping with the Postmaster at Iver, and 2 days after it had been so left there was received from the Comptroller of Stamps at Llandudno a communication in these terms:

The document *re* Dunthorne Estates, Ltd. & Wiggins & Another in respect of which 10s. has been deposited with the Postmaster, Iver, Bucks, is apparently liable to £1 3s. duty; namely, 6d. duty as an agreement under hand as an agreement for sale of the property, 2s. 6d. *ad valorem* duty securing the weekly payment of 25s. for an indefinite period (i.e., until the promissory note is redeemed) and £1 fixed duty (see under the heading of Lease "of any other kind whatsoever not hereinbefore described" in the Stamp Act, 1891, Sched. I) in respect of the tenancy at will pending completion. The additional duty of 13s. should be paid to the Postmaster who will notify this office of its receipt. The document will then be stamped and returned to him.

Upon that footing Shore, a partner in the plaintiff firm, caused the agreement in question to be stamped with the duty claimed, namely, £1 3s.

It is necessary to construe this agreement. Mrs. Wiggins, of course, had no more expectation of being able to buy this house, whether it was for £545 or £445, than the man in the moon. A widow with a widow's pension is incapable of performing the obligations which she had undertaken, and I do not suppose that for one moment Shore ever thought that she really had intended to become the purchaser of this house. None of the matters which would be discussed between persons who genuinely intended to be buyers were discussed between Mrs. Wiggins and Shore, nor, I apprehend, did Shore ever imagine that Mrs. Wiggins or Mr. Wiggins intended to become purchasers of the house; but when she signed the instrument there is no doubt that Mrs. Wiggins realised that she

was entering into a contract to buy the house and she entered into that contract because it was the only way by which she could get a roof over her head.

A The question that I have to determine, I think, is whether the legal effect of the document is not merely to create between the parties concerned the relationship of vendor and purchaser, but also to create between them the relationship of landlord and tenant. If the document creates between them the relationship of landlord and tenant, and provides for the payment by the tenant to the landlord of a rent, then the document is one to which the provisions of the Rent Restrictions Act must be applied, and the real point in this case is whether you can regard cl. 3 as a separate contract between the parties to the instrument by which, in order that Mrs. Wiggins might have possession of the house, the relationship of landlord and tenant was created. That it is not an impossible thing is shown by the fact that when the document was submitted to the authorities for the management of stamps, it was regarded as a document B which had that effect in law; and, in my judgment, there is no alternative to the construction which the revenue authorities put upon it, namely, that cl. 3 of the document creates, between the parties to it, the relationship of landlord and tenant.

C Cl. 2 provides for the sale and purchase of the house and specifies the terms upon which the purchaser is to become the purchaser of the house. Cl. 3 is a clause which gives the purchaser a right to possession—a right to exclusive possession—and creates what the parties to it have described as “a tenancy at will.” It is not truly a tenancy at will, because it is a tenancy which cannot be determined at the will of the landlord; it can only be determined if the tenant makes, for 14 days, default in payment of the weekly sums. I will read the clause again:

D . . . the purchaser shall be allowed entry as Tenant at Will provided he pay to the agents the sum of 25s. per week from the date of possession on to the actual date of completion.

The payment surely is a weekly payment which gives the purchaser the right to exclusive possession of the premises in question, and I do not see upon what ground it can be held that a payment which gives a person the right to exclusive possession of land for a term is not a payment of rent.

E Then you have cl. 6, by which it is agreed that, if the said weekly payments (and those are the weekly payments of 25s. per week) are more than 14 days in arrear of the agreed date, the purchaser shall forthwith vacate the premises and deliver them up to the agents on behalf of the vendor. It seems to me that in those 2 clauses you have all the elements which are required at law to create the relationship between the parties of landlord and tenant; they provide for the payment, by the latter to the former, of a weekly sum which can only be considered as rent. The fact that when he gets it the landlord is F to deal with it in a particular way is, in my judgment, irrelevant. Once you have got the relationship of landlord and tenant created, and a rent fixed, then you have a contract of tenancy, and to that contract, in the circumstances, it seems to me, the Rent Restrictions Act must apply.

G For these reasons it seems to me that the plaintiffs' action fails. They cannot recover upon the footing that the defendants are purchasers in possession under a contract of sale who have made default in the performance of their obligations as purchaser. They are in not as purchasers under a contract for sale, but as tenants under an agreement of tenancy.

H Then one has to consider the counterclaim. What is the relationship if they are tenants? The rent is payable weekly, and in those circumstances, I suppose, the implication of law is that they are weekly tenants. It is common ground between the parties that the statutory rent or the permitted rent is 21s. 6d., the landlord, out of that sum, paying rates. The conclusion is, in my judgment, that the action for possession must be dismissed, and that upon the counterclaim there must be a declaration. The infant defendant came of age whilst the proceedings were pending and he has repudiated liability under the contract into which he entered, so that he is not entitled to have any declarations made in his favour; but the defendant Rose Caroline Wiggins is entitled, in my judgment, to have a declaration that upon the true construction of the agreement of Feb. 10, 1941, she is a weekly tenant of the premises known as 12a, Dell Road, West Drayton, Middlesex, at a rental of 21s. 6d. per week, the landlord

paying the rates, such rental being the permitted rent of the premises pursuant to the Rent Restrictions Act. There is no question about overpayment. She overpaid for a time, but the plaintiffs have no longer, having regard to the time when she did pay rent, any moneys of hers in their hands for which they are accountable, so that I think there is no relief required on the counterclaim except that declaration.

Judgment for the defendant on the claim. Declaration accordingly on the counterclaim. Costs for the defendant on the claim and counterclaim.

Solicitors: *Champion & Co.*, agents for *Tuberville Smith & Co.*, Uxbridge (for the plaintiffs); *Harold Miller* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

SCOTT v. SCOTT.

[CHANCERY DIVISION (Lord Clauson), December 16, 1942.]

Companies—Directors—Powers—Financial control given to directors by articles—Attempted control by members in general meeting—Resolution for payment of instalments of preference dividend before dividend declared—Interim dividend—Companies Act, 1929 (c. 23), Sched. I, Table A, arts. 67, 90.

A private limited company by its articles of association incorporated the Companies Act, 1908, Sched. I, Table A. The plaintiffs were two members of the company and the defendants were the remaining members of the company. The plaintiffs contended that the following resolutions passed in general meeting were invalid: (i) that a payment be made to each preference shareholder of a weekly sum calculated on the paid up capital on the preference shares, by way of advance and without interest, until the payment of the dividend for the current year, the sums to be deducted from the dividend when declared and, if the dividend was insufficient, any deficiency was to be repaid to the company; (ii) that Messrs. A. H. & Co. be instructed to investigate the financial affairs of the company for the last two financial years; (iii) that Messrs. A. H. & Co. should be the auditors of the company for the ensuing year. On the supposition that this appointment was invalid an application had been made to, and granted by, the Board of Trade for the appointment of auditors on the footing that the company had failed to appoint them. It was subsequently admitted by the plaintiffs that the appointment by the company was valid, and the defendants counterclaimed for a declaration that the appointment by the Board of Trade was inoperative:—

HELD: (i) the first and second resolutions were invalid as being attempts by the company in general meeting to usurp the powers of the financial direction of the company which under the articles rested solely in the hands of the directors.

(ii) the defendants were entitled to a declaration that the auditors appointed by the company should be the sole auditors.

[EDITORIAL NOTE.] Under the articles of this private company, as is the case with most such companies, the management of the business and the declaration of interim dividends were both assigned to the directors. That being so, they were not subject to any control in that respect by the company in general meeting. It is true that, if the company in general meeting disapproved of the management or the declaration of an interim dividend, they could remove the directors, but the general meeting could not, as the articles stood, directly interfere by resolution with the management or the declaration of an interim dividend. The division of authority is important even in the case of what may be called family companies, and having regard to the liability of directors as occupying a fiduciary position, it is necessary that it should be strictly observed.

AS TO HOW FAR THE REGULATION AND MANAGEMENT OF THE COMPANY MAY BE CONTROLLED BY THE MEMBERS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 315-316, para. 530; and FOR CASES, see DIGEST, Vol. 9, pp. 474-475, Nos. 3115-3117.]

ACTION and counterclaim to determine the validity of certain resolutions passed by a private company in general meeting. The facts are fully set out in the judgment. The company being incorporated under the 1908 Act, the references to Table A are to the table annexed to that Act, but the relevant articles appear in the same words in the Table A annexed to the 1929 Act and are arts. 67 and 90.

H. J. Wallington, K.C., and *S. Pascoe Hayward* for the plaintiffs, Reginald Scott and his wife.

H. Wynn Parry, K.C., and *J. A. Wolfe* for the first three defendants, Martha Scott, Monica Scott and Mabel Annie Scott.

J. Pennycuik for the fourth defendant Marie Irene Scott.

The defendant company was not represented.

A LORD CLAUSON : In 1927 the company, Frank F. Scott (Liverpool), Ltd., who are the last defendants to this action, was incorporated under the Companies Act as a private company limited by shares. The company was formed to acquire the business of shipping butchers and contractors which had been previously carried on by Frank F. Scott (whose name appears in the title of the company), Frank Stanley Scott and Reginald Scott, in co-partnership, Frank Stanley Scott and Reginald Scott being brothers and sons of Frank F. Scott.

B The share capital was divided into 14,700 preference shares of £1 each and 300 ordinary shares of £1 each. There was a provision under the memorandum which entitled the holders of the preference shares to the payment of a cumulative preferential dividend at such a rate as should, after deduction of income tax at the rate for the time being in force, yield a clear £15 net per centum per annum on the capital for the time being paid up on the preference shares. I am glad that in this case I am relieved from any duty of construing the rights of the preference shareholders in respect of those words which I have read, having regard to recent legislation on the question of taxation. At all events, it is not raised in this case, and I say no more about it.

C I ought to say that, so far as I am aware, no difficulties appear to have arisen during the lifetime of Frank F. Scott, but he died, and at the material times since his death the shares have been held this way : 1,700 preference shares in the names of the widow, Martha Scott, and the two daughters, Monica Scott and Mabel Annie Scott ; 1,600 in the names of the defendants, Mrs. Scott, the widow, and Monica Scott ; a further 1,600 in the names of Mrs. Scott, the widow, and Mabel Annie Scott ; a further 4,900, which, it will be observed, is a figure equal to the shares I have already mentioned, in the name of the defendant Marie Irene Scott, who is the widow of Frank Stanley Scott who has died, and the remaining 4,900 in the names of the plaintiffs jointly, that is, Reginald Scott and his wife. The ordinary shares are divided in this way : 100 are registered in the name of Mrs. Scott, a further 100 in the name of Marie Irene Scott, and the remaining 100 in the name of the plaintiff Reginald Scott. The parties to this action are Reginald Scott and his wife as plaintiffs, and Mrs. Scott, the widow, Mrs. Marie Irene Scott, the widow of Frank Stanley Scott, Miss Monica Scott, Miss Mabel Annie Scott, the two daughters of Frank F. Scott, and the company. It will be observed, therefore, that I have before me all the shareholders in the company.

D **E** **F** As regards the directors, at the material times the directors were Mrs. Scott and Mr. Reginald Scott. Since then, Mrs. Marie Irene Scott has been appointed a director, so I have before me all the shareholders and the directors at the material time, and also the lady who, since the material time, has become a director of the company.

G The points which are brought before me are purely technical points. That is no reason why they should not be properly dealt with. I ought, however, to add this, that at one time on the pleadings the plaintiffs claimed an order that there should be a certain refunding of the company's moneys which had been paid out to divers parties. Neither side is proposing or intending to call evidence and has not called any evidence. After I had pointed out the considerable difficulty there would be in the court making a refunding order without knowing more about the matter than appears on the pleadings, I am glad to say that counsel for the plaintiffs was instructed to withdraw the claim for a refunding order.

H I ought to say there is a counterclaim, and in the action and on the counterclaim three points have to be resolved.

The first point is whether a resolution which I am about to read is or is not an effective, valid and operative resolution. The resolution was passed at the general meeting of the company on Dec. 6, 1940, and is in these terms :

That as from Mar. 13, 1940, and until otherwise decided by the company in general meeting a weekly payment be made to each preference shareholder of a sum equivalent

to 1/52 of 15 per cent. on the capital for the time being paid up on the preference shares held by him or her by way of advance (without interest) pending the declaration and payment of the dividend on the preference shares for the current year, such weekly payment to be deducted and retained by the company out of such dividend when declared and payable and in case the dividend shall be insufficient to permit of such deduction and retainer any deficiency to be repaid to the company by the shareholder within one calendar month after demand by the company.

Before making any further observations upon that resolution I wish to call attention to the provisions of the articles of association of the company. The articles consist of the regulations contained in the Companies Act, 1908, Sched. I, Table A, with certain variations and exclusions. The first observation I have to make is that there seems to be nothing in the variations and exclusions which are referred to in the articles which overrides the provisions in Table A in regard to interim dividends. On turning to Table A, I find, under art. 96 :

The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

It is quite clear, accordingly, that the payment of an interim dividend is a matter which, by that article, is placed within the exclusive power of the directors, unless I can find some other article which limits that. I shall have, for another purpose, to refer in a minute or two to Table A, art. 71, which deals with the powers and duties of directors in managing the business of the company.

I do not think it is suggested that, if this resolution is a resolution for the payment of an interim dividend, that it could possibly be held to be valid, it having been passed by the company in general meeting. If it was, then the annual general meeting impinged upon the sphere of activity which, in the most express terms, is confined to the directors.

It was suggested to me that this could not possibly be treated as a direction to pay an interim dividend because the resolution contains a provision that, if the dividend ultimately declared is insufficient to permit of such deduction and retainer, any deficiency is to be repaid. I am not prepared to accept that argument. It seems to me that this resolution is nothing more nor less than an attempt to declare an interim dividend. As such, the company had nothing whatever to do with that, and the resolution is wholly inoperative. I am, however, prepared to assume that I may be wrong in that view and that there may be something in that point that, for one reason or another, this cannot be treated as an attempt to declare an interim dividend, and that it is merely a direction that certain loans shall be paid to certain shareholders out of the funds of the company.

Let me test the matter on that footing. It appears to me quite clear from these articles, including, as they do, art 71, that one thing which is to be managed by the directors and with which the company may interfere only by removing the directors or by having an investigation under the statutory provisions, is the management of the business of the company.

The trade of this company is that of shipping butchers and contractors. I cannot see how the business of a company whose trade is that of shipping butchers and contractors, on, as I understand it, not an insubstantial but a large scale, can be managed without regard to finance, and it appears to me that a resolution of the company which directs the directors to make certain loans is a most obvious interference with the very root of that which is committed to the directors, namely, the management of the business. How can you manage a business without managing its finance ; how can things be carried on if at any moment the company can interfere and say to the directors : You must not keep a balance at the bank, although you may have demands coming forward in a week or two ; you must let out that money on loan, because that will bring in more interest, or something of that kind ? It is purely a matter of the management of the business. It may not be management in actual dealing in butchers' meat, but that is not the point ; the point is that the business is to be managed by the directors. How the directors can manage the business if they are to be interfered with in such an ordinary financial matter as to how to deal temporarily with balances which are for the moment not required for the purpose of the business, I confess I cannot conceive.

It seems to me it is quite clear that this resolution, if it is not aimed at declaring an interim dividend, is aimed at interfering with the management of the business

by the directors and, as such, it is in my view wholly inoperative, and the general meeting had no power to pass it.]

It is suggested that somehow or other the resolution can be justified under the terms of art. 71, because it is said that while the directors are authorised by that article to

... exercise all such powers of the company, as are not, by the Act, or by these articles required to be exercised by the company in general meeting, subject, nevertheless, to any regulation of these articles, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting . . . those words must be treated as limiting the power, the right and the duty—I would prefer to say “duty” rather than “right”—of the directors to manage the business of the company.

To begin with, I do not take the view that those limiting words “subject nevertheless,” and so forth, have anything to do with the duty cast upon the directors in the first two lines of the article to manage the business of the company. However that may be, if I am wrong in that, and, if I ought to treat the duty cast upon them to manage the business as being “subject to any regulation of these articles”—which, of course, it must necessarily be—to the provisions of the said Act—which it must necessarily be—and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting,” the question is whether the company, by prescribing this important regulation, if it be a regulation, are prescribing something which is inconsistent with the aforesaid regulations or provisions. [One of the aforesaid regulations or provisions is this provision about the business of the company being managed by the directors, and I find the greatest difficulty in seeing how any resolution of the company in general meeting, controlling the directors in the management of the business, can possibly be justified under the terms of this article.]

I do not propose to refer to the authorities. This particular case seems to me to be an easy one, and for that reason it is not necessary to go with meticulous care through the authorities, which, I must admit, offer some difficulty of interpretation and some difficulty as to their scope; but it must be borne in mind that the professional view as to the control of the company in general meeting over the actions of directors has, over a period of years, undoubtedly varied, as may be observed by a critical investigation of the statements about the law on the matter to be found in earlier editions of well-known text books; but I do not think that in this case I have anything of that sort to consider. For the purposes of this case I am satisfied, for the reasons which I have given, that the first resolution is inoperative.

Now I come to the second resolution, about which a question is raised. The second resolution was passed on July 31, 1941, at a general meeting of the company, and it is in these terms:—

That Messrs. Arthur Hallett & Co. be instructed to investigate the financial affairs of the company for the years ending Mar. 12, 1940, and Mar. 12, 1941, and report to the company thereon as soon as practicable and prepare any fresh accounts which they may consider necessary.

The objections raised to this resolution are as follows. It was first of all said that this is an attempt to do by ordinary resolution of the company in general meeting what under sect. 137 of the Act can be done only by special resolution. That section enables the company by special resolution to appoint inspectors to investigate its affairs. I think there is something to be said for that argument, but I do not see my way to hold on that ground alone that this resolution is inoperative. The difficulty that strikes me about this resolution is that it is an interference by the company in general meeting with the financial affairs. How you can investigate the financial affairs of the company without interfering with the management of the company's financial affairs by the directors in the course of managing the business, I myself am quite unable to see, and it is on that ground that I think this resolution is inoperative.]

I think that I ought, before dealing specifically with this resolution, to refer to the third resolution upon which a question arises, the question being raised by the counterclaim. It arises in this way. On July 31, 1941, a resolution was passed for the appointment of Messrs. Arthur Hallett & Co. as auditors of the company for the ensuing year; that is to say, until the next annual general meeting of

the company. A question was raised at one time as to whether that resolution effectively appointed Halletts as auditors. The matter is a little complicated by the fact that an application had been made to the Board of Trade to appoint auditors on the footing that the company had failed to appoint them, and the Board of Trade, in fact, on Aug. 1, in ignorance, no doubt, of what had happened on July 31, professed to appoint certain persons auditors. It can hardly be suggested, I think, that the appointment by the Board of Trade, having regard to the fact that the company had appointed auditors, can be treated as operative. That is the view I take; but the matter has been simplified by the fact that counsel for the plaintiffs is prepared to admit that by that resolution of July 31, 1941, Halletts had been duly appointed auditors.

Let me interpose here, which rather comes out of order, a trifling point. It appears that the actual partnership firm of Halletts had come to an end for some reason or another which I did not quite appreciate, whether it was death or what it was, and that now the gentleman who is carrying on the business of Hallett & Co. is in fact a Mr. Yaxley, who is the gentleman who was concerned in the matter before. Whether he is the sole partner, as it is sometimes called, I am not quite clear. It is admitted on all hands that, if that resolution is to be treated as a valid resolution, as I think it must be, in view of the resolution of the directors of Nov. 3, 1942, Yaxley, the successor to the business, is now the auditor.

It is also admitted, and the admission seems to be a perfectly proper one, that accordingly Yaxley only will have the powers and duties conferred on auditors by sect. 134 of the statute.

Having regard to the way in which the third resolution is to be dealt with and the appointment of Halletts as auditors is to be dealt with, the second resolution becomes one about which it is hardly necessary to say very much; but I think it is right I should say, as I have indeed already said, that, in my view, for the reasons I have given, that being an interference with the directors' management of the business, this resolution is inoperative.

The counterclaim also asks for a declaration that the appointment by the Board of Trade was inoperative. It will be observed from the declaration I have made that it implies that in my view that appointment was inoperative; but the Board of Trade are not before me, nor are the gentlemen who were so appointed, and I think it will be sufficient if I register the opinion of the court in the form of a declaration that it will be Yaxley and Yaxley only, upon whom fall the rights and duties conferred upon auditors by sect. 134 of the statute.

Order accordingly. No order as to costs.

Solicitors: *Layton & Co.*, agents for *Layton & Co.*, Liverpool (for the plaintiffs); *J. C. Fox, Gamble & Son* (for the first three defendants); *Field, Roscoe & Co.*, agents for *Guy Williams & Co.*, Liverpool (for the fourth defendant).

[Reported by **IRENE G. R. MOSES**, *Barrister-at-Law*.]

LYON AND LYON v. DAILY TELEGRAPH, LTD.

[KING'S BENCH DIVISION (Hilbery, J.), **March 1, 1943**.]

Libel—Fair comment—Honest expression of opinion—Letter to newspaper—False name and address.

The plaintiffs, who were the principal artistes in a radio entertainment, claimed damages for libel in respect of a letter, purporting to be written by a clergyman, named A. Winslow, which was published in the correspondence columns of a newspaper. It was admitted that the address on the letter was non-existent and that there was no clergyman of that name. The letter described the entertainment as a costly broadcast and complained that it was a vulgar and unworthy performance. It was found as a fact that the entertainment was not a costly broadcast. The defendants pleaded fair comment:—

HELD: (i) the letter was defamatory of the plaintiffs in their profession as artistes.

(ii) since the identity of the writer of the letter was unknown there was no evidence that the comments contained in it were the expression of an opinion honestly held. The defence of fair comment could not, therefore, be upheld.

[EDITORIAL NOTE. A defence of fair comment fails if it is based on a mis-statement of fact. It seems that that proposition was sufficient to defeat the defence in the present case. The fact that the writer gave a false name and address only provides a *prima facie* presumption that he was not acting honestly, but it would seem that, where the address is chosen with a view to lending point to the criticism, these facts by themselves may be sufficient to defeat a plea of fair comment.

AS TO THE NECESSITY FOR HONEST BELIEF, see HALSBURY, Hailsham Edn., Vol. 20, p. 495, para. 604; and FOR CASES, see DIGEST, Vol. 32, pp. 143, 144, Nos. 1742-1754.]

A ACTION for damages for libel in respect of a letter published in a newspaper. *G. O. Slade* for the plaintiffs.

Serjeant Sullivan K.C., and *Valentine Holmes* for the defendants.

B **HILBERY, J.:** The plaintiffs claim damages for what they complain was a libel upon them as the principal artistes in a radio entertainment called "Hi Gang." That entertainment was broadcast by the British Broadcasting Corpn. every Sunday evening at 6.30 p.m., for several consecutive weeks, and the plaintiffs were in truth the two principal artistes performing in it every week. They complain of a letter which was published by the DAILY TELEGRAPH. The DAILY TELEGRAPH at the time of the publication of this letter was running in its columns a correspondence, critical or otherwise of the entertainments then being given over the air by the British Broadcasting Corpn. to the **C** Forces. Its columns had apparently been open for some time for the publication of letters expressing the views of listeners about the entertainment thus being offered over the broadcasting system, and that correspondence was at the time of the publication of this letter appearing under the generic title, "flabby amusement." They published on Mar. 15 a letter, which is the letter complained of, in the following terms:

D Sir—Every Sunday evening at church time there is put on the air a costly broadcast which is an insult to British intelligence. The type of humour consists of a vulgar exchange of abuse. One comedian alludes to the other as "a louse" and his chief humorous contribution is to say at intervals, "I'm laughing me blooming 'ead off." The woman artist [meaning the female plaintiff] has a fair voice and sometimes sings a good song, but for the most part she indulges in vulgar wisecracks. We must be a nation of lunatics to permit such a waste of money for such a very sordid show. Yours sincerely, A. Winslow, The Vicarage, Wallington Road, Winchester.

E There is an innuendo in the statement of claim complaining that those words mean that the entertainment was of so offensive and degrading a character that a clergyman had felt constrained to pillory those responsible for its presentation and production and the artistes taking part in it in one of the leading English newspapers. How much of that innuendo the plaintiffs themselves ever really thought it conveyed, and how much of it was the discovery of the pleader, I do not know, but I have to ask myself (since the plea here is one where **F** the publication is admitted, but it is said that the publication was a matter of fair comment), in the first place, is this matter defamatory of the plaintiffs? That is the first question. Is it capable of being defamatory of the plaintiffs? Then I must examine and see whether it is a matter of comment on a matter of public interest and whether it is fair comment.

G This letter is, on the face of it, or purports to be, a letter criticising the public entertainment for which the two plaintiffs are largely responsible, and criticism which is adverse almost necessarily disparages; but the matter I have to consider is whether, first of all, in its form it was capable of being something which was so disparaging of the two plaintiffs as to go beyond that which could fairly be called criticism. That, I think, is a fair way to test whether it was defamatory of the plaintiffs. That it could fairly be understood to refer to the plaintiffs, I think is beyond question because they were particularly associated with this **H** production; they were the leading artistes in it, and this was essentially an attack upon the performance given by them in that production as artistes. I think it would be impossible for a judge to say that he would withdraw this from the jury as incapable of being defamatory of them. It was capable of being defamatory of them in the way of their work as comedy artistes, or variety artistes, whichever they choose or prefer to call themselves. If it was capable of being defamatory, the next question is, was it in fact defamatory? I am very doubtful whether an ordinary and reasonable man reading this would really have considered it as something which, in the ordinary acceptance of the term, defamed

the plaintiffs as artistes ; but while I very much doubt it, there may be juries who would have said, " Yes, ordinary people would have thought it defamatory " ; and, on the whole, I have come to the conclusion, not, as I have said, without considerable doubt, that perhaps the right view is to say that it was defamatory of them as artistes—not of them as man and woman in their private lives, but upon them as Ben Lyon and Bebe Daniels in this particular " Hi Gang " entertainment.

The next question is : Is it fair comment ? It cannot be too strongly stressed that I have nothing whatever to do with whether this sort of observation about this performance was, in my view, fair or not fair. What I am concerned with is : Is it shown that, in so far as it consists of statements of fact, those statements of fact are accurate ; in so far as it consists of comments, are they comments which a sensible and honest person could express, and are they expressions of opinion that the person writing did hold ? I do not think I need cite or refer to the authorities to which counsel for the plaintiffs has referred me. When I have said that, I think it will be plain that I read the authorities which counsel for the plaintiffs has cited to me as producing those as the questions which I have to determine. It is perfectly clear that they were opinions which an honest person might hold. I have heard a witness in the box, who was an honest person, who said they coincided actually with his opinions. They were opinions, in other words, which could be held by an honest person. They were certainly comment and comment on a matter which was one of public interest in so far as they consisted of comment ; but when I ask myself, were the statements of fact which were made accurate, I am bound to say there seems to me, at any rate, to be one statement of fact which is relied on, because it is twice alluded to, once directly and once indirectly, in the letter, which is not an accurate statement of fact. The letter begins by adding emphasis to the attack which it directs against this broadcast as being a low and unworthy performance by calling it a costly broadcast. That was not an accurate statement of fact, and it was a statement of fact which, in my view, was added to give a barb to the criticism which followed, and it is indirectly referred to again in the last sentence of the matter complained of, where the writer says :

We must be a nation of lunatics to permit such a waste of money for such a very sordid show.

There, at any rate, is one statement of fact which is utilised, as I have said, to give a barb to the matter which is in the letter, which is certainly not a fact. If it is an essential part of the attack—if it is a statement of fact which forms an essential part of the attack—and it is shown not to be accurate, then that is an end of the plea of fair comment ; but here I go further because it must be shown, in my opinion, in the case of a plea of fair comment, that the opinion was honestly held by the writer of the letter ; that is to say, that it was an honest expression of someone's opinion, and here there is no evidence before me that any person held this opinion honestly.

The letter comes from an address which is non-existent. That is admitted. There is no Church of England clergyman of the name of A. Winslow to be found in any of the records which are usually resorted to to discover a person amongst the clergy ; and in those circumstances it cannot be said that the writer of this attack, whoever he was, honestly held those views at all. What I do know is that whoever the writer was he hid himself behind the cowardly device of anonymity or of a false name. He was minded to lend point to it by using a false name and a false address which would suggest that he was a responsible person and a minister of religion. That is some evidence, I think, that the motive in writing this letter was not wholly a motive prompted by conscience. In those circumstances, it appears to me that the defence of fair comment breaks down completely, and the action, I think, is, therefore, really an undefended action.

Judgment for plaintiffs for £5 and costs.

Solicitors : *Harold Kenwright & Cox* (for the plaintiffs) ; *Alfred Cox & Son* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

ABSALOM v. TALBOT (H.M. INSPECTOR OF TAXES).

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.J.J.), February 23, 24, 25, 26, March 1, April 20, 1943.]

Income Tax—Profit—Speculative builder—Part of purchase price not advanced by building society advanced by builder on security—Trade debt—Income Tax Act, 1918 (c. 40), Sched. D, cases I and II, r. 3 (i).

A A speculative builder had built a number of houses for sale to the working classes and in respect of each house an advance was obtained from a building society of the greater part of the purchase money. The builder received a small deposit and the remaining money required to make up the purchase price was allowed to remain on loan secured in favour of the builder either by a second mortgage or by a promissory note. It was contended for the builder that the sums due under the second mortgages or the promissory notes were either to be treated as trade receipts in the year in which they were actually paid or that they should be brought into account at figures not exceeding their present value :—

B HELD [SCOTT, L.J., *dissenting*] : the capital amount of each debt but not the interest payable thereon must be brought into account in the year when each house was sold. The word “debts” in Sched. D, cases I and II, r. 3 (i) is not limited to debts due and payable in the year of assessment.

C *Decision of MACNAGHTEN, J. ([1942] 2 All E.R. 269) affirmed.*

[EDITORIAL NOTE. It was attempted to bring this case within the decision in *Harrison v. Cronk & Sons, Ltd.* (1), but that case has been distinguished on its facts. In *Cronk's* case (1), the builder had deposited sums with the building society which stood as a security for the extra sums advanced by the society, and those amounts were, therefore, due to the society. In the present case the corresponding sums were advanced direct by the builder and in respect of them he obtained a second mortgage or a promissory note. The two cases are not, therefore, on all fours and that is why the excess over the amount actually advanced by the building society is treated as a trade debt of the builder. The judgments discuss at some length whether a debt payable only at some time after the end of the year of assessment should be brought into charge in the year of assessment or brought into charge as and when received. Upon this there has been a difference of opinion, but the majority have agreed with the decision of MACNAGHTEN, J., that these debts must be brought in at their capital value in the year of assessment in which the debt is created, and that so much thereof as is interest must be charged in the year in which it is received. That is a result which does not allow for bad debts and involves considerable calculation in order to ascertain the amount of interest received in each year, and it would seem that some more practical method ought to be adopted.]

E AS TO INCOME TAX ON SALE OF PROPERTIES BY BUILDERS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 100, 101, para. 194; and FOR CASES, see DIGEST, *Supp. Income Tax*, F Nos. 122c-122f.]

Cases referred to :

- * (1) *Harrison v. Cronk & Sons, Ltd.*, [1937] A.C. 185 ; [1936] 3 All E.R. 747 ; Digest Supp. ; 106 L.J.K.B. 70 ; 156 L.T. 20 ; *sub nom. Cronk & Sons, Ltd. v. Harrison*, 20 Tax Cas. 612.
- * (2) *Emery (John) & Sons v. Inland Revenue Comrs.*, [1937] A.C. 91 ; Digest Supp. ; 156 L.T. 87 ; 20 Tax Cas. 213.
- G (3) *Gleaner Co., Ltd. v. Assessment Committee*, [1922] 2 A.C. 169 ; 28 Digest 49, n.
- (4) *Russell v. Town and County Bank* (1888), 13 App. Cas. 418 ; 28 Digest 45, 227 ; 58 L.J.P.C. 8 ; 59 L.T. 481 ; 2 Tax Cas. 321.
- (5) *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309 ; 28 Digest 59, 302 ; 62 L.J.Q.B. 41 ; 67 L.T. 479 ; 3 Tax Cas. 185.

H APPEAL by the taxpayer from a decision of MACNAGHTEN, J., given on May 15, 1942, and reported [1942] 2 All E.R. 269. The facts are fully set out in the judgment of SCOTT, L.J.

Cyril King, K.C., and *J. H. Bowe* for the appellant.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and *Reginald P. Hills* for the respondent.

SCOTT, L.J. : The appellant, for some years before 1933 and until Dec. 31, 1937, carried on the business of a speculative builder. He then retired. He was assessed under Sched. D., case I, for the years 1934-5 to 1937-8 in the sums of £87,000, £48,000, £24,000 and £30,000. The assessments have been kept

open for the determination of certain issues. These issues involve, directly or indirectly, important questions of income tax law in regard to trade debts in general, and particularly in any business the contracts in which, like those of the speculative builder, postpone for many years the final discharge of the consideration moving from the purchaser.

The appellant's business was carried on mainly in Erith and Bexley Heath, where he bought open land, constructed roads and sewers, built houses, and then sold the freehold plots to purchasers at prices expressed in the conveyance or land transfer certificate as lump sums ranging from £395 to £750. In almost all cases the purchaser was only to find a very small sum of money himself, varying between £20 and £35, the rest had to be found for him, directly or indirectly, by the appellant with the assistance of a building society.

At first the appellant used to adopt the method which the courts had to consider for income tax purposes in *Harrison v. Cronk & Sons* (1). There, too, there was a small initial payment of cash by the purchaser, but on completion there was a complex transaction in which the building society nominally found the whole of the balance, partly on first mortgage and partly on a guarantee by the builder, supported by a cash deposit from him with the society on which the society allowed him interest until the whole transaction was finally cleared after many years.

The appellant, however, became dissatisfied with this guarantee system, apparently preferring direct relations with the man to whom he must look for ultimate performance of the obligations of the contract of sale to the indirect pressure which he might exercise as guarantor.

His new plan, which applies to all his transactions under review in the appeal, was, as stated in the special case, a

... system of granting second mortgages and in some cases accepting promissory notes in respect of the difference between the sale price of the house and an amount made up of the cash deposit and the amount advanced on first mortgage by the building society.

The second mortgage and the promissory note were both executed by the purchaser at the same time as the first mortgage to the building society, at the moment of completion, when the appellant executed the conveyance. Both mortgages provided for payment by instalments, the second mortgage over a period of some 14 years. The promissory note was payable by instalments over 4 years. All instalments were payable with interest.

The cash deposit had in each case been paid at the time the plot was reserved to the purchaser, which may have been before the house on it was even started. Copies of the conveyance, first and second mortgages and promissory notes are attached to the special case in two typical instances: (1) Mayhew's purchase, where there was no promissory note, and (2) Hearnden, with a promissory note.

The real effect of each system, although not the form of either, was, in my opinion, to effect part payment of the consideration in cash, that is to say, to the extent of the deposit, plus the advance by the society on its first mortgage; but for the balance to create a series of fixed credits, the purchaser being put by the contract under no obligation to pay except as and when each instalment fell due (apart from default), the vendor being content with his right as second mortgagee to enforce payment by the agreed instalments, unless the purchaser made default (including default under the first mortgage), when the whole of the balance would become payable.

The promissory note obviously did not constitute a discharge of any existing obligation contracted by the purchaser: nor did the second mortgage under either system constitute a payment "in kind." No money was paid and rent, although the documents purported to say so.

The only other facts to note are those found by the commissioners in para. 5 of the special case. The appellant

... never wrote off debts as bad until it was known that the building society had sold the house in question under its powers. Up to 1935 he had occasionally sued on the covenant in the second mortgage granted by him, but he had then given it up as useless. He had also tried debt collectors but the purchasers were not worth pursuing.

The case for the Crown is simple but far-reaching. It was based on the

language of r. 3 (i) of the rules applicable to Sched. D, cases I and II, which provides as follows :

A In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . (i) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad. In the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof.

B The Solicitor-General and Mr. Hills contend that the whole of the selling price must in law for the purpose of income tax assessment be brought into the builder's accounts as at the moment of completion, whether the price falls to be recorded by the builder in his accounts as a cash receipt of the whole—a very rare event—or partly as cash and partly as a debt, and whether the debt is secured or unsecured.

It is further contended that the part which is on completion left outstanding as a debt must always in law be brought in at its face value, unless within that same year of assessment it is proved to be “bad” or “doubtful,” so as to entitle the taxpayer under the rule to have it written off, if bad, or to have it estimated and its total figure reduced to its real value if it is “doubtful.”

C They recognise that it is the practice of the revenue to allow r. 3 (i) to be applied in years subsequent to the year of assessment, but they both concede and insist that such allowances are extra-legal arrangements outside or even contrary to income tax law, which limits each annual assessment to its own proper year in regard alike to income to be brought in for purposes of charge and to permitted deductions and allowances.

D In effect, their legal proposition is that, if a bad or doubtful debt is not proved to be bad or doubtful before the assessment becomes final and conclusive, there is never again any legal opportunity for rectifying the overcharge of tax ; and that appears to me to be an injustice, although it may be the present law. So pure is their doctrine that they treat as *prima facie* good for its face value every debt, whether, under the terms of the contract which gave it birth, it is or is not to be paid within the year, and even if it is not payable till a date years ahead or is only payable by fixed instalments over a long period of years.

E Such a debt may only be *solvendum in futuro*, but, say the revenue, it is *debitum in praesenti*, and that is enough to bring it into charge as a component of the year's actual profits and gains. Not only do they seek to bring into charge in the assessment year debts only payable in future years, but contend that the normal financial operation of discounting in order to arrive at present value is contrary to income tax law ; and that, as the year of assessment is strictly self-contained, the resultant over-payment of tax through the over-valuation of a debt only payable in future years is irremediable, for it can never in law be rectified.

F It was argued by counsel for the appellant as an alternative (which I think rests on no basis of fact in this appeal) that the case is governed by *Cronk's* case (1), the argument being advanced on the footing that the second mortgage in each transaction was a part of the consideration for the purchase and, therefore, to be valued as a part payment in kind on the principle enunciated in the judgment of LORD THANKERTON in that case, where the tripartite arrangement between builder, purchaser and building society was held to constitute a part payment of that type.

G The difficulty of counsel for the appellant is that that contention presupposes an interpretation of the facts stated, which, in my opinion, is erroneous. The reality of each of the appellant's transactions was that the balance of the consideration, over and above the purchaser's cash deposit and the society's cash advance in first mortgage, was simply not paid over to the appellant, either in cash or kind. The appellant gave credit, although he required and got the security of his second mortgage, with the added advantage in some of the sales of a 4 year promissory note with the possibility it afforded of speedy judgment under R.S.C., Ord. XIV. It follows that the whole balance of the consideration was payable to the appellant in sterling and not in kind.

H We are, therefore, only concerned with sterling “debts,” and have not to consider the problem dealt with in *Cronk's* case (1) and in *John Emery & Sons v.*

Commissioners of Inland Revenue (2), of putting a value on a part consideration not expressed in sterling.

The questions we have to decide concern (a) the legal effect of the postponement effected by the contractual arrangements for sale, of the due dates for payment; and (b) the application (if any) of the "bad and doubtful debts" rule to those sterling "debts," the badness of or doubts about which do not become manifest till a time when the assessment in which they are treated as having been received by the taxpayer has become final and conclusive, so that it cannot be re-opened.

It is difficult, in my opinion, to exaggerate the practical importance of getting income tax law about debts on to lines which are both fair and clear. At present they seem to me to be neither. Whether it can be achieved wholly by judicial elucidation of the law without legislation I very much doubt, although, after such careful consideration as I can give it, I think much can be done by judicial decision upon the law as it stands.

A fundamental matter for consideration is that debts, whether in cash or in kind, which ultimately prove bad or "doubtful," seldom disclose to the creditor their inherent weaknesses at the time when they are contracted, but only later on. *Ex hypothesi*, under the annual system of assessing, charging and collecting income tax, the horizon which limits the scope of all ascertainment of taxable income is the 12 months' period fixed by the beginning and end of the accounting year on which the assessment is based, alike for receipt of income as for deductions and allowances, save in so far as there is statutory provision for action of any kind after that period has expired, whether for additional assessments or for rebates, or for adjustments and rectifications.

For such subsequent revision of bad or doubtful debts no such statutory provision is made. It is none the less patently fair and just that, if tax has been paid on a debt which, when brought into credit for purpose of charge, seemed good but was bad, in the sense of having what I may call "a latent defect," the Crown should return the overpaid tax when the truth is discovered. It is in reality this moral view which is in fact taken by the revenue authorities and applied in their extra-legal practice. Counsel for the respondent specifically told us so. It also appears in para. 7 of the special case that the appellant's accountant, who regularly did his tax work, gave this evidence:

The figure of sales in the profit and loss account included the nominal amount of second mortgages and promissory notes. The respondent had in every year allowed a deduction for debts (secured by second mortgages or promissory notes) proved to be bad and the amounts of these deductions are agreed subject to the question of principle at issue. After the decision in *Harrison v. John Cronk & Sons, Ltd.* (1), he wished to re-open the accounts.

The existence of this non-legal practice and its past application to his own assessments, coupled with the knowledge that he has no legal right to the indulgence, is no doubt the explanation of the appellant's second contention before the commissioners (see special case, para. 8 (b)) :

. . . that, if a valuation be found to be impracticable, then the sums received under the second mortgages or the promissory notes are assessable as trading receipts in the trading years in which they are received.

Indeed, the commissioners, whilst finding in favour of the Crown that "on the granting of a second mortgage or promissory note . . . a trade debt was created" (*sic*) and therefore, according to them, had to be included for purpose of charge at its face value, added :

These debts, if and when proved to be bad, would be allowable as deductions in the normal manner.

The word "normal" shows how common the practice has become, in order to be fair to the taxpayer in spite of the law.

The appellant's position in the present case is, as I have already said, essentially different from the builder's position in *Cronk's* case (1) ; here the building society had no concern in the matter beyond its rights as first mortgagee. It is true that the recital of full payment in the conveyance or land certificate of transfer resembles the recital in *Cronk's* case (1) ; but, as was there pointed out, the purpose of that recital is only to protect the purchaser on a re-sale by him and is not to estop the vendor or the court from proving or inquiring into the real facts : and there is no other similarity. The appellant's alternative contention

based on *Emery's* case (2) and *Cronk's* case (1), therefore, need not be further considered.

The questions of law directly and indirectly raised are of great and general importance alike to the taxpayer and to the revenue. The curious thing is that they seem to have hitherto, in greater or less degree, escaped judicial determination. Their attendant difficulties arise in the main out of the inflexible rule of income tax law that each year's assessment of income for the purpose of charge is self-contained and cannot be altered after the assessment has once, by the lapse of time for appeal or by final judgment on appeal, become "final and conclusive," unless there is some express statutory provision which permits alteration in favour either of the revenue or the taxpayer—which there is not.

The simplest way of stating the problem is to ask the question: What debts ought to be included in the taxpayer's return of the true balance of his profits and gains as the basis for his assessment? That question depends primarily on the meaning to be attributed to the noun "debts" in r. 3 (i). Does that word, as the Crown contends, include not only debts which are "owing," but also those which are "accruing" and will not be "owing" till after the end of the accounting period which constitutes the basis of the year's assessment?

The contrast of meaning between those two adjectives is forcibly illustrated by R.S.C., Ord. 45, formerly the Common Law Procedure Act, 1854, s. 61. To prevent misconception in what follows, let me state in advance that I am assuming, for the purpose of the present appeal, the correctness of the proposition that debts which both accrue and become owing and payable within the accounting year are properly included for assessment in the account of the profits earned during that year as if they were cash receipts, even though they in fact remain unpaid at the end of that year by reason of the debtor's default. That question does not arise for decision in the present case; but several difficult questions of income tax law have to be thought out. To clarify the position, it will be useful to analyse the income tax problem about debts into a series of distinct though related questions.

(1) Do contractual promises to make payment at some future date subsequent to the standard year, whether in one lump sum or spread by instalments over several years, with no right in the payee to demand payment at any earlier date than the due date (except sometimes on default), give rise, in the standard year when the contract is made, to "debts" which the payee, as trader, is under legal obligation to bring into his income tax return of his actual profits in the standard year during which the contractual obligation arose?

(2) Even assuming absolute certainty of ultimate payment, must such so-called "debts" be brought in at their face value, although in order to ascertain their present value in the market their nominal amount has to be discounted?

(3) Has r. 3 (i) of the rules applicable to cases I and II any and what application to the so-called "debts" referred to in questions (1) and (2), which are neither bad nor doubtful, but only payable at a future date?

(4) If a debt of the description mentioned in (1) and (2), which is "good" in the sense of not being as yet proved to be either "bad" or "doubtful," is brought in as equivalent to cash, but in a subsequent year turns out to be bad or doubtful, has the taxpayer who has paid tax on it (calculated *ex hypothesi* on its face value), any legal redress?

(5) If, before the assessment is closed, a risk of ultimate default in payment exists and the debt is proved to be doubtful, and is accordingly valued down in the assessment, but the devaluation proves in a later year to have been insufficient is there then any redress open to the taxpayer? Or, conversely, if the devaluation proves to have been excessive because the debt after all proves to be good, or not so bad as was supposed, can the revenue then make an additional assessment?

This question raises the definite issue whether there is or is not statutory sanction for the Inland Revenue practice of making an allowance to the taxpayer in a subsequent year, when a debt, originally taxed on face value, turns out to be worth less than the figure upon which the taxpayer paid, or even to be wholly irrecoverable. Is the practice (a) lawful; (b) devoid of legal sanction; or (c) contrary to law and therefore prohibited?

What is really the same legal problem from the taxpayer's angle, though argued for the appellant as a separate point, may be posed in terms of the con-

venient accountancy usage of bringing the item "sundry debtors" forward at the beginning of the annual account, and then allowing for bad debts, first discovered to be bad in that year, in the carry-forward of sundry debtors from that year's to the next year's account. This way of bringing forward a lump sum for sundry debtors, as for stock-in-trade, at the beginning of the year, and carrying a comparable figure forward at the end of the year, has led to the use of the phrase "circulating capital" as a description of such items. Question (6) might, therefore, be: "Are the above commercial ways of treating debts, which are intended to bring the accountancy results of businesses carried on for profit into harmony with their true commercial results over a succession of years, consistent with income tax law? If the answer is No, as it may well be, a very serious defect exists in our tax legislation, and one which calls loudly for statutory amendment."

Bearing all the above aspects of the problem in mind, I start with the present position. The Income Tax Acts contain no provision which in positive terms enacts that, in computing the balance of profits or gains, "debts" are to be brought into charge. The nearest approach to it is the negative direction in r. 3 (i) that "no sums shall be deducted in respect of . . . any debts except" bad or doubtful debts. That rule seems to assume that the merchant's annual account exhibiting the profits or gains of his business will, or may, contain not only actual receipts (in cash or value), but also amounts only receivable in future years, not yet in-gathered, because credit has been promised in the contract or gratuitously permitted.

It is impossible to read the rule without recognising its apparent assumption that some debts may be commercially an element in the annual balance of profits, and may, therefore, appear as items on the receipt side of the account on which the taxpayer is to be assessed. The statutory position of debts is thus in my opinion so ambiguous that it is right to examine the history of the relevant legislation both in its language and by reference to contemporaneous practice in business.

So far as I know, debts have never in any Income Tax Act been expressly brought into charge as an ingredient of profits. The nearest approach is the above implication of chargeability in r. 3, and its predecessors in earlier Acts. In the 1799 and 1803 Acts there was no reference to debts even in that restricted context.

The germ of the "no deductions" rule first appeared in sect. 84 (Sched. D section) of the 1803 Act, but was there limited to the topic of "repairs." "Debts" were first mentioned in the rule in sect. 112 (Sched. D section) of the 1806 Act, which repeated r. 3 of the 1803 Act about repairs and added many of the prohibitions against deductions now contained in the 1918 Act, Sched. D, cases I and II, r. 3. The 1806 form of the rule about debts was:

. . . nor for any debts, except such debts, or such parts thereof as shall be proved to the satisfaction of the commissioners respectively to be irrecoverable and desperate.

The provision for a deduction was there limited to debts wholly or partly bad, doubtful debts not being mentioned. Income tax was abandoned after Waterloo and not revived till the 1842 Act. The Act of 1806, r. 3, was then re-enacted, most of it in almost identical language, in sect. 100 (Sched. D section), but the dramatic epithets about "debts" were abbreviated into the plain word "bad"—"nor for any debts except bad debts proved to be such to the satisfaction of the commissioners"; but, in my opinion, the substitution of the epithet "bad" for "irrecoverable and desperate" made no relevant change of meaning. "Doubtful" debts were first brought in by the 1853 Act, sect. 50 of which provides that: "In ascertaining estimating or assessing profits of any person chargeable . . . it shall be lawful to estimate the value of all doubtful debts due or owing to such person"; and then, after making the bankruptcy provision which is repeated in the 1918 Act, r. 3, adds: "and the duty chargeable . . . shall be assessed and charged upon the estimated value of all such doubtful debts accordingly." This addition was not re-enacted in the 1918 Act, Sched. D, cases I and II, r. 3—I think probably because it was thought to be redundant.

Before discussing the above history of r. 3 (i), I call attention to the language about doubtful debts used in sect. 50 of the 1853 Act. The words "due or owing to such person" were really superfluous. They were evidently inserted

only to make it doubly clear that it was debts owing to and not by the taxpayer with which the section was concerned.

In the next session after the Income Tax Act, 1853, Parliament passed the Common Law Procedure Act, 1854, sects. 60-67 of which introduced the process of attachment of debts into our common law system, and made it applicable not only to debts "due or owing," but also to debts "accruing," though payment of the latter type of attached debt could not be enforced on the garnishee until it had accrued due.

A R.S.C., Ord. 45, is from this angle a mere repetition of the Common Law Procedure Act. The two words "due" and "owing" in the Income Tax Act, 1853, were, in my opinion, tautologous, the "or" being only exegetic; the whole phrase meant a debt of which the due date for payment had arrived so that the debt was then "owing." This is borne out by the definition of the word "debt" in the Oxford dictionary :

B Debt. 1. That which is owed or due : anything (as money, goods, or service) which one person is under obligation to pay or render to another : *a*, a sum of money or a material thing. 1596 Shakespeare : *Taming of the Shrew* iv.iv.24 : "Having come to Padua to gather in some debts." 1845 Stephen's *Laws of England* II, p. 144 : "Whenever a man is subject to a legal liability to pay a sum of money to another, he is said to owe him a debt to that amount."

C The addition of the alternative epithet "accruing" to the word "debts" in the sections of the Common Law Procedure Act, 1854, about attachment of debts, thus affords a significant contrast to the omission of it in sect. 50 of the 1853 Act. It invites the inference that Parliament in the years 1853-1854 realised quite well that, if debts which were merely "accruing," but not yet "due or owing," were to be brought in, it was essential to add the words "or accruing," because the meaning of the bare word "debts" did not go beyond debts already due for payment and therefore presently recoverable, that is to say, such debts as would found a bankruptcy.

D In the bankruptcy legislation of the 18th century, a "debt" always meant a debt of which payment was already due. Even in the Income Tax Act, 1842, it seems to me difficult to suppose that the legislature could have intended to legislate for deduction of debts as "bad," if they were not due for payment till future years; the intention must surely have been to legislate about debts which had proved "irrecoverable," that is to say, because they had fallen due for payment, but had not been paid, and because some further fact was known such as the bankruptcy, insolvency or disappearance of the debtor which made the prospect of enforcing payment hopeless.

E That such must have been the intention of Parliament in 1806 seems to me plain from its picturesque language used to describe bad debts—"irrecoverable and desperate." I reject as absurd any contention that the change of those two words into the one word "bad" in 1842, is any indication that the legislature was then intending that debts, not payable in the year, upon which the assessment was to be based, should be brought in, or that the deduction for bad debts was to apply to any debts except those of the same category.

F If, in spite of the statutory history of the language used, it be thought that there still remains any ambiguity in the meaning of the rule, I think the doubt should be disposed of on another ground. In 1806 the methods of business in the trades and manufactures to which Sched. D, case I and its rules were addressed were very different from what they had become in 1918 : and the language of 1806 should be construed in the light of those characteristics of profit-making businesses which were familiar to Parliament in 1806.

G If the natural meaning of the unqualified word "debt" in the English language was at that time a debt which has accrued due for payment, that *prima facie* is the proper interpretation of it in any contemporaneous legal context ; and that should still *prima facie* be its interpretation, even if popular usage may have enlarged its meaning in the course of time since the statutory or other legal context took shape.

H If the change in popular usage, which has led to the wider denotation, has itself resulted from changes in methods of business in the intervening years since the date when the legal context in question took shape, that is not merely a *prima facie* reason, but an almost conclusive reason for not giving the old word

in the old legal context—particularly in a taxing Act—the new meaning which has gradually become attached to it by popular usage.

It may be that an extrinsic change of this kind, in regard to the scope of the word “debts” in common parlance, has occurred since 1806. At the end of the 18th century long credit was common, but rarely, I think, under contractual postponement of due dates for payment. Since then business changes have, of course, been immense. The whole system of limited liability has grown up since the middle of the 19th century.

Many contractual methods were then unheard of which today give rise to long fixed credits, especially for payment by instalments. The search for profitable outlets for enterprise has led to strenuous endeavours to find new markets; and in the home market the vast size of the employed population of the United Kingdom has attracted attention, and stimulated ingenuity in the discovery of means of making large profits out of what may be regarded as mass contracts with persons having definite wants but small incomes with which to satisfy them.

The successful prosecution of such a plan imposes two conditions—the acceptance of payment for an expensive article by degrees out of the purchaser's small current earnings, and the discovery of some kind of security to reduce the risk attaching to such extended credit. “Easy payment” is essential to create the market demand: but with reasonable security against default large profits may result. I think that that is the history for instance of hire purchase.

The more elaborate, but essentially similar, system of speculative building of houses for persons of small means is equally the result of the same economic causes, although it could not have grown up without the building societies, which finance so large a part of each transaction as to make the credit risk for the speculating builder a business proposition sufficiently safe to attract him.

There were small building societies earlier, but the first of the large modern building societies was apparently registered in 1847—that is, not until 5 years after the Income Tax Act, 1842. For the modern magnitude of building societies' operations and the dates when the societies started, see Whitaker's Almanack for 1943, pp. 558-560. Long term instalment contracts are an essential ingredient of all such businesses—nay, more, they are their absolute foundation.

I regard it as an anomaly that any debt, even one payable in the standard year, should be brought within an income tax assessment as if it were a cash receipt, and an injustice, unless complete relief can be given in respect of tax paid upon debts so brought in if and when in subsequent years they prove to be wholly or partly irrecoverable; and indeed, in justice, such relief should include interest on the money so overpaid to the revenue. None the less, having regard to the statutory history of the practice and of r. 3 (i), I have, as I have already said, assumed (without expressing any opinion) the legality of the practice of charging the taxpayer in respect of debts contracted and due for payment within the year; but I reject the argument for the Crown that all debts, in the wide meaning which they give to the word, are intended by the Acts to be treated as the equivalent of cash, unless proof is forthcoming, before the assessment of “the balance of profits and gains” becomes final and conclusive, that they are bad or doubtful; and also the Crown's further argument that they are to be included for purpose of charge at their face value. The judgment of the Privy Council, delivered by LORD BUCKMASTER, in *Gleaner Co. v. Assessment Committee* (3) at p. 173 (where the Jamaican law was the same as our own) lays it down quite clearly that no deduction for the badness of a debt can be made except in the self-same assessment as contains the original credit entry of the debt: but, on the other hand, their Lordships carefully limit the debts which can be brought into an assessment to those which have accrued due for payment in the year on which the assessment is based.

It is in truth vital in all the questions which I have posed in this judgment never for a moment to forget the legal position that each year of assessment is for all purposes self-contained; and that once the assessment has become final and conclusive, it cannot be re-opened or altered, unless there is some express statutory provision for that purpose—whether in favour of the Crown for additional assessment, or in favour of the taxpayer for adjustment of losses, or for rebates.

In *Gleaner's* case (3), at p. 174, the Privy Council said categorically, that there is no legal provision in English legislation for any allowance or deduction for bad

or doubtful debts except out of the profits to be brought into charge in the year of assessment. On p. 175 the Board discusses the very practice which has been followed by the appellant's accountant and by the income tax authorities for years in dealing with the present appellant's assessments; a practice which has been indorsed by the commissioners who stated the present special case.

At p. 175, LORD BUCKMASTER said:

Their Lordships are unable to attach any weight to this practice.

A In truth, it was recognised by both sides before us that any such practice is wholly extra-legal.

I, therefore, approach the problem of construing r. 3 about debts with the conviction in my own mind that Parliament did not intend any allowance to be made for debts charged at their face value in one year of assessment if and when they should prove in subsequent years to be bad or doubtful. It would be so grievously unjust for no remedy to be available to the subject in such a calamity—
B for it might well be for him a most serious financial calamity—that, unless the words of the rule, or of some judicial exposition of the rule binding on this court, are too clearly against the view which I take to permit of doubt, I think we should construe the words “any debts” in respect of which “no sum shall be deducted” in a way which will prevent that injustice.

C And in that context I pray in aid the rule of interpretation of ambiguous language in favour of the taxpayer. I also bear in mind that the context in connection with which the “debt” is to be scrutinised is the account of profits upon which the assessment is founded.

In *Russell v. Town and Country Bank* (4), LORD HERSCHELL said, at p. 424:

D The duty is to be charged upon “a sum not less than the full amount of the balance of the profits or gains of the trade manufacture, adventure or concern”; and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purpose of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed, you do not ascertain, and cannot ascertain, whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word “profits” in relation to any trade or business. Unless and until you have ascertained that there is such a balance,
E nothing exists to which the name “profits” can properly be applied.

In *Gresham Life Assurance Society v. Styles* (5), LORD HERSCHELL said, at p. 322:

When we speak of the profits or gains of a trader we mean that which he has made by his trading.

F In the present case, how can it possibly be said that the appellant made in the year 1934-1935 profits to an extent measured by the face value of the totality of instalments thereafter payable to him under his second mortgages over a future period of 14 years or so?—or even of his promissory notes payable over 4 years?

G The only way of preventing that injustice, which will also be consistent with the implied provision (which I have assumed) that some “debts” are to be brought in, is to construe the word as limited to debts which fall due for payment in the accounting period on which the assessment is based. This would exclude altogether debts not payable at all till after the end of the standard year and all future instalments falling due for payment after that date.

H On the whole, I think that is the right view to take about the inclusion of debts as the general result of income tax law as well as of r. 3 (i). Such a reduction of the assessment figures in the present case should, in my opinion, be made for each year in question as will exclude all instalments not yet due for payment in that year.

That leaves one question still open—the question about bad or doubtful debts. If such badness or doubt can be shown in regard to a debt or a particular instalment of a debt falling due in a relevant year, before the assessment then open is finally closed, an allowance can be demanded in respect of the debt or instalment which falls due within that period. If in that year the debt becomes “bad,” no instalment will have been paid, and relief will be obtainable under my previous conclusion. If evidence is forthcoming that such a debt is

"doubtful," though not definitely "bad," some allowance can be made for that year, leaving future doubts or defaults to be settled in future years.

The problem of how to value doubtful debts which are presently payable remains, though it is not necessarily involved in our decision to-day. I venture to express the opinion that the only satisfactory solution for what must be a very common hardship, especially in these days of financial difficulties, is a legislative amendment putting the taxation of profits on to the footing of actual receipts so that, in the words of LORD HERSCHELL, the man taxed on his business under Sched. D, case I, will in fact only have to pay on "the profits he has made."

No judicial countenance can or ought to be given in matters of taxation to any system of extra-legal concessions. Amongst other reasons, it exposes revenue officials to temptation, which is wrong, even in the case of a service like the Inland Revenue, characterised by a wonderfully high sense of honour. The fact that such extra-legal concessions have to be made to avoid unjust hardships is conclusive that there is something wrong with the legislation.

The taxpayer ought to know where he is, and the fact that there are great temptations to avoid the tax-gatherer's net, especially with present rates of taxation, is not, in my opinion, any reason for tolerating the continuance of an unfair provision in the tax legislation of the country. However, LUXMOORE and DU PARCQ, L.JJ., differ, and judgment will be as they direct.

I have read and considered their judgments with care. I cannot agree with them, but differ with doubt in what appears to me to be a very difficult case. That some legislation is needed, I feel convinced. How much, depends on what the law now is. I hope that this case may go to the House of Lords, as I think it of high public interest that the difficult question which it raises should be elucidated there.

The appeal should, in my opinion, be allowed, and the case remitted to the Special Commissioners to adjust the assessments in accordance with the principles laid down in this judgment.

LUXMOORE, L.J.: The problem to be solved is how ought the annual profits of a builder to be assessed for income tax where the method of trading consists in the purchase of land and its development as a building estate by the erection thereon of houses which are sold to purchasers of small means on the terms that a part only of the purchase price is paid on completion while practically the whole of the balance is payable by instalments spread over a number of years and secured either by promissory notes or second mortgage.

The Special Commissioners held that the builder was bound to bring into account at face value for the year when the contract for sale was made (a) the part of the purchase price paid in cash and (b) the part which was made payable by instalments. The builder appealed from the decision of the Special Commissioners and contended that the outstanding part of all purchase money in respect of sales made in a particular year of assessment ought to be valued as at the end of that year or, alternatively, that, if it was not possible to make such a valuation, each instalment should be treated as a trading receipt in respect of the year in which it was received and not in respect of that in which the sale was made.

The appeal came before MACNAGHTEN, J., who held that the decision of the Special Commissioners was correct for the reasons given by them. The builder has appealed to this court.

The material facts are as follows: The appellant, F. R. Absalom, carried on business at all material times to Dec. 31, 1937, when he retired. The business in which he had been engaged is described as that of a speculative builder, though I doubt if there is any distinction between the business of a builder with or without the adjective. In the course of his business, Absalom purchased building land, mainly at Erith and Bexley Heath, developed it for building in the usual manner, and erected on it a large number of small dwellinghouses. These houses were intended to be sold and were in fact sold mainly to persons in receipt of weekly wages without sufficient capital to purchase a house outright. In consequence, Absalom made arrangements under which the purchaser of a house could borrow on first mortgage from a building society a sum equal to between two-thirds and three-fourths of the purchase price.

The money so borrowed was paid to Absalom in satisfaction *pro tanto* of the

purchase price, the difference between the purchase price and the amount raised on first mortgage being satisfied by a small payment in cash and as to the balance either by a second mortgage of the property purchased or by a series of promissory notes. In each case the balance of the purchase price was payable by instalments extending over periods varying from 4 to 15 years, but subject to a proviso that the whole of any outstanding balance of purchase money was to become payable immediately if default should be made in the payment of any instalment.

A The total amounts of the assessments to which this appeal relates are £87,000 for the tax year ending Apr. 5, 1935, £48,000 for the year ending Apr. 5, 1936, £24,000 for the year ending Apr. 5, 1937, and £30,000 for the year ending Apr. 5, 1938. No final assessment has been made in respect of these years and in the circumstances it remained open to Absalom to challenge the assessments.

B The Special Commissioners found that all the trading accounts of Absalom from 1933-1936 had been prepared on identical lines: the figures for sales of houses in each year included, in addition to the moneys actually received by him in respect of purchase price and deposits, the actual sums secured by second mortgage or promissory notes as the case might be.

C These last-mentioned sums were brought into the accounts of the year at their respective face values without any deduction or allowance; but the inspector of taxes had in each year allowed a deduction to be made in respect of moneys secured by second mortgage or promissory note in respect of sales effected in earlier years when the moneys so secured had proved to be irrecoverable during the year when the allowance was made.

The Special Commissioners held that, on the granting of a second mortgage or a series of promissory notes by the purchaser of a house, a trade debt due from the purchaser to Absalom was created and that in computing his profits and gains it must be included at face value in the account for the year under consideration.

D The language of this finding, I think, gave rise to some misapprehension during the course of the argument of the appeal, for it was treated as referring to the face value of the instalments payable under a second mortgage or a series of promissory notes. The position is, perhaps, best explained by reference to the documents relating to the purchase of a house by one Mayhew which are annexed to the special case. The total purchase price was £425. £40 was paid by the purchaser in cash, £320 was raised by first mortgage and paid to the vendor, while the remaining £65 was secured by second mortgage of the house to Absalom. This last mentioned sum was made payable by monthly instalments of 8s. 2d. extending over a long period of years, each instalment being made up partly of capital and partly of interest at $5\frac{1}{2}$ per cent. per annum. The aggregate of these instalments was naturally far larger than £65 but the sum brought into account for income tax purposes was £65.

F On the form of the transaction the whole of the purchase price was paid by the purchaser to the builder, who then advanced a part of the purchase price on the security of a second mortgage or a series of promissory notes. From this point of view no question could possibly arise, for the payment of the whole purchase price has been made by the purchaser to the builder; but, in substance, having regard to the financial position of the purchaser, the purchase consideration has been treated as composed of two parts, the first being a sum of cash payable on the conveyance of the property to the purchaser and the balance a sum of cash secured by second mortgage or a series of promissory notes repayable at the option of the purchaser either under the second mortgage or the promissory notes or by instalments spread over a number of years, the instalments being so arranged as to provide for the repayment of the balance left unpaid at the date of conveyance with interest at $5\frac{1}{2}$ per cent. per annum by equal monthly payments during the whole of that period.

H The option was in fact exercised by the purchaser and consequently the unpaid balance became repayable by instalments which included both capital and interest. The earlier instalments were composed chiefly of interest while the later instalments were composed chiefly of capital. The arrangement also included a term that, if default was made in the payment of any instalment, the vendor could at once insist on the repayment of the capital sum then outstanding with the appropriate interest.

The result of the transaction was that the £65, the unpaid balance of purchase money, remained due to the vendor from the purchaser, but the purchaser had

the right to repay it by instalments with interest at the agreed rate. It is true that, if the purchaser exercised his option to repay by instalments and performed his obligations, the vendor could not require repayment of the debt except in the manner agreed, but in order to ascertain the vendor's profits and gains the transaction had to be brought into the accounts for the year when it took place.

Counsel for the appellant, on behalf of the builder, argued that the transaction did not constitute a debt within the meaning of Sched. D, cases I and II, r. 3 (i), and that he was entitled to treat the second mortgages or series of promissory notes as items of property having money values which after being valued ought to be brought into account at those values.

This argument was said to be based on the decision in *Harrison v. Cronk & Sons, Ltd.* (1). In my judgment, it must be rejected, for it is plain that in the case cited the subject-matter of the valuation was not of anything provided by the purchaser, but of a deposit made out of the purchase price by the vendor in favour of the building society which might, either in whole or in part, be irrecoverable by the vendor.

In my judgment, where the purchaser elects to pay part of his purchase price with interest by equal instalments over a number of years, the vendor is bound, for the purpose of ascertaining his annual profits, to bring in the capital value of the instalments at a sum equal to the capital sum repayable by those instalments. This has nothing to do with and cannot be described as making a deduction from debts represented by the instalments. It is an ascertainment of the profits by reference to the sale consideration. Those parts of the instalments which represent interest are properly excluded from the account and are subject to income tax in the respective periods when they are received.

No question is raised by either side in respect of the valuation of the instalments at a sum equal to the outstanding part of the purchase price, but it is argued on behalf of Absalom that he is entitled to take into account in the valuation of those parts of the instalments which represent capital the fact that there is uncertainty that the instalments will be paid in full owing to the fact that the security is insufficient and the purchaser may be unable to pay if he should from illness or other cause cease to be a wage-earner. It was further argued that unless he is so entitled he is likely to suffer hardship.

The answer to the question whether the contentions of counsel for the appellant are correct or not depends solely on construction. What is the true nature of the purchaser's liability to pay the outstanding balance of his purchase price? Is it a debt or does it constitute property falling into some other category? In ordinary parlance "debt" is the proper description to be applied to money which is owing and remains unpaid, whether the due date of payment has arrived or not, as witness the well-worn phrase "*debitum in praesenti solvendum in futuro*." With all respect to SCOTT, L.J., I can find nothing in the Acts or rules to control the meaning of the word "debts" in r. 3 (i) so as to limit it to debts due and payable. The rule provides that:

In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of . . . (i) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent they are respectively estimated to be bad.

In my judgment, the capital sums secured by the second mortgages and promissory notes are debts within this description and are none the less so because they are said to be secured by second mortgages or promissory notes.

Counsel for the appellant admitted in the course of his argument that he was not in a position to prove that in the year when a sale was effected the purchaser's debt was either bad or doubtful, and consequently he had no answer to the argument put forward on behalf of the Crown if Sched. D, cases I and II, r. 3 (i), applied. With all deference to counsel, I think it might well be open to Absalom to prove that, having regard to the class of persons who constitute his purchasers and to the actual experience of past years of trading that a percentage of debts outstanding in respect of houses sold in fact turns out to be irrecoverable, the whole of the debts incurred in any year are doubtful and consequently a percentage deduction could be made in respect of them to cover the estimated proportion expected to be found to be irrecoverable. But this aspect of the case cannot arise on this appeal.

I have arrived at the conclusion that the finding of the Special Commissioners and the judgment of MACNAGHTEN, J., were correct, and consequently, in my opinion, this appeal should fail, with the usual consequences.

DU PARCQ, L.J.: The only question to be determined on this appeal is whether it was proper to apply r. 3 (i) of the rules applicable to Sched. D, cases I and II in the computation of the appellant's profits and gains. If the answer is Yes, then by common consent two results follow: (1) The full amount of the debt must be brought into account in the year when it was incurred, subject to such deductions as the rule permits; (2) The proof or estimate of bad and doubtful debts under the rule must, in strictness, be made in, as well as for the purposes of, the year of assessment.

In order to answer the main question it is necessary to dispose of two subsidiary questions. First, do the words "any debts" in the rule extend to include debts which are *debita in praesenti solvenda in futuro*? In my opinion, the answer is that since r. 3 deals with the computation of profits and gains, the words "any debts" must be taken to include all obligations which a trader would naturally describe as "debts" and as such would bring into the computation as assets. If this opinion is right, there can be no doubt that debts which, *ex contractu*, are payable in the future, fall within the description "any debts."

I do not think that the fact that the contract provides for payment of the debt by instalments affects the question. If a debt the payment of which is postponed for a long time is a "debt" within the rule, it can make no difference that the contract requires the obligation to be performed not by a lump sum payment at the end of a period but by a series of payments spread over a period. It is to be observed that in the present case the debtor might, if he chose, upon giving the statutory notice, pay off his debt without taking full advantage of the provision in the second mortgage by which, if the debt were paid by instalments, the appellant (the mortgagee) bound himself to accept such payment. If the debtor elected to do this, however, he would still be liable to pay the full amount of the principal.

No question arises in this case, therefore, as to the proper method of computation in the case of a contract which gives the debtor a choice between paying a smaller sum within a short period, or a larger sum by instalments over a longer period. It may no doubt be said that the appellant would have been prepared to take a smaller sum for each of his houses if the buyer had been prepared to make a cash payment. That is likely enough, but we can only look at the contract in fact made and the amount in fact payable thereunder.

It was suggested in the course of the argument that, though it might be reasonable to insist that a creditor who was entitled to immediate payment should bring the full value of the debt into his computation, it would be unreasonable to apply the same rule to a creditor who was bound by contract to give time for payment. This was put forward as a ground for rejecting the view (which I have adopted) that the legislature meant to include in the rule debts payable *in futuro*.

I do not think, however, that the suggested distinction can properly be drawn. The creditor who gives long credit to a debtor from whom payment is immediately due may be said to be according the credit voluntarily, although in the case of an elusive or insolvent debtor the creditor's willingness to wait is not always the most striking feature of the transaction. In truth, however, the creditor who binds himself by contract to give credit shows at least as much willingness to give it as the creditor who is induced to give it though in law he need not do so. Indeed, since the former enters with his eyes open into a transaction according to the tenor of which he will certainly have to wait for his money, his grant of credit seems to me to be more obviously voluntary than that of a man from whom credit is extracted notwithstanding the terms of a contract which demands prompt payment.

The second subsidiary question is this: In the circumstances of the relevant transactions, is it right to say that a debt remained due from the purchaser of each house, or is the true view that the appellant received part of the purchase consideration in the form of money's worth? It is, in my opinion, reasonably plain when the substance of the transactions is looked at, that in each case a

debt remained due. It was a secured debt, but none the less a debt. Technically it may be said as to the sum secured by second mortgages that the appellant had received payment and re-invested the sums paid, but it would avail him nothing if this technical view were taken.

The suggestion that he took the second mortgage not as security for his debt, but as a form of payment of the debt equivalent to, for example, a transfer of shares, seems to me to accord less with the reality of the transactions than does the view taken by the commissioners and by MACNAGHTEN, J., with which I agree. A

I now turn to a consideration of the rule itself. I take it to mean that (subject only to the exceptions specified therein) all debts must be brought in on the credit side of the computation of profits and gains without deduction.

It is, I think, pertinent to inquire what are the deductions which the legislature had in mind as being deductions which, apart from the prohibition contained in the rule, the subject might be minded to make. Now, it is plain that a debt payable *in futuro* has less value than a debt already paid or presently payable because of the risk that it may never be paid at all. B

One other reason, and I think the only other reason, for saying that a debt payable *in futuro* may have less value than a debt presently payable is that the creditor has not the use and enjoyment of the money until he is paid. I say "may have less value" advisedly; because it may be that, if the debt is secured and satisfactory provision has been made for the payment of interest while it remains unpaid, the creditor will consider that he has made a good investment and prefer that early repayment should not be made. C

One can well understand, however, that, but for the provisions of the rule, a creditor who has given long credit, whether *ex contractu* or as a matter of commercial policy, or because of a combination of forbearance on his part and dilatoriness on that of his debtor, might have made a plausible and perhaps a convincing case for deduction from the total of the debt, which he is bound to bring into account in the year when it is incurred, of a sum representing the loss which he suffers through waiting for his money. He might not unreasonably make such a claim even though he was willing to admit that the debt would in all probability be paid in the end. D

The effect, and, as it seems to me, the intention of the rule is to prohibit any such deduction, and I can see no sufficient answer to the contention of the Crown. It was said, no doubt truly, that when the rule first came into existence the type of transactions with which we are here dealing was unknown. Credit, and long credit, was, however, commonly given in some trades 100 years ago, and the literature and social history of the period teach us that many persons were willing to take advantage of it, sometimes to their ultimate undoing. E

It may well be that a strict application of the rule to conditions not originally envisaged by the legislature will result in hardship, but it is not the duty of the courts, when times and conditions change, to put a new interpretation on statutory provisions so as to mitigate their possible harshness. If changed conditions demand a change in the law, Parliament alone can change it. F

Much was made in the argument for the appellant of the difficulties standing in his way if he sought the allowance of a deduction on the strict terms of r. 3 (i). It is, indeed, obvious that in the year when a debt is incurred it must be difficult to prove that it is bad or doubtful, and, when it is shown to be doubtful, to estimate the extent to which it is bad. G

The difficulties must often be insuperable if it is necessary to base such proof or estimate on an examination of each particular debt and of the circumstances of each individual debtor. Whether it would be legitimate in dealing with such a business as that of the appellant to rely on proof that, according to commercial experience, a certain proportion of bad debts is normal in this branch of commercial activity and to apply the law of averages in making the estimate which the rule permits, is a question which I will not now seek to answer. H

It is enough to say that, if, as I think, the appellant cannot be allowed any deduction except that permitted by the rule, he has already received the allowance to which he is entitled, although he has agreed to take it in a form which has no statutory sanction. I would add that, if the provisions of the statute are strictly observed, it must almost always be difficult to estimate the degree of badness of each particular debt even where comparatively short credit is given. To do

so requires a prophetic vision which the creditor cannot be supposed to possess : if he were gifted with it, he would have no bad debts.

We were told that, in dealing with some contracts for payment by instalments, the Board of Inland Revenue has devised a method of computation which to some extent may temper the wind to the shorn taxpayer. It might be well if this method were given statutory sanction, but, in my opinion, the fact of its adoption without such sanction cannot affect our decision in this case.

A I would only add, to prevent a possible misunderstanding, that, although the full amount of each debt must, in my opinion, be brought into the account in the year when the house is sold, the same cannot be said of the interest, which can only be taxed in the year in which it is paid. Payment of interest on a debt is not payment of a debt, and the interest to be received cannot be included in the sum of the purchase price.

B I have not referred to the authorities which were cited to us, but I have had them in mind, and, though I think that none of them deals precisely with the points of real difficulty in the present case, I believe that I have said nothing which is inconsistent with them. I have done my best to follow the guidance which they afford.

For the reasons which I have stated, I would dismiss this appeal.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

C Solicitors : *Claude Barker & Partners* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*

D

E

Re RIDLEY.

[CHANCERY DIVISION (Uthwatt, J.), **March 19, 1943.**]

Emergency Legislation—War damage—Instalment of contribution—Proprietary interest subject to mortgage—No receiver at relevant date—Liability for instalment—War Damage Act, 1941 (c. 12), s. 27.

F A lease which was a proprietary interest for the purpose of payment of war damage contribution was subject to a mortgage and a receiver had been appointed in 1916. The property was requisitioned on Sept. 29, 1940, and the local borough council became liable to pay a rent by way of compensation. The receiver died on May 10, 1941, but a new receiver was not appointed until Mar. 25, 1942, and some time after that date the borough council paid over to him the whole of the rent due from the date of requisition :—

G **HELD :** since on Jan. 1, 1942, which was the relevant date for determining the liability in respect of the instalment of contribution payable on July 1, 1942, there was no receiver "in receipt of the whole of the rents and profits incident to the mortgaged interest," there was no liability in respect of that instalment of contribution imposed on the mortgagee by virtue of the War Damage Act, 1941, s. 27.

H

[**EDITORIAL NOTE.** The liability for an instalment of contribution is fixed by the rights of the various parties on Jan. 1 in any year although the instalment does not become payable until July 1. The relevant date for determining liability is, therefore, Jan. 1. Since there was no receiver in existence on that date, it is held that the mortgagee escapes liability in respect of any part of that instalment of the contribution although the receivership was subsequently reconstituted by the appointment of a new receiver.

FOR THE WAR DAMAGE ACT, 1941, s. 27, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 482.]

SUMMONS to determine liability for payment of an instalment of contribution under the War Damage Act, 1941.

M. Turner-Samuels for the applicant.

R. W. Jennings for the respondent.

UTHWATT, J. : The only question that I have to consider is a short question of construction arising on the War Damage Act, 1941, s. 27 (b). That section commences with the words : "Where at the relevant date in any year . . ." The relevant date for the present purpose is Jan. 1, 1942, so, in this particular case, those words should be read : "Where on Jan. 1, 1942 . . ." The subsection then provides as follows :

(b) if there is then subsisting in the property more than one such interest, that one of them which as between them carries the immediate right to possession of the whole of the property, is subject to a mortgage . . .

The lease which I have to consider is a "proprietary interest," and it is subject to a mortgage. It is one of those proprietary interests which carries "the immediate right to possession of the whole property." So far the case falls within the section. The section continues as follows :

. . . and under the mortgage the mortgagee is in possession of the property or the mortgagee or a receiver is in receipt of the whole of the rents and profits incident to the mortgaged interest, the instalment of contribution becoming due in that year in respect of the property shall be payable by the mortgagee . . .

Then certain other subsections are directed to what may follow from that.

In this particular case one Stopher had been appointed receiver in 1916. He continued as receiver under the mortgage until his death on May 10, 1941. No new receiver was appointed until Mar. 25, 1942. The position of the property was then that it had been requisitioned and the local borough council were liable to pay a rent by way of compensation in respect of the requisition. The effect of that position is this. At some date after Mar. 25, 1942, the borough council paid to the new receiver appointed on Mar. 25, the whole rent from Sept. 29, 1940, to Mar. 25, 1942. The question I have to consider is whether in those circumstances one can accurately say that the mortgagee or the receiver was at the relevant date, Jan. 1, 1942, in receipt of the whole of the rents and profits incident to the mortgage interest. The answer to my mind is plainly no. The mortgagee certainly never got them. So far as the receiver was concerned, there was no receiver. It is quite true that the receiver who subsequently was appointed did get the rents covered by that period. Right down to date it is quite true he got those rents ; but there was no obligation on the mortgagee to appoint any new receiver. The fact that the first receiver had died did not put the mortgagees in the position of mortgagees in possession. They remained in exactly the same position as before. To my mind it is wrong to suggest that there is thrown upon the mortgagee as respects the contribution payable on July 1, 1942, the obligation imposed by or referred to in sect. 27. I propose so to declare. The only point which has been raised before me is the construction of sect. 27 and I have nothing to do with the rest of the Act.

Declaration accordingly. No order as to costs.

Solicitors : *Cohen & Cohen* (for the applicant) ; *Foyer, White & Prescott* (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

THE TITHE REDEMPTION COMMISSION v. THE COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.J.J.),
March 8, 9, 10, April 20, 1943.]

A *Ecclesiastical Law—Church in Wales—Tithe rentcharge—Capitular tithe rentcharge vested in Ecclesiastical Commissioners—Lay impropiator—Liability of lay impropiator to repair chancel—Welsh Church Act, 1914 (c. 91), ss. 6, 28 (1)—Tithe Act, 1936 (c. 43).*

By the Welsh Church Act, 1914, s. 28 (1), nothing in that Act was to affect the liability of any lay impropiator of tithe rentcharge to repair any ecclesiastical building. Certain capitular tithe rentcharges were at the material time vested in the Ecclesiastical Commissioners and it was contended for the appellants that the Ecclesiastical Commissioners were lay impropiators within the meaning of the section:—

B **HELD:** (i) the Ecclesiastical Commissioners were not lay impropiators within the meaning of sect. 28 (1) and their powers and liabilities in respect of chancel repairs were put an end to by sect. 6 of the Act.

(ii) sect. 28 contemplates a person whose liability subsists subsequently to the date of disestablishment.

C *Decision of BENNETT, J. ([1942] 2 All E.R. 539) affirmed.*

[EDITORIAL NOTE. In the court below BENNETT, J., considered that he was bound by the decision in *Welsh Church Comrs. v. Representative Body of the Church in Wales* (1) to hold that the Ecclesiastical Commissioners were not lay impropiators within the meaning of the Welsh Church Act, 1914, s. 28. In the Court of Appeal LUXMOORE, L.J., has similarly held that the matter is covered by the previous decision, but LORD GREENE, M.R., and GODDARD, L.J., whilst not altogether differing from this view of the position, have taken the view that the facts before the court in the two cases were not perhaps so identical that the present case could be considered as finally settled by the previous decision, but have shown that the Ecclesiastical Commissioners in the present case, like the Welsh Church Commissioners in the earlier case, are not lay impropiators upon the proper construction of the section in question.

D **AS TO TRANSFER OF ECCLESIASTICAL PROPERTY ON DISESTABLISHMENT OF THE CHURCH IN WALES,** see HALSBURY, Hailsham Edn., Vol. 11, pp. 581, 582, para. 1026; and **FOR CASES,** see DIGEST, Vol. 19, p. 307, Nos. 1062-1065.]

E Cases referred to:

* (1) *Welsh Church Comrs. v. Representative Body of the Church in Wales and the Tithe Redemption Commission*, [1940] Ch. 607; [1940] 3 All E.R. 1; Digest Supp.; 109 L.J.Ch. 245; 165 L.T. 80.

* (2) *Wickhambrook Parochial Church Council v. Croxford*, [1935] 2 K.B. 417; Digest Supp.; 104 L.J.K.B. 635; 153 L.T. 187.

F (3) *A.-G. v. Horner* (1884), 14 Q.B.D. 245; 42 Digest 743, 1679; 54 L.J.Q.B. 227; on appeal (1885), 11 App. Cas. 66.

(4) *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.*, [1919] A.C. 744; 42 Digest 705, 1217; 88 L.J.Ch. 464; 121 L.T. 361.

G **APPEALS** by the defendants the Representative Body of the Church in Wales and the defendants Plymouth Estates, Ltd., from an order of BENNETT, J., dated Oct. 26, 1942, reported [1942] 2 All E.R. 539. The facts are fully set out in the judgment of LORD GREENE, M.R.

R. F. Roxburgh, K.C., W. G. Hannah and R. Gwyn Rees for the appellants, the Representative Body of the Church in Wales.

Wilfrid M. Hunt for the appellants, Plymouth Estates, Ltd.

C. S. Newcastle, K.C., and Meyrick Beebe for the respondents, the Commissioners of Church Temporalities in Wales.

H *Meyrick Beebe* for the respondents, the University of Wales.

W. F. Waite for the respondents, the Tithe Redemption Commission.

LORD GREENE, M.R.: Under the provisions of the Welsh Church Acts, 1914 and 1919, tithe rentcharge owned by the Ecclesiastical Commissioners which was ascertained to be Welsh Ecclesiastical property but was not appropriated to the use of any parochial benefice vested as from the date of disestablishment (that is to say, Mar. 31, 1920) in the Commissioners of Church Temporalities in Wales (hereinafter referred to as "the Welsh Commissioners"). Under the Welsh Church Act, 1914, s. 8 (1) (e), the ultimate destination of this

tithe rentcharge was to be the University of Wales. Part of the tithe rentcharges with which we are concerned in this appeal was of this character, the remainder was tithe rentcharge in lay hands forming no part of the endowments of the Church in Wales. Before any transfer to the University of Wales took place, the Tithe Act, 1936, came into force. Under that Act all tithe rentcharge was extinguished on Oct. 2, 1936, with compensation to the owners in the form of redemption stock. Under sect. 31 of that Act provision is made for the liability to repair the chancel of a parish church which arises from the ownership of tithe rentcharge payable in respect of land in the parish. In order to provide for that liability, part of the redemption stock calculated to be sufficient to provide for future repairs is to be issued to the diocesan authority which in Wales is the Representative Body of the Church in Wales. Under Sched. VII to the Act, where the obligation to repair a chancel attaches to the ownership of two or more rentcharges, the stock so to be issued to the diocesan authority is to be taken proportionately from the redemption stock issuable in respect of those rentcharges, the owner of each rentcharge being treated as liable for no more than his due proportion of the cost of the repairs.

The present question arises in the following way. If, notwithstanding the disendowment of the Church in Wales, liability to repair chancels remains attached to the ownership of the tithe rentcharge which, under the Welsh Church Acts, is to be transferred from the Ecclesiastical Commissioners to the Welsh Commissioners and by them to the University of Wales, part of the redemption stock which falls to be issued to the University of Wales as the ultimate transferees will be issuable to the Representative Body to meet the cost of future repairs. If, on the other hand, the liability to repair was extinguished on disendowment, the University of Wales will be entitled to the whole of the redemption stock.

There is a further complication. In certain cases some of the rentcharges payable in respect of lands in a parish were in lay hands and their ownership was not affected by the Welsh Church Acts. Thus, in the case of the parish of Llantwit Major, Glamorganshire, tithe rentcharges amounting to £481 7s. 11d. belonged to the Ecclesiastical Commissioners while tithe rentcharges amounting on Oct. 2, 1936, to £64 4s. 2d. belonged to the Plymouth Estates, Ltd., whose title is not affected by the Welsh Church Acts. If, therefore, the liability in respect of repairs to the chancel of the parish church which formerly attached to the ownership of the former rentcharges was extinguished by the disendowment, no apportionment in respect of the liability to repair can be made upon the issue of redemption stock. Consequently, Plymouth Estates, Ltd., will have to suffer a deduction from the stock issuable to it of an amount sufficient to meet, not a proportion, but the whole of the cost of future repairs to the chancel. As will appear later in this judgment, even if tithe rentcharge had never been extinguished as it was by the Tithe Act, 1936, on the hypothesis stated, a corresponding result would have followed and Plymouth Estates, Ltd., would have been left to carry the whole burden of the repairs without any right of contribution against the Welsh Commissioners or the University of Wales.

For the purposes of this appeal, tithe rentcharge payable in respect of land in Wales can be divided into two classes, namely, tithe rentcharge the title to which is divested by force of the Welsh Church Acts and tithe rentcharge the title to which is left unaffected by those Acts. The former class vests in the Welsh Commissioners on the date of disestablishment and is by them transferable as to one of two sub-classes to the county councils and as to the other to the University of Wales. The tithe rentcharge which is to be transferred to the county councils is that which was formerly appropriated to the use of any parochial benefice (Welsh Church Act, 1914, s. 8 (1) (c)) : the tithe rentcharge which is to be transferred to the University of Wales includes all tithe rentcharge ascertained to be Welsh Ecclesiastical property which was not so appropriated and includes the tithe rentcharge formerly belonging to the Ecclesiastical Commissioners with which we are concerned in this appeal. For convenience I will refer to the tithe rentcharge which is to be transferred to county councils as "tithe rentcharge in spiritual hands," to the tithe rentcharge which is to be transferred to the University of Wales as "tithe rentcharge belonging to the Ecclesiastical Commissioners" and to tithe rentcharge in the hands of lay

impropriators such as Plymouth Estates, Ltd., whose title is not affected by the Welsh Church Acts as "laicised rentcharge."

A It is not in question that before the date of disestablishment liability in respect of chancel repairs attached to the ownership of tithe rentcharges of each of these three classes. That liability existed and was enforceable under ecclesiastical law which ceased to exist as law as from the date of disestablishment (Act of 1914, s. 3 (1)). Thenceforward, spiritual rentcharge, so long as it remained in the hands of, for example, an existing incumbent, carried with it the obligation in respect of chancel repairs by virtue of the statutory covenant imposed on members of the Church in Wales under sect. 3 (2) of the 1914 Act, a covenant which does not, of course, affect either the Ecclesiastical Commissioners or the Welsh Commissioners. In the case of laicised rentcharge, the obligation of the lay impropiators in respect of chancel repairs is preserved by sect. 28 of the Act, but under subsect. 2 of that section liability upon a notional covenant is substituted for the liability under ecclesiastical law which had been abolished by sect. 3.

B It is also beyond question that, in the case of tithe rentcharge in spiritual hands, the county councils as transferees were not to be under any liability for chancel repairs. In *Welsh Church Comrs. v. Representative Body of the Church in Wales* (1), this court decided that, during an intervening period when tithe rentcharge in spiritual hands was temporarily vested in the Welsh Church Commissioners, they were under no liability in respect of chancel repairs since in regard to that class of rentcharge they were not "lay impropiators" within the meaning of sect. 28. The question raised in this appeal is different from that decided in the case just mentioned since it is concerned with tithe rentcharge belonging to the Ecclesiastical Commissioners.

C With these prefatory observations I turn to the Welsh Church Act, 1914, D s. 28, which provides as follows :

(1) Nothing in this Act shall affect any liability to pay tithe rentcharge, or the liability of any lay impropiator of any tithe rentcharge to repair any ecclesiastical building, but a county council shall not, by reason of being entitled to or receiving any tithe rentcharge under this Act, be liable for the repair of any ecclesiastical building. (2) Such liability as aforesaid of a lay impropiator may be enforced in the temporal courts at the instance of the representative body in like manner as if such liability arose under a covenant made with the representative body and running with the tithe rentcharge.

E It was held by BENNETT, J., that, although the Ecclesiastical Commissioners were lay impropiators in the ordinary sense of that expression, they were not lay impropiators within the meaning of this section. He based his conclusion upon certain words contained in the judgment of MACKINNON, L.J., in the case referred to. BENNETT, J., in my opinion, came to the right conclusion : but, as I do not think that MACKINNON, L.J., was intending to refer to anything but the facts then before the court, I prefer to consider the matter without reference to the words upon which BENNETT, J., relied.

F The argument for the appellants was of this nature. The Ecclesiastical Commissioners were, it was said, immediately before disestablishment, "lay impropiators" : their liability in respect of chancel repairs was, therefore, expressly preserved by sect. 28. But, as upon disestablishment the tithe rentcharge belonging to them was *ipso facto* transferred to the Welsh Commissioners, the section, it was said, must be construed as imposing upon the Ecclesiastical Commissioners, simultaneously with the divesting of their title, a liability in respect of repairs under the statutory covenant imposed by subsect. (2). This covenant, it was conceded, could never have any operation as against the Ecclesiastical Commissioners themselves since they ceased to be owners of the H rentcharge simultaneously with its imposition ; but, as the statutory covenant is to run with the tithe rentcharge, it binds the Welsh Commissioners as transferees of the rentcharge and (but for the Tithe Act, 1936) would have bound the University of Wales as transferees from the Welsh Commissioners. In other words, Parliament intended the following operations to be treated as taking place simultaneously : (1) divesting of the title of the Ecclesiastical Commissioners ; (2) while the title was, so to speak, *in transitu*, the imposition of the statutory covenant upon the Ecclesiastical Commissioners ; (3) vesting of the tithe rentcharge in the Welsh Commissioners subject to the statutory

covenant. I think it unlikely that the clear and simple language of the section was intended by the legislature to cover conveyancing acrobatics of such a complicated and artificial kind as this. But the argument requires closer examination.

The object of the Welsh Church Acts was the disestablishment and disendowment of the Church in Wales. Disestablishment was effected by sect. 3 of the 1914 Act, disendowment by the provisions of that Act relating to property belonging to or held for the benefit of the Church. The property affected is described in sect. 4 of the Act and does not include property which, although in origin ecclesiastical, had been laicised before the date of disestablishment as, for example, the tithe rentcharge belonging to Plymouth Estates, Ltd. The provisions of the 1914 Act which brought about disendowment are contained in Pt. I under the captions "Vesting of Property" (sects. 4-7), "Distribution of Property" (sect. 8), and "Border Parishes" (sect. 9). The machinery of disendowment falls into two parts, first the divesting of church property from its owners and its vesting in the Welsh Commissioners who are a transitory and purely administrative body, secondly, its distribution among three bodies or groups of bodies subject to special provisions with regard to burial grounds. Those three bodies are the Representative Body, the county councils and the University of Wales. Tithe rentcharge, formerly in spiritual hands, was to be transferred to the county councils and tithe rentcharge formerly belonging to the Ecclesiastical Commissioners was to be transferred to the University of Wales. Sect. 19 provides for the application of church property after its transfer to the county councils and the University respectively.

Sect. 6 is for present purposes important. It provides that as from the date of disestablishment, any liability or power of the Ecclesiastical Commissioners to make payments for any ecclesiastical purpose in or connected with the Church in Wales shall cease. Sect. 28, under the language of which liability for chancel repairs is said to follow the tithe rentcharge into the hands of the University, is contained in the 1914 Act, Pt. IV, the title of which is "Supplemental." If the results of the Act down to that point are considered, their effect so far as regards the present question is free from doubt. As from the date of disestablishment the following changes take place, namely, first, as to the rentcharge belonging to the Ecclesiastical Commissioners (i) this rentcharge is transferred to the Welsh Commissioners with a view to its ultimate transfer to the University of Wales, (ii) the powers and liabilities of the Ecclesiastical Commissioners in respect of chancel repairs come to an end under sect. 6, (iii) no liability for chancel repairs attaches to the ownership of the rentcharge in the hands of the Welsh Commissioners (sect. 3). Secondly, as to the tithe rentcharge belonging to Plymouth Estates, Ltd.: (i) the title to this was not affected in any way, (ii) their liability in respect of chancel repairs ceased to be enforceable by reason of the provisions of sect. 3. Bearing this in mind, I turn to sect. 28 in order to see to what extent this supplemental provision affects the situation. As was pointed out by this court in the earlier case above referred to, the section is a saving clause. So far as Plymouth Estates, Ltd., are concerned, their liability in respect of chancel repairs which would otherwise have been extinguished is preserved, but a new method of enforcement under a notional covenant is substituted for the original method of enforcement under ecclesiastical law. This is common ground. Does the section operate in the way suggested to keep alive the liability of the Ecclesiastical Commissioners by subjecting them to the notional covenant simultaneously with the transfer of the tithe rentcharge from them to the Welsh Commissioners? Quite apart from the fact that so striking a modification of the earlier provisions of the Act would not naturally be found in a section described as "supplemental," there appear to me to be two considerations which prevent any such effect being attributed to the section. First, it would be inconsistent with sect. 6 to which I have already referred. That section without qualification extinguishes both the liability and the power of the Ecclesiastical Commissioners in respect of chancel repairs. I do not see how this can be reconciled with a construction of sect. 28 which treats the liability as subsisting, if only momentarily, for the purpose of making the Ecclesiastical Commissioners parties to the notional covenant. Secondly, the language of sect. 28 itself appears to me to contemplate that the party to a notional covenant will necessarily be a person whose liability subsists subse-

quently to the date of disestablishment and is not apt to apply to the case where the liability is to cease on disestablishment. I base this view on the words of subsect. (2) under which "such liability," that is, the liability which is preserved by subsect. (1) is to be enforced as under a covenant with the Representative Body. There does not appear to be anything in the Act to prevent incorporation of the Representative Body under sect. 13 (2) before the date of disestablishment. But, in my opinion, the notional covenant under sect. 28 (2) is not intended to come into existence before that date; if it were otherwise, liability under the covenant and liability under ecclesiastical law would for a time co-exist.

In support of the argument for the appellants, a point was made which, at first sight, appears to be of importance. As I have already said, if the Welsh Church Acts are construed as extinguishing once for all on disestablishment the liability for chancel repairs which previously attached to the ownership of the tithe rentcharge belonging to the Ecclesiastical Commissioners, the result will be to leave Plymouth Estates, Ltd., and other lay impropriators of the same kind to bear the whole burden of future repairs by deduction from the redemption stock issuable to them under the Tithe Act, 1936. If that Act had not been passed, the effect of such a construction would have been for practical purposes the same for this reason. Under the law as laid down by this court in *Wickhambrook Parochial Church Council v. Croxford* (2), the liability of every owner of tithe rentcharge is a several liability to repair the chancel, that is to say, a liability for the whole of the repairs and is not limited to the amount actually received by him in respect of his rentcharge. It was also laid down that an owner who is being held liable for more than his proper share can obtain contribution from the other owners of tithe rentcharge in the parish. If, therefore, the liability attaching to the ownership of rentcharge belonging to the Ecclesiastical Commissioners was extinguished on disendowment, a lay impropriator in the position of Plymouth Estates, Ltd., would have been left to bear the whole of the burden without having any one from whom contribution could be claimed. It is said that such a result could not have been intended by Parliament since the effect would be to deprive the lay impropriator of a valuable right without compensation.

In my opinion, this argument cannot prevail against what, in my opinion, is the clear meaning of the Welsh Church Act, 1914. Its force is, I think, in any event, very considerably diminished for the following reason. Until the point was settled by the decision in the *Wickhambrook* case (2), there was no case which decided that the liability of the owner of tithe rentcharge extended beyond the amount of his actual receipts. This absence of authority was no doubt due to the fact that, before the passing of the Chancel Repairs Act, 1932, the specific question would not arise in a civil court. At the date when the Welsh Church Act, 1914, was passed, the most authoritative writers on Ecclesiastical Law apparently held the view that the liability of the owner of tithe rentcharge was limited to the amount of his actual receipts (see BURN'S ECCLESIASTICAL LAW, 1842, Vol. 1, p. 352; PHILLIMORE'S ECCLESIASTICAL LAW, 1895, Vol. 2, p. 1417; and the judgments of LORD HANWORTH, M.R., and ROMER, L.J., in the *Wickhambrook* case (2) at pp. 430 and 443). It may well be that the legislature, if indeed it considered the matter at all, thought that a lay impropriator in the position of Plymouth Estates, Ltd., could not in any circumstances be made liable beyond the amount of his receipts. It is perhaps equally likely that the legislature either did not consider the point or was not aware that there was in fact any tithe rentcharge which was divided between the Ecclesiastical Commissioners and a lay impropriator like Plymouth Estates, Ltd.

I should add that, apart from any special context, the Ecclesiastical Commissioners would, I think, be properly described as "lay impropriators" which is the view taken by BENNETT, J. My decision rests on the opinion that in the special context of the Welsh Church Act, 1914, and particularly that of sect. 28 the Ecclesiastical Commissioners are not included in that expression. I do not ignore the reference in sect. 28 to the county councils. But I adhere to the opinion which was expressed by this court in *Welsh Church Comrs. v. Representative Body of the Church in Wales* (1) that this reference was inserted *ex abundanti cautela*.

It was faintly suggested by counsel for the appellants as an alternative argu-

ment that, if the Ecclesiastical Commissioners cannot be regarded as lay impropiators for the purposes of sect. 28, the Welsh Commissioners themselves ought to be so regarded with the result that they and not the Ecclesiastical Commissioners would be the notional covenantors under the statutory covenant with the Representative Body. It is sufficient to say with regard to this argument that it cannot, in my opinion, be reconciled with the decision of this court in *Welsh Church Comrs. v. Representative Body of the Church in Wales* (1).

I would dismiss the appeals.

LUXMOORE, L.J. : I also am of opinion that these appeals fail. This is, I think, inevitable in view of the decision of this court in *Welsh Church Comrs. v. Representative Body of the Church in Wales* (1), for I agree with BENNETT, J., that that decision covers the cases before us.

GODDARD, L.J. : I need not recapitulate the facts of this case. The points for decision are (i) whether at the date of the disestablishment of the Welsh Church the Ecclesiastical Commissioners were lay impropiators of tithe rentcharge of the parishes in which it was paid to them within the meaning of the Welsh Church Act, 1914, s. 28 ; (ii) if they were, did their liability to repair chancels which lay upon them as lay impropiators pass to the Welsh Church Commissioners on the transfer to them of the tithe rentcharge, which for brevity I will refer to as tithe. That the Ecclesiastical Commissioners as a statutory body cannot have the cure of souls and so must be regarded as a lay corporation is admitted, but, having regard to the avowed object of the Act in disendowing the Welsh Church, it would be a remarkable result if Parliament had left such large tithe owners or their transferees under the obligation to repair chancels. For it is the right to receive tithe which imposes the liability. The Act does not, nor was it intended that it should, relieve the tithe payer of his liability to pay tithe ; its object was to divert the tithe from the Church and to apply it to secular purposes so that the tithe payer would not be supporting an ecclesiastical institution with which he was not in sympathy. In my opinion, the lay impropiator referred to in sect. 28 is one who owns tithe as purely temporal property. For something like 400 years a large part of the rectorial tithes in England and Wales has been in lay hands, and like any other rentcharge can be bought and sold in the market. Its ownership has carried with it the burden of repairing the chancel of the church of the parish in which the tithe-burdened lands are situate, or for the benefit of which the tithe is paid if the burdened land is outside the parish. The owner is commonly referred to as the lay rector and is, if an individual, entitled to a seat in the chancel. A consideration of other sections makes it clear, in my opinion, that the Ecclesiastical Commissioners, though a lay body, were not intended to be classed as lay impropiators. By sect. 4 there vests in the Welsh Commissioners from the date of disestablishment all property vested in the Ecclesiastical Commissioners which is ascertained to be Welsh ecclesiastical property. Sect. 5 provides for the method of ascertainment. The property of a lay impropiator is certainly not ecclesiastical property, and, if any impropiator had placed it in trust for the benefit of the holder of an ecclesiastical office, which includes a benefice, or for any cathedral or ecclesiastical corporation, by sect. 38 the property is to be deemed to belong to that office or corporation. This emphasises, in my opinion, that the purpose for which the tithe is to be applied is the material consideration. Then sect. 6 provides that as from the date of disestablishment any liability of the Ecclesiastical Commissioners to make payments for any ecclesiastical purpose (which clearly would include the repair of a chancel) in or connected with the Church in Wales, shall cease. How then could any liability to repair an ecclesiastical building remain in the Ecclesiastical Commissioners after disestablishment ? As they were under no liability there was none for the Welsh Commissioners as their transferees to assume. In my opinion, the Act contemplates and deals with four different classes of tithe, (i) that paid to ecclesiastical persons as such, (ii) that paid to the Ecclesiastical Commissioners, (iii) that paid to trustees who receive it on trust to apply it to the cure of souls, and (iv) that paid to lay impropiators, who may hold it either beneficially or in trust for objects other than the cure of souls. It is only with the fourth class that sect. 28 is concerned. Even if the Ecclesiastical Commissioners are to be regarded as lay impropiators for the purpose of the Act, it is impossible to suppose that Parliament meant,

after relieving them by sect. 6 of their obligation to repair, to reimpose it by sect. 28. Moreover, by subsect. (2), a notional covenant running with the land has to be envisaged between the lay impropiator and the Representative Body, and this court has decided that the lay impropiator referred to is the tithe owner at the time when the Act came into force. It follows that one would have to imply a covenant by the Ecclesiastical Commissioners sealed immediately before the Act came into force or simultaneously with its taking effect to perform an obligation of which the Act relieved them, the burden of which would then by force of the Act be transferred to and imposed on the Welsh Commissioners and ultimately upon the University. It is impossible to suppose that Parliament intended anything of the sort.

The result is, no doubt, unfortunate for the Plymouth Estates, Ltd. and other lay impropiators in a like position. Where the tithe has been apportioned as in the present case, it follows that the lay rectors remain under a liability to repair the chancel, and, since the *Wickhambrook* case (2) their liability is not measured by the amount of the tithe they receive, and they have lost the right of contribution from the other tithe owner which that case decided they had. Indeed, the hardship that results was the strongest argument for the appellants. The peculiar position of a lay impropiator of an apportioned tithe was very probably overlooked when the Act was drafted, or, it may be, it was thought that the true view was that the tithe owner was only liable for repairs to the amount of the tithe that he received. For this view there was the support of text writers on ecclesiastical law of great eminence, though the *Wickhambrook* case (2), which is still open to review in the House of Lords, decided otherwise. But as, in my opinion, the matter is not open to any other construction than that which we are now placing on it, an argument based on hardship, real though it be, cannot prevail.

I agree that the appeals should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors : *Milles, Jennings White & Foster* (for the first appellants) ; *Nicholl, Manisty & Co.* (for the second appellants) ; *A. D. Stocks* (for the respondents, the Tithe Redemption Commission) ; *R. Primrose* (for the other respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

M'GARVEY AND OTHERS v. CALEDONIA STEVEDORING CO., LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Macmillan, Lord Wright, Lord Clauson), **February 1, April 16, 1943.**]

Workmen's Compensation—Course of employment—Accident occurring after termination of employment—Custom for workmen arriving late to be replaced by others—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

The appellants were the dependants of a deceased dock labourer who had been employed by the respondents. The deceased was engaged on night shift work which was divided by a supper period. It was the custom in this type of work that, if a workman failed to return after the supper period, the respondents might engage a substitute, whereupon the former workman's employment was terminated and he received wages for the first half of the shift only. The deceased was due to return from his supper period at 12 midnight, but failed to do so, and at 12.10 a.m. a substitute was engaged to take his place. At 12.20 a.m., while the deceased was returning for the second half of the shift, he fell off the quay and was drowned. The deceased's dependants claimed compensation under the Workmen's Compensation Act, 1925 :—

HELD : the deceased's employment had been terminated at 12.10 a.m., and as the accident occurred at 12.20 a.m. it could not be said to have arisen in the course of his employment.

[EDITORIAL NOTE.] There have been many decisions that workmen meeting with an accident on their way to or from work have in certain circumstances suffered injury due to that accident in the course of their employment. It seems that the present case would be within those authorities but for the fact that there was shown to be a custom that men returning late to work were replaced by others and that in this case the foreman

had in fact replaced the workman. For these reasons it is held that the contract of service had in fact been determined before the occurrence of the accident and that the accident could not arise in the course of the employment. It may be that only in the case of casual labour could a contract of service be duly determined at such short notice.

AS TO ACCIDENTS WHILE WORKMAN GOING TO OR RETURNING FROM WORK, see *HALSBURY*, *Hailsham Edn.*, Vol. 34, pp. 825-827, para. 1164; and FOR CASES, see *DIGEST*, Vol. 34, pp. 277-282, Nos. 2341-2371.]

Cases referred to:

- (1) *Sexton v. Hosford* (1916), 9 B.W.C.C. 643; 34 Digest 324, 2652i; 50 I.L.T. 91.
- (2) *Riley v. Holland (William) & Sons, Ltd.*, [1911] 1 K.B. 1029; 34 Digest 283, 2376; 80 L.J.K.B. 814; 104 L.T. 371; 4 B.W.C.C. 155.
- (3) *Weaver v. Tredegar Iron and Coal Co., Ltd.*, [1940] A.C. 955; [1940] 3 All E.R. 157; Digest Supp.; 109 L.J.K.B. 621; 33 B.W.C.C. 227.
- (4) *Stewart (John) & Son* (1912), *Ltd. v. Longhurst*, [1917] A.C. 249; 34 Digest 279, 2357; 86 L.J.K.B. 729; 116 L.T. 763; 10 B.W.C.C. 266.

APPEAL by the workman from a decision of the Second Division of the Court of Session affirming the award of the Sheriff-Substitute. All the facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

Arthur P. Duffes, K.C., and *H. W. Guthrie* (of the Scottish Bar) for the appellants.
James Walker (of the Scottish Bar) for the respondents.

VISCOUNT SIMON, L.C.: My Lords, this is an appeal by the dependants of a deceased dock labourer named Michael M'Garvey from the unanimous decision of the Second Division of the Court of Session upholding the conclusion reached by the Sheriff-Substitute that the accident which killed the workman was not one which occurred in the course of his employment. In my opinion, the decision appealed against is right and the appeal must be dismissed.

M'Garvey had been engaged by the respondents for the night shift of Sept. 1-2, 1939, from 6 p.m. until 4 a.m. on the work of helping to load a ship at Princes Dock, Glasgow. In ordinary circumstances, the night shift in such cases is divided into two halves by the supper hour, which provided a break from 10 p.m. to 11 p.m., and during this interval men on the shift were permitted, but not required, to go home to supper. If, however, a man failed to report back when work was resumed, a substitute might be engaged for the second half of the shift, in which case his employment then terminated and wages would be paid to him for the first half of the shift only. The night of Sept. 1-2 was the first night of the black-out and, as certain of the men lived at a considerable distance from the dock so that it was impossible for them to go home and return in an hour under black-out conditions, they made an arrangement amongst themselves whereby those men who were "spelled off," i.e., not helping to unload a truck during the spell prior to the usual supper hour, might depart for home about 9 p.m., and return at 11 p.m. to take the first spell after the resumption, while those who were actually unloading up to 10 p.m. might leave at that hour and return to take their spell at 12 midnight. The foreman of the deceased's squad knew of this arrangement and did not object to it, and I will assume that those who acted in accordance with it were, in the special circumstances, duly discharging their duty to the respondents.

M'Garvey was one of those who worked till 10 p.m., and then left, and was, therefore, due to report back at 12 midnight, with the risk that, if he was later than this, a substitute might be engaged in his place and his employment would thereupon come to an end. M'Garvey went home to supper; he did not start back till about 11 p.m. and had not reached the place of work by 12.10 a.m. when, in default of his appearance, a substitute was engaged. At about 12.20 a.m., while still making his way back to the place of work, M'Garvey fell off the quay at about one-third of a mile from the ship and was drowned.

On these facts, the arbitrator found that this unfortunate man's employment was terminated at 12.10 a.m., and that the accident at 12.20 a.m. did not arise in the course of his employment. It seems to me impossible to say that these conclusions are wrong in law. The LORD JUSTICE CLERK points out that at the time of the drowning the man was not returning to work under a current contract of service, but was at best returning to the scene of his previous labours, either in the hope that he would be taken on because no substitute had been engaged in his place, or in the hope that he might persuade any substitute who had been engaged to give way in his favour. If he were to be regarded as employed

at 12.20 a.m., then two workmen would be employed on the same individual job, and the respondents would be responsible for accident to either.

A The case is essentially different from those in which it has been held that an accident to an employed workman on his way to or from work may, under certain conditions and within certain limits, be regarded as occurring in the course of his employment; here the workman at the critical time was not an employed workman. Neither is the case analogous to those in which the workman meets with an accident on leaving after dismissal (*Sexton v. Hosford* (1), at p. 647), or on going to draw his wages, as the contract of employment contemplated, after his work has ended (*Riley v. Holland* (2)). It is not necessary for the House in reaching its conclusion to affirm or review earlier decisions. It is sufficient to say that upon the facts and findings of the present case, the appellants cannot succeed.

I move that the appeal be dismissed with costs.

B LORD THANKERTON: My Lords, when the deceased workman, Michael M'Garvey, left his house at 11 p.m., he intended to resume his work again. He must be held to have known—assuming in his favour that he was entitled to rely on the arrangement come to—that if, whether through his own fault or not, he had not reached his work by midnight, he was liable to be superseded by the foreman engaging another man to take his place, and that such engagement would terminate his right to resume his work, unless he could persuade the substitute to give way to him, in which case his right to work might be said to be renewed or revived.

C It is clear, in my opinion, that as soon as M'Garvey had failed to turn up by midnight, the foreman, at his own hand, was entitled to engage a substitute, though it was usual to give some minutes of grace. The engagement of the substitute would at once terminate M'Garvey's right to return to his work, as D equally the employer's right to insist that he should do so. M'Garvey's actual knowledge or ignorance of the appointment of the substitute is irrelevant. The substitute having been engaged, M'Garvey's position in law was no better than that of a fresh applicant for work, though the circumstances might have helped him to persuade the substitute to give way. Accordingly, by 12.10 a.m. the substitute having been engaged, M'Garvey's right to resume his work under the original contract had gone, and, therefore, his employment was E terminated before he met his death. There is no room in the present case for any contention that, though the employment is terminated, the contractual relationship of employer and workman for the purposes of the Act should be held to have continued for some special purpose, as for instance, in the case of a discharged workman who returns to the premises in order to draw his pay, and meets with an accident within the premises (*Riley v. William Holland & F Sons, Ltd.* (2)). Therefore I express no opinion on the correctness of that decision.

Though there is no reason to suppose otherwise than that the deceased was anxious to get on with his important war-time work, and was only thwarted by the new experience of the black-out, I am unable—in agreement with VISCOUNT SIMON, L.C., and the judges in the lower courts—to hold that the respondents are under any liability under the Workmen's Compensation Act.

G LORD MACMILLAN: My Lords, the decision of the Second Division of the Court of Session in this case is plainly right. The benefits of the Workmen's Compensation Acts are confined to workmen who in any employment have sustained personal injury by accident arising out of and in the course of the employment, and to their dependants. At the time when the unfortunate fatal accident befell M'Garvey he was not in any employment. It is not contested H that the respondents in the circumstances acted within the terms of the deceased's engagement with them when, before the occurrence of the accident, they terminated his employment and took on another man in his place. Accordingly the accident did not arise in the course of the deceased's employment by the respondents and they are under no liability to the appellants, his dependants. To hold otherwise would result in imposing on the respondents in respect of one man's job simultaneous responsibility for accidents to two men, the deceased and the man who took his place.

I agree that the appeal should be dismissed.

LORD WRIGHT : My Lords, this is a claim under the Workmen's Compensation Act, 1925, which raises in peculiar circumstances the question whether the fatal accident on which the claim rested arose out of and in the course of the deceased man's employment. The facts found by the Sheriff-Substitute as arbitrator were shortly as follows. The deceased was a labourer who on the night of Sept. 1, 1939, was employed by the respondents, a firm of stevedores, in loading the Clan Ferguson, in Princes Dock, Glasgow, with munitions. The night shift on which he was employed was from 6 p.m. until 4 a.m. the next morning. The loading was done by lifting the munitions from the trucks on the quayside to the vessel which was lying alongside. The workmen were divided into squads of 6 men, who worked in "spells" of 3 men at a time. Each spell of 3 men discharged a truck. That operation took from half an hour to an hour. When that truck was finished, the 3 men who had been working on it had a rest and were replaced by the other 3 members of the squad, who discharged the next truck. This was the system.

The night of Sept. 1, 1939, was the first night of the black-out. The men arranged to the knowledge of the foreman that they would take 2 hours for supper instead of the usual supper time of 1 hour. M'Garvey went home for supper at 10 p.m., and was due back at 12 under the arrangement described. He did not return by midnight. Some time after midnight, about 12.10 a.m., another man was engaged in his place.

The arbitrator found in the stated case that sometimes men who go home for supper do not return that night. When a man thus fails to return the respondents engage, if possible, another man in his place for the remaining half-shift, and the man who has not returned is paid for the half-shift he has worked. His employment is terminated and ceases at the end of the half-shift during which he has worked. M'Garvey had not left a message that he would not return, but at or about 12.10 a.m. the foreman engaged another man in his place and M'Garvey's employment thus terminated about 12.10 a.m. In fact about 12.20 a.m. that morning he had fallen for some unexplained reason from the quay into the water and had been drowned.

The arbitrator found and held that the accident resulting in the man's death was not caused in the course of, and did not arise out of, his employment. He accordingly dismissed the appellants' claim. His decision was affirmed by the Court of Session. The arbitrator's decision that the accident did not arise out of and in the course of his employment is a finding of fact and must receive effect unless it is wrong in law. The Court of Session have affirmed the arbitrator's decision and I agree with them.

It is true that authorities in this House and in the appellate courts have held that the course of a man's employment may not be limited to the time when he is actually working but may include time when he is off work, such as meal times and times when he is going to and from his work, at least while he is on his employer's premises, or while he is traversing a place which though not part of his employer's premises he is only entitled to traverse because he is going to or coming from his work. I need not now develop this construction of the Act, because it has quite recently been fully explored in *Weaver v. Tredegar Iron and Coal Co.* (3), in which all the earlier cases are examined. I shall here assume that, if the man's employment had not been terminated at 12.10 a.m., that is 10 minutes before he met his death, the appellants would have had a good claim for compensation. The supper time interval would have fallen within the period of the man's employment, to the extent at least of the time when he was going to and from the place on the quayside where he was working, so long as he was either on his employer's premises or was traversing a place which he was permitted to go across in order only to reach his work, even though that place was not within the possession or control of his employer. The use of such a way for that purpose is :

... within the contemplation of both parties to the contract as necessarily incidental to it.

(as LORD FINLAY, L.C., said in reference to a case of that type in *Stewart & Son* (1912), *Ltd. v. Longhurst* (4) at p. 253). I assume in favour of the unfortunate man that the extension of the supper time from 1 to 2 hours with the permission of the foreman bound the employers and that the man was actually trying to get back to the loading place on the quay but lost his way in the dark.

It was not contested that he was entitled to make his way from the dock gates to the quay over the dock area. It is clear that in the black-out that was a dangerous operation as was shown by the actual event of his falling into the water. He was encountering dangers which he would not have encountered but for his employment. It is true that he had not yet reached the point where he was to work on the ship, but as the arbitrator finds he had arrived at a point on the quay near the stern of the ship, which the arbitrator put at a distance of some 600 or 700 yds.

- A So far all the conditions which in the earlier authorities have been held to justify a claim for compensation were fulfilled. But the crucial distinction here is that the man's employment had in fact terminated at least 10 minutes before his death. On the facts found by the arbitrator the employers were then entitled to treat him as no longer in their employment and they did so treat him. Whatever elasticity has been given by the courts in favour of workmen and their dependants to the vague words "course of employment," I do not think it is possible to extend these words to a case like the present. It is true that so far as the man's intention can be inferred, he was intending to get back to his work, and he was drowned because that intention brought him into the danger which caused his death. If the death had occurred at say 10 minutes before midnight instead of 20 minutes after, the authorities would, it seems, have entitled the appellants to succeed. But the limitations in the Act must receive effect. Where a line is drawn, a case falling on the wrong side of the line may appear to involve unfairness. It may seem a hard case. I cannot, however, construe the words of the Act so as to cover a case like the present, in which the man was neither going to, nor coming from, his employment, because he had at the material time no employment at all.
- B
- C

- I agree that the decision of the Court of Session should be affirmed and the appeal dismissed.

LORD CLAUSON: My Lords, I have had the advantage of reading, in print, the opinion which has just been delivered by VISCOUNT SIMON, L.C. Finding myself in complete agreement with it, I concur in the motion that this appeal should be dismissed.

Appeal dismissed with costs.

- Solicitors: *Smith & Hudson*, agents for *W. Thornton*, Glasgow, *Thomas J. Addly*, Edinburgh (for the appellants); *Langhams & Letts*, agents for *Menzies & White*, Edinburgh, and *Paterson & Ross*, Glasgow (for the respondents).
- [Reported by C. ST. J. NICHOLSON, Esq., *Barrister-at-Law*.]

MINISTER OF SUPPLY v. BRITISH THOMSON-HOUSTON CO., LTD.

- F [COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), April 1, 2, 19, 1943.]

Constitutional Law—Action by Minister for breach of contract—Counterclaim—Right to counterclaim—War Department Stores Act, 1867 (c. 128), s. 20—Ministry of Supply Act, 1939 (c. 38)—Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (S.R. & O., 1939, No. 877).

- G The appellant, by writ dated May 28, 1942, sued the respondents on the ground of breach of contract and claimed £2,235 damages. The respondents, by their defence, admitted the contract, denied the breach and brought a counterclaim for £68 12s. for damages for an alleged breach by the appellant. The appellant asked that the counterclaim should be struck out on the ground that as a Minister of the Crown he could not be sued upon the contract either personally or in the name of his office. The respondents contended that by the terms of the War Department Stores Act, 1867, s. 20, as made to apply to the appellant by the Ministry of Supply Act, 1939, and the order made thereunder, they were entitled to counterclaim in an action brought by the appellant:—

H HELD: upon the true construction of the War Department Stores Act, 1867, s. 20, the Minister may sue in respect of a breach of contract, and similarly the other party to the contract may sue the Minister in respect of a breach of contract. The respondents were, therefore, entitled to counterclaim in the action brought by the Minister.

[EDITORIAL NOTE.] Apart from special enactment the only remedy on the part of a subject in the circumstances here considered is by petition of right. Several enactments have been passed, differing somewhat in their terms, making government officials and departments liable to actions, either in contract or in tort, in the ordinary form. These enactments have often said that the official or department may sue and be sued, in which case there seems little doubt that a subject who is sued can counterclaim in the same action. The War Department Stores Act, 1867, s. 20, however, provides that the Secretary of State for War may institute and prosecute any action and may defend any action suit or proceeding. It was argued that the words "may defend" are purely permissive and do not and cannot give the subject the right to bring an action against the Crown. This argument, though it would probably sound far-fetched to the lay mind, is very familiar to lawyers and could no doubt be supported by many citations. The authorities in point on the subject are not very helpful and the Court of Appeal have treated the matter as an open one. The matter is made a little more difficult by the fact that the 1867 Act came into force before counterclaims were allowed. It is, however, decided that the words of the 1867 Act have the same effect as the words "may sue and be sued" and that, at the present time, such words justify the defendant in bringing a counterclaim. In effect, the whole matter is one of procedure, for, if the effect of the statute was that a counterclaim was not available, the subject would have his remedy by petition of right, which would now be heard and decided at the same time as the action. The procedure by way of counterclaim would probably be less costly and certainly more convenient, and thus the decision is a helpful one.

AS TO CONTRACTS BY SERVANTS OF THE CROWN, see HALSBURY, Hailsham Edn., Vol. 6, pp. 488-491, paras. 602, 603; and FOR CASES, see DIGEST, Vol. 38, pp. 60-63, Nos. 359-365, 378-387.]

Cases referred to:

- * (1) *Williams v. Admiralty Comrs.* (1851), 11 C.B. 420; Digest Supp.; 20 L.J.C.P. 245; 17 L.T.O.S. 200.
- (2) *Hosier Bros. v. Derby (Earl)*, [1918] 2 K.B. 671; Digest Supp.; 87 L.J.K.B. 1009; 119 L.T. 351.
- (3) *Admiralty v. Baird Bros.* (1921), 8 Lloyd L.R. 69;
- (4) *Rowland v. Air Council* (1923), 39 T.L.R. 228; *on appeal*, 39 T.L.R. 445; 36 Digest 776, 2560.
- (5) *Rowland and Mackenzie-Kennedy v. Air Council* (1925), 41 T.L.R. 545.
- (6) *Gillegham v. Minister of Health*, [1932] 1 Ch. 86; Digest Supp.; 101 L.J.Ch. 81; 146 L.T. 231.
- (7) *Rowland and Mackenzie-Kennedy v. Air Council* (1927), 96 L.J.Ch. 470; Digest Supp.; 137 L.T. 794; 44 R.P.C. 453.
- * (8) *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517; 38 Digest 63, 387.
- (9) *Ryves v. Wellington (Duke)* (1846), 9 Beav. 579; 16 Digest 237, 323; 15 L.J.Ch. 461; 8 L.T.O.S. 66.
- (10) *Graham v. Public Works Comrs.*, [1921] 2 K.B. 781; 38 Digest 60, 363; 70 L.J.K.B. 860; 85 L.T. 96.
- (11) *Roper v. Public Works Comrs.*, [1915] 1 K.B. 45; 38 Digest 61, 364; 84 L.J.K.B. 219; 111 L.T. 630.
- (12) *Kynoch, Ltd. v. Secretary of State for War*, unreported, Robertson's Proceedings by and against the Crown, p. 31.

APPEAL by the plaintiff from an order of VISCOUNT CALDECOTE, L.C.J., dated Mar. 12, 1943, reversing an order of a master who had struck out a counterclaim in an action for breach of contract which had been brought by the appellant. The facts are fully set out in the judgment of MACKINNON, L.J.

Patrick Devlin for the appellant.

Valentine Holmes for the respondents.

Devlin: *Williams v. Admiralty Comrs* (1) is an authority against me. I shall ask the court to distinguish that case or, if necessary, to say that it is wrong. It is explicit in that case that there was a form of action and the only question was whether the form was right or wrong. If the court decides that War Department Stores Act, 1867, s. 20, must be construed as giving to the Minister a cause of action that he otherwise would not have, it does not follow that a cause of action is given to the subject. The words "may defend" cannot by themselves give a cause of action to the subject. If the legislature intended to give the subject a right to institute proceedings against a Minister, it is difficult to see why it has not done so in express words. The words "may defend" are permissive and would cover a case in which a Minister chose to allow himself to be sued in respect of a liability of the Crown. In order to find a cause of action conferred upon the subject, it must be held that it is given by implication from the words "may defend." Those words, however, can be given a reasonable

meaning without such implication. The section confers a procedural benefit upon the Minister alone and not upon the subject. If the subject counter-claims the Minister is entitled to have the counterclaim struck out just as though he had commenced proceedings by Latin information. In *Williams v. Admiralty Comrs.* (1) the point was not taken that the Lords Commissioners could not be sued at all. [Counsel referred to *Admiralty v. Baird Bros.* (3), *Rowland v. Air Council* (4), *Rowland and Mackenzie-Kennedy v. Air Council* (7), *Gilleghan v. Minister of Health* (6), *Graham v. Public Works Comrs.* (10), *Roper v. Public Works Comrs.* (11) and *Kynoch, Ltd. v. Secretary of State for War* (12).]

- A *Holmes* : When the legislature passed the Admiralty Lands and Works Act, 1864, it must have assumed the correctness of the decision in *Williams v. Admiralty Comrs.* (1). It is immaterial whether one calls sect. 20 of the 1867 Act procedural or non-procedural. The section enables the Secretary of State to bring an action relating to war department stores. He could not previously have brought such an action because he would have been an agent for the purpose of making the contract. Once it is conceded that sect. 20 of the 1867 Act gave the Secretary of State a power to sue, which power he had not previously possessed, it must be granted that the converse is true. The present appeal is concerned only with sect. 20 of the 1867 Act. The authorities to which the court has been referred are cases relating to different forms of words in different Acts of Parliament. They have no direct bearing upon the construction of the section which is relevant in the present case. In *Rowland and Mackenzie-Kennedy v. Air Council* (7) the contract was one in respect of which the remedy for breach was by petition of right. If the court thinks it necessary to do so, I ask that *Gilleghan v. Minister of Health* (6) should be overruled. If an action would lie against the Secretary of State under sect. 20 of the 1867 Act, a counter-claim would also lie because a counterclaim is a proceeding. [Counsel referred to *Hosier Bros. v. Derby (Earl)* (2) and *Rowland v. Air Council* (4).]
- D *Devlin*, in reply.

LORD GREENE, M.R. : I have read the judgments which are about to be delivered by MACKINNON and GODDARD, L.JJ., and I agree with them.

- E MACKINNON, L.J. : This is an appeal by the plaintiff from a decision in chambers of VISCOUNT CALDECOTE, L.C.J. A master had made an order striking out the defendants' counterclaim, but this order was reversed by VISCOUNT CALDECOTE, L.C.J.

- F The plaintiff by a writ dated May 28, 1942, sued the defendants. By his statement of claim he alleged that he had made a contract of purchase from the defendants, and claimed damages for its breach by them. The defendants by their defence admitted the contract, denied the breach, and by way of counter-claim asked for damages for an alleged breach by the plaintiff. The monetary amount of their claim was only £68 12s.

- G On Oct. 19, 1942, the plaintiff took out a summons before a master in chambers applying "for an order that the counterclaim of the defendants in this action be struck out as disclosing no cause of action." No affidavit was filed in support of this application. The summons, in its terms, would seem to be doomed to failure, for on the law of the sale of goods the counterclaim of the defendants manifestly did disclose a cause of action. The plaintiff, however, was able to ask the master to take judicial notice of the fact that he was a Minister of the Crown. His contract with the defendants was made as a Minister of the Crown on behalf of His Majesty. He, therefore, relied on the well-known principle of the common law that a Minister, or other servant of the Crown, having made such a contract cannot be sued upon it either personally or in the name of his office. For this reason the plaintiff alleged that the defendants could not pursue
- H their counterclaim.

Logically the reply of the defendants was that this rule of the common law not only lays down that a Minister cannot be sued upon such a contract but also that he cannot sue upon it. If, therefore, the rule be invoked it operated to show that the plaintiff's claim disclosed no better cause of action than the defendants' counterclaim. Therefore, if the counterclaim must be struck out, so must be the claim. To this contention the reply of the plaintiff is that, in variation of the common law rule, a statute has given him the right to sue upon the contract, and, therefore, no objection can be taken to the claim. To which

the defendants in effect reply: "It is true that there is a statute which gives you such a right to sue, but that same statute makes you equally liable to be sued. Therefore, you cannot object to our counterclaim." The only question we have to consider is whether this last contention of the defendants is correct.

The statute in question is the War Department Stores Act, 1867, which is made to apply to the plaintiff by virtue of the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, so that the plaintiff's position is assimilated to that of the Secretary of State for War under the 1867 Act. Sect. 20 of the 1867 Act provides that the Secretary of State for War:

... may institute and prosecute any action ... concerning ... stores sold or contracted to be delivered to or by the Secretary of State for War for the use or on account of Her Majesty ... and may defend any action, suit, or proceeding concerning any such stores ... and any such action, suit or proceeding shall not be affected by any change in the person for the time being holding the office of Secretary of State for War.

There is a proviso that nothing in the section shall:

... take away or abridge in or in relation to any such action ... any legal right, privilege, or prerogative of the Crown; ... the Secretary of State for War may exercise and enjoy all such rights, privileges, and prerogatives ... as if the Crown were actually a party to such action ...

Upon the construction of this section, if I were unassisted by any authorities, or not embarrassed by them, I should be of opinion that it does empower the defendants to sue the plaintiff upon this contract, and therefore their counterclaim ought not to be struck out. It is true that the section does not use the plainer words "may sue and be sued," which appear in some similar enactments; but the words:

... may institute and prosecute any action ... and may defend any action, suit, or proceeding

seem to me to involve the clear implication that such "action, suit or proceeding" may be brought against the Minister by the other party to the contract. Unless it can be so brought, there is nothing which he "may defend." Nor can I agree with the suggestion that the provision that "he may defend" an action brought against him must be read subject to the implication "unless he elects to rely upon the common law rule that the action cannot be brought against him." If Parliament had meant to make such a qualification it could and would have expressed it; I cannot think that it ought to be implied. Nor do I think that the proviso saving the rights and privileges of the Crown and giving the Minister such rights and privileges, preserves the common law right of the Minister to object to an action being brought against him. For the proviso speaks of the Minister enjoying:

... all such rights, privileges, and prerogatives ... as if the Crown were actually a party to such action. ...

That clearly has in view the rights of the Crown in the course and conduct of the action (e.g., as to discovery); it cannot refer to a right to put an end to the action under a rule of the common law.

In the result I think that, unless there are authorities which constrain me to a contrary view, the decision of VISCOUNT CALDECOTE, L.C.J., was correct and this appeal fails. But it remains to consider the cases which were cited to us.

The earliest is *Williams v. Admiralty Comrs.* (1). By the Admiralty Lands Act, 1821, the commissioners "are authorised ... to bring any action" of a particular sort "and also ... to defend any action" of the like sort. The plaintiff sued the commissioners. On a rule *nisi* to show cause why his action should not be set aside for irregularity the court refused to make any order. JERVIS, C.J., said in terms that the defendants "may ... sue and be sued in an action of debt" and the other three members of the court agreed with him. It was manifest from the writ that the action was not one of those authorised, but the court would not set it aside on that ground, which, they thought, must be left for the trial. This is significant of the extreme technicality of procedure as late as 1851. If the present application to set aside the writ "as disclosing no cause of action" had been made, it would have had short shrift in the time of JERVIS, C.J. This case is a clear authority in support of the respondents, and of the view which I have expressed, and counsel for the appellants had to ask us to overrule it.

In *Hosier Bros. v. Derby (Earl)* (2) an action was brought against the Earl who was

Secretary for War when the writ was issued, but not when the contract relied on was made. The Court of Appeal stayed the action. In argument there was a suggestion that the suit might be properly brought under the War Department Stores Act, 1867, and counsel for the plaintiffs asked leave to amend by framing his action thereunder. As to this SWINFEN EADY, M.R., said at p. 675 :

The present action is not brought under that statute ; it is not brought against the Secretary of State for War for the time being as such ; it is brought against a named defendant, the Earl of Derby.

- A He refused the application to amend, and expressed no opinion as to the result if the claim had been made under the War Department Stores Act, 1867. SCRUTTON and DUKE, L.JJ., merely expressed their concurrence.

The case that is reported as *Admiralty v. Baird* (3) is obscure. The court allowed an appeal from BAILHACHE, J., and stayed a counterclaim. BANKES, L.J., is reported as saying :

- B The commissioners have certain rights by statute to bring an action and defend an action, but there is no suggestion in this statute that anybody has any right to bring an action or counterclaim against the commissioners.

What was the statute in question is not indicated. Nor can I understand how the commissioners could defend an action unless an action was and could be brought against them. Further, no one appears to have referred to *Williams v. Admiralty Comrs.* (1) decided by the full court of Common Pleas in 1851.

- C We were then referred to a number of cases arising out of the inventive activities of a Mr. Kennedy. In *Rowland v. Air Council* (4) his trustee in bankruptcy sued. The statute there involved was the Air Force (Constitution) Act, 1917, s. 10 (1), which is as follows :

The Air Council may sue and be sued, and may for all purposes be described, by that name.

- D These words, " the Council may sue and be sued," appear to me to be perfectly explicit and to mean what they say. That the Council " may be sued " can only mean one thing, and is much clearer than the words " may sue and may defend " in the earlier cases. None the less it was held by RUSSELL, J., as he then was, that the plaintiff's action must be stayed, and he dismissed the action. This decision was followed by LAWRENCE, J., in *Rowland and Mackenzie-Kennedy v. Air Council* (5). It was again followed by FARWELL, J., in *Gilleghan v. Minister of Health* (6). The relevant statute there enacted that the Minister " may sue and be sued by the name of the Minister of Health." FARWELL, J., says at p. 92, that the matter has been considered and decided by RUSSELL, J., P. O. LAWRENCE, J., and the Court of Appeal, all of whom have held that the provision did not entitle a subject to sue the Minister.

- E If the Court of Appeal has so decided it may be that we are bound to follow that decision. It is, therefore, necessary to consider the cases in which Rowland and Kennedy appeared in this court. The first of those occasions was Apr. 24, 1923, when the above mentioned judgment of RUSSELL, J., was set aside : *Rowland v. Air Council* (4). The court declined to express any opinion whether the view of RUSSELL, J., was right, set aside his order dismissing the action, and ordered it to come on for hearing on the question of liability alone. On June 20, 21, 1927, three appeals appear to have been heard, of which two are reported in 96 L.J.Ch., 470, and 477, and the third in [1927] 2 K.B. 517.

- G The first was an appeal from P. O. LAWRENCE, J., and apparently was the same action in which the Court of Appeal had set aside the judgment of RUSSELL, J., and ordered the action to be heard (39 T.L.R. 455), and P. O. LAWRENCE, J., had heard the action. Whatever the action was, P. O. LAWRENCE, J., had dismissed the claim on the ground, *inter alia*, that the action would not lie against agents of the Crown. The court dismissed the appeal. The effective ground of that dismissal was, I think, that stated by SCRUTTON, L.J., at p. 476.

- H The reason why this particular action must fail is that there were no liabilities of the Air Board to be transferred to the Air Council.

And ATKIN, L.J., on the same page, says :

Mr. Mackenzie-Kennedy fails to show that the Air Council ever themselves became parties to a contract.

It is true that BANKES, L.J., at pp. 473 and 474 seems to express some approval of the judgment of RUSSELL, J. (which the court had overruled 2 months before), but I do not understand him as agreeing with the contention that no action will lie against a Minister when a statute has expressly enacted that he " may

sue and be sued." The other two Lords Justices clearly do not assert such a proposition.

The second appeal, or second part of the appeal, from P. O. LAWRENCE, J., was then heard. That was in regard to the plaintiff's claim for an alleged breach of his patent rights. That appeal was dismissed, as I gather, upon the ground that the claim, if any, arose under the Patents and Designs Act, 1907, s. 29, which provided that a government department might use a patent on such terms as might be agreed between the department and the patentee, or, in default of agreement, as might be settled by the Treasury after hearing all parties interested. Therefore, an action to recover remuneration for such use of a patent would not lie.

Incidentally the first paragraph of the judgment of SCRUTTON, L.J., on p. 479, voices a protest from him, who was my master in the law, which I read with enthusiastic approval. Like him "I have been concerned with business," and like him I think that the difficulty of a subject in getting justice done against a Minister or a government department is "thoroughly discreditable to the English constitution." He adds a hope that legislation as to Crown procedure may be expected at an early date. That was in 1927. Now in 1943 nothing of the sort has been done.

Finally in [1927] 2 K.B. 517, there is an interlocutory appeal from FRASER, J., in chambers. I suppose that was "the third stage, the interlocutory motion, which is yet to come" mentioned by SCRUTTON, L.J., in the paragraph I have referred to. FRASER, J., had refused to put an end to the action. The Court of Appeal overruled him. BANKES, L.J., allowed the appeal on the ground that it was an action of tort, and the Air Council could not be sued in tort. SCRUTTON, L.J., discussed various aspects of the prolonged litigation, but ended, at p. 529, with these words:

I allow this appeal, however, on the ground that as the facts necessary to support the action have been already decided by LAWRENCE, J., against the plaintiff in an action in which the plaintiff could have raised the legal claims he now seeks to base on those alleged facts, the court has an inherent jurisdiction to dismiss the action as frivolous and vexatious.

ATKIN, L.J., put it on the ground that the claim was in tort, and the Air Council was not, by statute or otherwise, an incorporated body.

As a result of this melancholy review of the litigious efforts of Kennedy and his trustee I cannot find that FARWELL, J., was justified in saying that the Court of Appeal has held that the provision (that the Air Council may sue and be sued) "did not entitle a subject to sue the Minister." The only ground for such a proposition is the passage in which BANKES, L.J., expressed approval of the judgment of RUSSELL, J. But that was clearly an *obiter dictum*, since his own decision rested on other grounds. Moreover, he was a member of the court which less than 2 months earlier had set aside this very judgment of RUSSELL, J., upon grounds which are not apparent from the report in 39 T.L.R. 455.

In these circumstances, I think there is no decision of this court which constrains me to hold that where a statute in terms enacts that a Minister or other servant of the Crown

... may sue and be sued upon a contract made by him on behalf of the Crown ... those words do not bear their manifest meaning. Further, I think the words we are concerned with in the War Department Stores Act, 1867, that the Minister:

... may institute and prosecute any action ... concerning military or ordnance stores ... contracted to be delivered to or by the Secretary of State for War ... and may defend any action ... concerning any such stores,

though not so explicit, ought to be given the same meaning, viz., that on such a contract the Minister may sue the other party to it for breach of it, and that the other party, though a subject of the Crown, may equally sue the Minister for an alleged breach of the contract by him. In the result, I think the order of VISCOUNT CALDECOTE, L.C.J., allowing the appeal from the master, was correct, and this appeal should be dismissed, the costs in this court to be the defendants' in any event.

GODDARD, L.J.: The question which has to be decided in this appeal is, no doubt, one of considerable importance. It is, apparently, the first occasion on which this court has had directly to decide whether a Minister of the Crown who by statute is empowered to sue and to defend actions in respect of matters

appertaining to his office or who, as it is expressed in some statutes, may sue and be sued, is none the less entitled to object that he is immune from being sued, or having a counterclaim raised against him in an action which he himself has instituted, unless he consents to the subject availing himself of the right which any layman would, I feel sure, consider was conferred in plain language by the legislature. For myself I could wish that the question had been raised in circumstances that disclosed at least some semblance of merits. Here **A** the Minister is suing for damages, which he places at the not inconsiderable sum of £2,235, yet he objects to the defendants counterclaiming for, or seeking to reduce the amount of damages by, the comparatively trivial sum of £68 12s. For that, he says, the defendants must file a petition of right. It is difficult to see what possible advantage can accrue to the Minister if he is right. The only result, I should think, would be that the defendants would apply for this action to stand until the petition of right was ready for trial so that the two proceedings **B** could be heard together, and I can hardly imagine that the court would countenance the waste of time and money that would be involved if the two were tried separately. It may be that it would be a satisfaction to those who advise or act for the Minister (for I do not suppose he personally knows anything about the matter) to feel that they who litigate at the public expense, whether successfully or otherwise, can put the subject to the maximum of inconvenience and expense and thus perhaps deter others from being rash enough to bring **C** claims in which they believe against a department. But the advantage to the public interest, which ought to be the paramount consideration, is, to say the least, inconspicuous. VISCOUNT CALDECOTE, L.C.J., has decided against the Minister and I respectfully agree with him.

The instant question depends on the construction of the War Department Stores Act, 1867, s. 20, since, by the Ministry of Supply Act, 1939, and an order **D** made thereunder, the Minister of Supply takes the place of the Secretary of State for War under that section. In matters connected with stores under his control or sold to or by him, he may institute an action, suit or proceeding, and may defend any action, suit, or proceeding, and any such action, suit or proceeding is not to be affected by any change in the person for the time being holding the office. It appears to be to me as plain as anything can be that a counterclaim is a proceeding, and, is indeed, simply a cross-action. The filing of the counter- **E** claim is equivalent to the issue of a writ. Thus, if the claim raised thereby is liable to be met by a plea of the Limitation Act, the material date is that on which it was filed. It is objected that a counterclaim is entirely the creature of the Judicature Act, which was not passed till 6 years after the Act we are now considering, and which did not bind the Crown. I shall consider hereafter the effect of the first proviso to the section, but, apart from that, it is, I think, **F** immaterial that a counterclaim was first permitted after the 1867 Act came into force. It is a proceeding within the section so long as it relates to any such stores, matter or thing as are therein mentioned. It is said that this section is one which relates only to procedure and neither confers nor alters rights or causes of action. In my opinion, this cannot be correct. Consider first the position of the Minister as plaintiff. He has bought or acquired stores not for himself but for His Majesty. He was an agent, and as such has no right to sue. It is said that **G** the only effect of the section is to permit an action to be brought instead of a proceeding by way of information. The right of His Majesty to proceed by way of information is preserved, and when that process is adopted, the information is filed to confer on the Minister a cause of action which otherwise would be only in his principal and thus to enable him to sue as though he were the principal. Put in another way, the section enables the Minister, in relation to military stores, to take the position that he and not the Crown is the contracting party or the owner of the property in them, while preserving, by the **H** second proviso, the right of the Crown to assert its rights and ownership if it pleases. Then it would seem only consistent with the most elementary principles of justice that, if that right be conferred on the Minister, a corresponding obligation should also be imposed. If he may sue, why should he not also be liable to be sued in respect of the matters or things dealt with by the section? The section provides, therefore, that he may defend any action, suit or proceeding relating thereto. In my opinion these words are clearly intended to give the subject the right to sue the Minister, and are equivalent to saying that he may

be sued. Almost identical words are to be found in the Admiralty Lands Act, 1821, and in *Williams v. Admiralty Comrs.* (1) there is no doubt that the Court of Common Pleas so regarded them. It is extravagant to suppose that Parliament should expressly provide for the Minister defending an action which could not be brought. Obviously some meaning must be given to the words, and two are suggested. First, it is said that they deal with the case where the Minister has made himself in some way personally liable. Theoretically, I suppose, the Minister could in buying military stores undertake a personal liability to pay for them, though one cannot imagine that he would. But, if he did, no Act of Parliament is required to make him liable to an action; he would be liable on his contract. His successor in office could not be charged with his debt, nor, if he were sued on his personal contract, could any question arise as to his enjoying the rights, privileges or prerogatives of the Crown in the proceedings. The section cannot be dealing with a situation which would, in fact, be fantastic. The more serious suggestion is that the section only means that the Minister can submit to be sued if he chooses, but that the subject cannot bring any action against the Minister unless the latter chooses to submit, which he could not have brought but for the section. I cannot believe that, if Parliament says that a Minister may defend an action, or may be sued, that means he has an option as to whether he will be sued or not. Of course, if an action is brought he need not defend any more than any other person against whom proceedings are taken; he may have no defence. But in saying that he may defend an action I think that Parliament contemplated and intended that an action should lie and should be an effective proceeding. There have been several statutes, some earlier, some later, than the Act that we are now considering, containing a similar provision, and it is only reasonable to suppose that the object was a simplification of the law and the provision of an alternative remedy to information on the one side and petition of right on the other. This is effected by clothing the Minister with the rights and obligations of a principal, so that he can enforce rights and remedies by the ordinary process of litigation, and at the same time enables the subject to sue him as though he were himself a contracting party and not the agent of the Crown. I confess that it seems to me that, if a Minister can, in face of such a provision, say that he declines to allow a claim to be preferred against him, there is no room left for any meaning to be attached to the words, at least no meaning of any value, for I cannot believe that, if a Minister has an option, he would ever fail to exercise it in his own favour. But it is said that this construction is supported by the first proviso to the section. It would be contrary to all established rules of construction to hold that a right or remedy given by the substantive part of a section is entirely abrogated by a proviso thereto. I think that all that is intended by the proviso is that the Minister is in the litigation, whether he is the plaintiff or the defendant, to have the additional advantages which the Crown enjoys over other litigants in such matters, for instance, as discovery and the like; as a defendant he is to be in the same position as is the Crown when resisting a petition of right.

It is said that authorities point to another conclusion. The two cases most discussed before us were *Rowland v. Air Council* (4), and *Rowland and Mackenzie-Kennedy v. Air Council* (7), which came before this court. For reasons which have been fully dealt with by MACKINNON, L.J., and which I need not repeat, I think that the remarks on the point we have to consider were *obiter*. I also think that RUSSELL, J., did mean that the words in the Air Force (Constitution) Act, 1917, s. 10:

The Air Council may sue and be sued, and may for all purposes be described, by that name . . .

were insufficient to enable a person to sue the council, unless the action was one which could have been brought independently of that section. When the case came before the Court of Appeal (it is reported in 96 L.J.Ch. 470), it is clear that the actual decision of the court was that the plaintiff had not shown that the contract, which he had originally made with the Secretary of State for War, had either by statute or order in council, been altered so as to substitute the Air Council for the Secretary of State for War. However, the case seems to have proceeded on the assumption or agreement that the only remedy the plaintiff would have had against the Secretary of State was by petition of right. The judgment of SCRUTTON, L.J., makes no reference to the point we have

now to consider, and ATKIN, L.J., expressly leaves the point open. BANKES, L.J., does, however, appear to have expressed agreement with the view of RUSSELL, J., that the words of sect. 10, quoted above, are not sufficient to create a liability or obligation which, apart from the statute, would have no existence. This again appears to me to be *obiter*, and with great respect to the high authority both of RUSSELL, J., as he then was, and BANKES, L.J., I do not feel able to agree. The former looked upon the matter as one which, if allowed, would effect a great constitutional change. I venture to think the effect is merely one of form and not of substance. Whatever may have been the position in former days, it is common knowledge that the Crown never refuses nowadays to grant the necessary *fiat* for a petition of right to proceed, unless, I suppose, the petition can be seen to be frivolous on its face : see *Ryves v. Duke of Wellington* (9), at p. 600. In 1860 the Petition of Right Act was passed, the title of which expressly states as one of its objects the simplification of procedure in such matters. By sect. 7 the procedure in ordinary actions is applied to such petitions, including the right to set-off, and sect. 11 deals with the payment and receipt of costs by the Crown. Counterclaims were not then known, but in view of that section I can see no reason why the Crown should not counterclaim in the answer to a petition of right. What is certain is that the defendants in this action could present a petition of right for that for which they now counterclaim against the Minister and it could be tried at the same time as the action. Parliament did make a change, at least as early as 1821, in allowing a department of state to sue and defend in respect of lands acquired for the purposes of that department, though, of course, they were acquired on behalf of the Crown. In *Williams' case* (1), the Court of Common Pleas had no doubt as to the right of the plaintiff to issue his writ ; they did not think he could succeed in his action because it did not relate to lands, but it is, I think, clear that, in the opinion of the court, if it had, there would have been no objection to the action proceeding. At the present day I do not suppose the court would take the highly technical view that prevailed in that case, that the court could not inquire as to what was the subject-matter of the action, but only as to whether a writ could be issued against the defendant, but for our present purpose the important thing is that they refused to set aside a writ issued against a department of state because there was a statute which enabled a subject to sue the department. A decision in favour of the subject in this case in no way alters the law respecting the non-liability of Ministers for torts committed by their subordinates. It is as well to emphasize this point because, in the course of the argument, reliance was placed on the wide and comprehensive section in the Ministry of Transport Act, 1919, whereby, I think, for the first time in English legal history, a Minister is made liable for the torts of members of his department. It is not and cannot be suggested that the words in the Act of 1867 render the Secretary of State or the Minister of Supply liable for the torts of persons employed in those respective departments. If the Minister is personally guilty of a tort the common law holds him liable, and he cannot ordinarily plead an act of state. He is not liable for the acts of persons employed in his department because they are not his servants, but the servants of the Crown, and there is nothing in the Act under consideration to show that it was the intention of Parliament to alter the law in that respect. Therefore, the alteration effected by this statute, and others containing the same or similar words, is one of form rather than substance.

I base my decision in this case upon two grounds. (i) Where a statute says that a minister or department of state may sue and defend any action that is equivalent to saying he or it may sue or be sued. (ii) These words mean what they say and do make the Minister liable to be sued as such. The statute in effect, changes his position from that of an agent to a principal, the object being to simplify process. But the Minister is not personally liable to satisfy the judgment, because it is clear that the action is against his office and not against the individual, as it is provided that the action shall not be affected by any change in the person for the time being holding the office. It must be presumed that the Minister will satisfy the judgment out of moneys provided by Parliament for his office, just as, if he brings an action and fails, he will satisfy the judgment for costs which would follow. In my opinion the order of VISCOUNT CALDECOTE, L.C.J., was right, and this appeal should be dismissed with costs in any event.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the appellant); *Stuart H. Lewis* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

PEARL ASSURANCE CO., LTD. v. O'CALLAGHAN (H.M.
INSPECTOR OF TAXES).

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), April 16, 1943.] A

Income Tax—Schedule A—Assessment—Block of offices—Assessment on landlord—One entire house or tenement—Gross annual value—Repair of lift—Rateable machinery—No allowances for repairs in addition to authorised deductions—Income Tax Act, 1918 (c. 40), Sched. A, No. V, rr. 7, 8, No. VII, r. 8 (c).—Finance Act, 1936, (c. 34), s. 22.

The respondents were the owners of an office building containing a number of offices let to several tenants who used in common the entrance, staircase and landings and also a passenger lift. The respondents undertook to pay for the upkeep of the lift and other services as well as for the repairs of the whole building. The assessment of such premises is made upon the landlord in respect of the whole premises. It was agreed that the gross annual value was to be ascertained by taking the rents received from the tenants and deducting therefrom the cost of the services provided by the landlord and the amount of the tenants' rates borne by the landlord. The Crown maintained that the lift was part of the hereditament and, since the respondents paid for the repair of the whole building and were, therefore, entitled under the Income Tax Act, 1918, Sched. A, No. V, rr. 7, 8, to the authorised deductions for repairs, the cost of repairs to the lift would be allowed twice, once in ascertaining the gross annual value and again in the authorised deductions :—

HELD : the lift, which is included in the definition of rateable machinery, must be regarded as part of the hereditament in respect of which Sched. A, No. VII, r. 8, puts both assessment and charge upon the landlord. The cost of its repair and maintenance could not be allowed as a deduction in the assessment under Sched. A.

Decision of MACNAGHTEN, J. ([1942] 2 All E.R. 546) reversed.

[EDITORIAL NOTE. The assessment for rating purposes of a block of flats was before the court in *Bell Property Trust, Ltd. v. Hampstead Borough Assessment Committee* (1). It was here contended that the assessment under Sched. A should be based on similar principles, but it is pointed out that, in the case of the assessment for rating purposes, the assessment is one of each separate flat, but, in the case of an assessment under Sched. A, the whole block of flats is assessed as one unit. Thus the lift, which is under the relevant enactments "rateable machinery," is part of the hereditament and its value is included in the assessment and the general allowance for repairs includes repairs to the lift. For these reasons, no deduction can be made for repairs to the lift.

AS TO DEDUCTIONS AND ALLOWANCES, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 48, 49, paras. 93, 94; and FOR CASES, see Digest, Vol. 28, pp. 9, 10, Nos. 44-50.]

Cases referred to :

* (1) *Bell Property Trust, Ltd. v. Hampstead Borough Assessment Committee*, [1940] 2 K.B. 543; [1940] 3 All E.R. 640; Digest Supp.; 109 L.J.K.B. 792; 163 L.T. 292.

(2) *Norwich Union Life Insurance Society v. Embleton, Embleton v. Norwich Union Life Insurance Society* (1927), 137 L.T. 415; Digest Supp.; 11 Tax Cas. 681.

APPEAL by the Crown from a decision of MACNAGHTEN, J., dated Oct. 2, 1942, and reported [1942] 2 All E.R. 546, where the facts are fully set out.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and *Reginald P. Hills* for the appellant.

Cyril King, K.C., and *F. Grant* for the respondent.

The Solicitor-General : My contention is that the lift is to be regarded as part of the hereditament. The rack-rent paid by the tenant is the full rent including payment for repairs to be done by the landlord. On the facts here, *Bell's* case (1) has no bearing on the question which the court has to determine which is one of the general law as applied to a Sched. A assessment. A rating assessment differs from an assessment to income tax under Sched. A in that in the former the repairs are by statute excluded from the rack-rent whereas in the latter it is assumed that the landlord does repairs to the whole building

and allowance is made accordingly. [Counsel referred to *Embleton v. Norwich Union Life Insurance Society* (2), to the Rating and Valuation Act, 1925, and submitted the following statement :

EXAMPLE OMITTING FOR SIMPLICITY RATES AND OTHER EXPENSES

A. Allowance in respect of different classes of repairs in a block of three flats governed by Valuation Metropolis Act, 1869, as amended (see HALSBURY, Vol. 27, p. 534).

	£	s.	d.
1. Rents reserved in the leases, respectively	200	0	0
	400	0	0
	600	0	0
Total	1200	0	0
2. Repairs to common parts of block	120	0	0

	1080	0	0
3. Gross annual value of respective flat respectively.. ..	180	0	0
	360	0	0
	540	0	0
4. Allowance in amended 3rd Schedule to Act respectively	33	6	8
	63	6	8
	93	6	8
5. Rateable Value respectively	146	13	4
	296	13	4
	446	13	4

B. Repair allowance in respect of repairs whether in common parts or demised premises in respect of the same block of flats under Schedule A.

	£	s.	d.
1. Rents reserved in the leases respectively	200	0	0
	400	0	0
	600	0	0

	1200	0	0
2. Repair allowance under rule 7 (£20 + 1-6th of £1100) ..	203	6	8
3. Repairs—Common parts £120 0 0			
Inside flats—full amount of			
rating allowances	190	0	0

	310	0	0
4. Carried forward under Rule 8	106	13	4

Cyril King, K.C. : The problem is to find the annual value. The rent is an inclusive rent and includes payment for services. The rents should be added together and the sum for services and rates apportioned to the different sets of offices. *Bell's case* (1) shows that for rating you have to deduct from the annual payment anything paid for services. On the facts found the cost of the lifts was part of the cost of the services.

SCOTT, L.J. [delivering the judgment of the court] : This appeal raises a question under Sched. A as to the correct way of ascertaining the annual value of a block of office flats in Newcastle-upon-Tyne in accordance with the general rule contained in "No. 1" of that Schedule. It will be best to begin by referring to the relevant statutory provisions. The groups of rules in the Schedule are rather inconveniently called "No. 1," "No. 2," and so on. We will refer to them as "groups." Group No. VII deals with persons chargeable. In most cases it puts the charge upon the occupier of the hereditament ; but r. 8 puts

... assessment and charge upon the landlord in the case of any building let in different tenements and occupied by two or more persons severally ... such as a block of flats. The block is then to be assessed and charged "as one entire tenement" with a proviso that, in default of payment by the landlord, the tax may be collected from the occupiers and a proviso in Group No. VIII, r. 9, to enable the taxed occupier to recover the tax from the landlord by deduction from his rent. Group No. V contains provisions for "deductions and allowances" and its r. 7 (as amended by the Finance Act, 1923, s. 28 (1), (2) and (3)) is, so far as is material to the present case, as follows :

(1) (b) In the case of an assessment upon any house or building ... the amount of the assessment shall, for the purposes of collection, be reduced (i) Where the owner is ... chargeable as landlord ... by a sum equal to the amount of the authorised reduction hereinafter mentioned ... (3) The authorised reduction for the purposes of this rule shall be ... (c) Where the amount of the assessment exceeds £100, £20

together with a sum equal to one-sixth part of the amount by which the assessment exceeds £100.

The fundamental point of the legislation is that the several occupiers are not charged in respect of their occupation of their several tenements, but the landlord is charged in respect of his ownership of the whole building.

The facts can be stated very shortly. It was agreed between the surveyors for both sides (i) that the rents payable by the various tenants were not rack-rents for the several offices, but included payment for various services rendered by the landlord; (ii) that the appropriate calculation was best made in three steps: (a) by adding all the individual rents together; (b) by deducting from the total for the whole block the sum total of the services which were no part of the rackrent of the individual hereditaments; and (c) (which is irrelevant to the appeal) by apportioning the total deductions between the individual so-called rents, in order to arrive at the rackrent of each hereditament in accordance with the general rule of "No. 1." Agreement on all items of deduction discussed was thus reached either between the surveyors or in the subsequent proceedings up to the Court of Appeal except on one topic—the passenger lift. Upon that the respondent company claimed to deduct from the global total of nominal rents two items: (i) £29 2s. for repairs to the lift itself, and (ii) £102 for new landing gate and guides. The company contended that these were "services" rendered by the landlord to the tenants; the Crown contended that the lift was a part of the whole hereditament in respect of which Group No. VII, r. 8, puts both assessment and charge upon the landlord: and that the repair and maintenance of the hereditament must be effected by the landlord at his own expense in order that it should command its several rackrents, just as in the case of an ordinary staircase. We think the Crown is right. The lift seems to us in its nature essentially a part of the hereditament; but, if it is not, at any rate it is deemed to be so for the purpose of Sched. A: see the Finance Act, 1936, s. 22, which says that:

No account shall be taken of the value of non-rateable machinery in ascertaining annual value.

"Non-rateable machinery" is defined in that section by reference to the Rating and Valuation Act, 1925, s. 24, which brings in the definition of Sched. III and thus includes "lifts" in rateable machinery. In our opinion, the above reasoning disposes of the respondent company's main contention.

The company, however, also contended that the decision of this court in *Bell Property Trust, Ltd. v. Hampstead Borough Assessment Committee* (1) was applicable and bound us. In our opinion, that decision does not apply. It was a case where the tenants of the individual flats were primarily responsible to the rating authority but the landlord had compounded. That liability of his for payment did not touch the tenants' basis of legal obligation. It was still the assessment of the individual flats which was concerned, not of the whole building. The lift there was outside the several hereditaments rated and its maintenance was, in that case, regarded as a service by the landlord to the tenants of the flats and as not to be included in the occupation for which the rent was payable by the hypothetical tenant. Under Sched. A the charge is put on the landlord in respect of the whole building; and it is, therefore, the annual value of the whole which is the subject-matter of the tax. The Solicitor-General gave us as part of his argument a typed statement containing a very apposite illustration of the difference between the rating position of flats in a block and the Sched. A position of the whole block. The carry-forward of the amount of repairs to the hereditament over and above the allowance given by Group No. V, r. 7, is permitted by Group No. VIII, r. 8, on the average of 5 years.

We do not think it necessary to refer to any of the cases cited to us. For the above reasons we think that the judgment of MACNAGHTEN, J., should be discharged and the case remitted to the commissioners to act accordingly. The Crown will have the costs here and below.

Appeal allowed. Case remitted to commissioners. Leave to appeal to the House of Lords.

Solicitors: W. H. Warne (for the appellants); Solicitor of Inland Revenue (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

DICK v. PILLER.

[COURT OF APPEAL (Scott, and du Parcq, L.J.J., and Croom-Johnson, J.),
April 7, May 4, 1943.]

County Courts—Appeal—Appeal on question of law only—Exercise of discretion—Refusal to adjourn hearing to enable a party unable to attend to give evidence—Evidence of party essential—Doctor's certificate unsupported by affidavit—County Courts Act, 1934 (c. 53), s. 105—Evidence Act, 1938 (c. 28), s. 1 (5).

A On the resumption of a part-heard case in the county court, counsel for the defendant applied for a further adjournment on the grounds that the defendant was too ill to attend and that his evidence was essential for the proper determination of the case. Without objection by the plaintiff's counsel, the judge received a medical certificate in support of counsel's statement. Counsel for the defendant stated that an affidavit by the doctor could be obtained on that day. The county court judge refused the application and also a similar application made at the close of the plaintiff's case when no affidavit in support of the application was produced. It was not contended that the statements in the medical certificate, though not admitted, were otherwise than accurate:—

B **HELD** [DU PARCQ, L.J., *dissenting*]: there was no evidence before the county court judge to justify his refusing to act upon the medical certificate and he exercised his discretion upon wrong principles in refusing to adjourn the further hearing of the case on such terms as he might have imposed for the plaintiff's protection. This was an error in law upon which an appeal lay to the Court of Appeal.

C [EDITORIAL NOTE. The question here is whether there is any appeal from the decision of a county court judge refusing an adjournment. It is clear that an appeal from the decision lies only where there is an error of law. Whether or not a party is granted an adjournment is wholly in the discretion of the judge which, it was said in this case, he would exercise solely upon his view of the facts. The majority of the Court of Appeal, however, have taken the view that the exercise of the discretion in this case amounted in the circumstances to a miscarriage of justice, and that this was a case where, within the decision of the House of Lords in *Evans v. Bartlam* (8), the judge had proceeded upon a wrong principle and there was an error in law which was appealable to the Court of Appeal. This point is obviously a fine one, and DU PARCQ, L.J., in a closely reasoned judgment, has differed from the other members of the court.

D AS TO CASES IN WHICH AN APPEAL LIES FROM THE COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 376-380, paras. 809-813; and FOR CASES, see DIGEST, Vol. 13, p. 527, No. 787.]

E Cases referred to:

* (1) *Maxwell v. Keun*, [1928] 1 K.B. 645; Digest Supp.; 97 L.J.K.B. 305; 138 L.T. 310.

F * (2) *Jones v. S.R. Anthracite Collieries, Ltd.* (1920), 124 L.T. 462; 90 L.J.K.B. 1315; 34 Digest 390, 3169; 13 B.W.C.C. 346.

* (3) *How v. London and North Western Ry. Co.*, [1892] 1 Q.B. 391; 13 Digest 526, 768; 61 L.J.Q.B. 368; 66 L.T. 398.

(4) *Metropolitan Ry. Co. v. Wright* (1886), 11 App. Cas. 152; 36 Digest 85, 565; 55 L.J.Q.B. 401; 54 L.T. 658.

* (5) *Brown v. Dean*, [1910] A.C. 373; 13 Digest 513, 619; 79 L.J.K.B. 690; 102 L.T. 661.

G * (6) *Henderson v. Watmough (Clifford) & Co.* (1939), 161 L.T. 233; Digest Supp.; 83 Sol. Jo. 747.

(7) *Flint v. Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

* (8) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; *sub nom. Bartlam v. Evans*, 157 L.T. 311.

(9) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; Digest, Practice, 788, 3503; 96 L.J.K.B. 1132; 137 L.T. 656.

H (10) *Sackville-West v. A.-G.* (1910), 128 L.T. Jo. 265; Digest, Practice 558, 2168.

(11) *Ord v. Ord*, [1923] 2 K.B. 432; Digest, Practice, 558, 2163; 92 L.J.K.B. 859; 129 L.T. 605.

* (12) *Hammond Bros. and Champness, Ltd. v. Jackson*, [1914] 1 K.B. 241; 13 Digest 503, 537; 83 L.J.K.B. 380; 110 L.T. 110.

APPEAL by the defendant from the judgment of His Honour JUDGE KONSTAM sitting at Epsom County Court, dated Dec. 9, 1942. The facts are fully set out in the judgments.

J. L. Poole for the appellant.

H. M. Pratt for the respondent.

SCOTT, L.J. : This is an exceptional case involving a point of practice of some importance in regard to the right of appeal to the Court of Appeal where a county court judge refuses an adjournment asked for on the ground of the inability of a party to attend whose evidence is materially relevant to the proper hearing of his case. *Prima facie* his discretion is unfettered, and, in addition, it may be that the Court of Appeal has less power to interfere with him than with a High Court judge from whom an appeal lies on fact as well as law ; but the very finality of his decision on every question of fact increases, if anything, the importance of this court, if it thinks the discretion has been wrongly exercised, making sure that there has been no error of law. The appellant was defendant in an action for £51 8s. 1d. brought by his agent against him as principal on a running account between them in respect of moneys paid, or remuneration for services rendered, in connection with the training and running of the defendant's horses in races. The defendant admitted indebtedness for rather more than half the amount claimed, but sought to " surcharge and falsify " the plaintiff's account in certain respects, disputing the balance on the ground of part over-payments and various other grounds which it is unnecessary to investigate for the purpose of the appeal, as it is, in my opinion, clear that the current arrangements were throughout made by word of mouth, and the payments were made personally between the plaintiff and defendant without documentary records. The defendant's evidence was, therefore, material and perhaps critically important if the issues raised were to be really tried on their merits ; for nobody else could give his evidence. I, therefore, think the county court judge, in refusing the adjournment, deprived the defendant of a hearing.

The only question in the appeal is whether the judge erred or misdirected himself in law in refusing the particular adjournment. DU PARCQ, L.J., thinks that, if the judge erred, his error was an error of fact. CROOM-JOHNSON, J., thinks there was an error of law. I have read both judgments with care and agree with the conclusion arrived at by the latter, although I agree with the former that, if the refusal of the adjournment had been an exercise of discretion on a pure question of fact, no appeal would have lain under the County Courts Act, 1934, s. 105. Upon the facts relating to the application for adjournment, I think that the judge caused a serious miscarriage of justice, and that, in doing so, he neglected a first principle of law, for he deprived the defendant of his elementary right to be heard before he was condemned.

The truly relevant facts can be very shortly stated. The opening and part of the evidence for the plaintiff having been heard some time previously, the plaintiff's evidence was to be completed and the defendant's case heard on Dec. 9. The defendant had been ill with bronchitis in the latter part of November and was still, or had become again, ill early in December, and on Dec. 2 the doctor who had been attending him gave him a certificate of his inability " to follow his occupation." His solicitors, accordingly, on Dec. 3, wrote to the plaintiff's solicitors as follows :

We regret to inform you that our client is still under the care of his doctor and will not be able to appear in court on the 9th instant. In these circumstances it will be necessary to have a further adjournment. We enclose a copy of the medical certificate, the original of which we have received to-day. We enclose consent for adjournment for your signature together with copy for your use.

The plaintiff's solicitors answered on Dec. 5 :

We are in receipt of your letter of the 3rd instant enclosing consent to an adjournment of this action. We regret we cannot see our way clear to advise our client to agree to a further adjournment as this matter has been adjourned for the convenience of your client and we have recently been informed that your client stated that " they would not get him to go to the court." We have also received information that your client has been instrumental in approaching witnesses who have already given evidence on behalf of the plaintiff to give further evidence on behalf of your client. We have therefore instructed counsel to oppose the application for adjournment.

The defendant's solicitors replied on Dec. 7 :

We have your letter of the 5th instant and regret to note that you are not agreeable to having this action adjourned although with knowledge of the fact that our client is unable to attend court in consequence of illness, and we have supplied you with a copy medical certificate. We would mention that if you had not asked for an adjournment for the convenience of your counsel this matter would have been disposed of as long ago as Oct. 28 last when our client would have appeared in court, and had made

arrangements to do so. Therefore your statement that the plaintiff would not get him to come to court cannot be substantiated. We note you do not raise any doubt regarding our client's inability to attend court on account of illness, because if you had done we would certainly at once have pointed out that you could have our client medically examined. We note your remarks regarding the approach of witnesses upon which we are taking our client's instructions.

In this letter they enclosed a new certificate which said that the defendant was "unable to leave home probably for two weeks." Upon that the defendant's solicitors on Dec. 9 attended at the court with their counsel. The latter informed the judge of the position, produced the two certificates, read the three letters and asked for an adjournment, offering to pay the costs thrown away. He also informed the judge that the doctor could, if necessary, attend the court, or swear an affidavit. I think he also told the judge that it could be sworn that day, but the judge refused any adjournment. The plaintiff's case was accordingly continued and completed; and at its close counsel again asked for an adjournment on the ground that the defendant's own evidence was vital. By then, in my opinion, the judge, having heard the whole of the plaintiff's evidence, including the cross-examination of his witnesses, must have realised that the defendant's evidence was certainly material, and perhaps crucially so. None the less, he refused an adjournment. As a result, the only available witness, who could give very little evidence, was called for the defendant and the defence in effect went by default, the claim being reduced only by a small total which the cross-examination of the plaintiff's witnesses had shown to be obvious.

If justice required an adjournment on Dec. 9, what had happened before was irrelevant, except possibly as to costs, and the reference in the letter from the plaintiff's solicitors of Dec. 5 to previous adjournments was beside the point, and also misleading, for it in fact misrepresented the past history of the case, which was this. The hearing of Sept. 16 was adjourned to Oct. 28 at the instance of the court, not of the parties. Before Oct. 28 it was again adjourned, with the consent of the defendant's solicitors, to Nov. 25, in order to oblige the plaintiff's counsel, who had an important engagement in court elsewhere. Before Nov. 25 arrived, the defendant had fallen ill with bronchitis; his solicitors obtained his doctor's certificate of his inability to attend and sent it to the plaintiff's solicitors, who agreed to an adjournment to Dec. 9, when the defendant's solicitors were expecting the defendant to be well enough to attend.

The case resolves itself into a short question of law. If an important witness—a *fortiori* if he is a party—is prevented by illness from attending the court for an adjourned hearing, at which his evidence is directly and seriously material, what is the legal duty of the judge when an adjournment is asked for? In my view, if he is satisfied (i) of the medical fact and (ii) that the evidence is relevant and may be important, it is his duty to give an adjournment—it may be on terms—but he ought to give it unless, on the other hand, he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs. These questions may depend on matters of degree, and matters of fact may be involved (as *DU PARCQ*, L.J., truly says), but on the facts of the present case I think the judge went wrong in law, because (i) my two positive conditions were satisfied, and (ii) no suggestion was made that an injustice would result to the plaintiff.

I am confirmed in this opinion by noting that he corrected the copy of his judgment which, as typed, merely said "adjournment refused," by adding the reason for his refusal, which he did by writing in ink the words "in absence of affidavit." That was, in my opinion, on the facts a wholly inadequate reason in law for depriving the defendant of a hearing. Apart from any offer by counsel for the defendant, the judge could, on his own motion, have imposed any terms of costs and also payment to the plaintiff of his admitted part of the claim and payment into court of part of the balance of the claim as a condition of granting the adjournment. Under the Evidence Act, 1938, s. 1 (5), both the plaintiff's solicitors and the judge ought in all the circumstances, and especially in view of the correspondence, to have accepted the medical certificate of Dec. 7 without an affidavit. For that section, in my view, was an ample justification for the defendant's solicitors not going to the expense of an affidavit. I cannot help thinking that suspicion without sufficient foundation was in the minds of both the plaintiff's solicitors and the judge, and, if it was in his mind, it was all the

more important for him to see the defendant under cross-examination in order to find out whether his suspicion was well-founded. The observations of ATKIN, L.J., in *Maxwell v. Keun* (1), at p. 657, and of LAWRENCE, L.J., at p. 659, are both in point. *Jones v. S.R. Anthracite Collieries, Ltd.* (2) in the Court of Appeal is authority that the question raised by this appeal is covered by the County Courts Act, 1934, s. 105, and, I think, affords some support to the view which I take that, where a miscarriage of justice, such as I think took place here, occurs, it necessarily involves an error of law. The appeal must be allowed and the case remitted to the county court for rehearing. The appellant will have the costs here: the costs below will be in the discretion of the judge who re-tries the case.

DU PARCQ, L.J.: The first question, and on the view which I have formed the only question, to be decided in this appeal is whether the defendant can establish that the "determination" of the judge of which he complains was a

. . . determination . . . in point of law . . . or upon the admission or rejection of evidence.

It is hardly necessary to cite authorities to show that the limitation upon the right of appeal from county courts which has long been imposed by statute, and is now prescribed by the County Courts Act, 1934, s. 105, has been carefully observed by this court, but I will refer briefly to two of them. In *How v. L. & N.W. Ry. Co.* (3) an appeal was brought against the decision of a county court judge who had granted a new trial on the ground that the verdict of a jury was against the weight of evidence. It was contended that, if the evidence in the case were looked at, it would be seen that the judge had not acted within the principles stated in *Metropolitan Ry. Co. v. Wright* (4). This court dismissed the appeal without calling on the respondents' counsel. The judge had stated that he was following the opinions of the House of Lords in *Metropolitan Ry. Co. v. Wright* (4). FRY, L.J., said, at p. 393:

What followed afterwards was a decision on a question of fact; and if he made an error, it was an error in fact.

It may be useful to compare with *How v. L. & N.W. Ry. Co.* (3) the decision of the House of Lords in *Brown v. Dean* (5), where the order of a county court judge that there should be a new trial was set aside because he had disregarded well-settled principles of law. In the recent case of *Henderson v. Clifford Watmough & Co.* (6) the appeal was against an award of damages by a county court judge, the ground of appeal being that the damages awarded were much too small. The appellant sought to rely on the principles laid down by GREER, L.J., in the well-known case of *Flint v. Lovell* (7), at p. 360. This court dismissed the appeal on the ground that it was not shown that the judge had "erred in point of law." The judgment of the court in *Henderson v. Clifford Watmough & Co.* (6) contains this passage, at p. 234:

"We would only add that in our opinion it is not useful to consider in this connection decisions as to the duty of this court in considering appeals against the verdict of a jury or a decision of a judge of the High Court sitting without a jury.

The present appeal is in form brought against a judgment under which the plaintiff recovered £44 3s. 10d. and costs against the defendant, and a counter-claim by the defendant was dismissed. In substance, what is appealed against is the judge's refusal to adjourn the resumed hearing of a part-heard case. Application was made for an adjournment on the ground that the defendant was a necessary witness and was prevented by illness from attending the court. The notice of appeal states the facts and summarises the grounds of appeal in the words:

And in the premises there was a miscarriage of justice.

I can state very shortly the only facts which I think material for the present purposes. The hearing of the action had been begun on Sept. 16, 1942. It was resumed on Dec. 9, 1942. The defendant was not present. His counsel asked for an adjournment and produced two medical certificates signed, or purported to be signed, by a gentleman who is said to be a medical practitioner. These certified that the defendant was suffering from bronchitis and would be unable to leave home probably for two weeks from Dec. 7. Although the defendant's solicitors had been told by the plaintiff's solicitors in a letter of Dec. 5 that they would not consent to an adjournment on the ground of the defendant's alleged

illness, but, on the contrary, were instructing counsel to oppose the application for an adjournment, no other evidence of the defendant's illness and inability to attend was forthcoming than the certificates. When the application was made it was opposed. The plaintiff's counsel did not admit that the defendant was ill, but he did not object to the reading of the certificates, which were considered by the judge. The defendant's counsel told the judge that an affidavit could be obtained from the doctor, but it seems to have been unlikely that an affidavit could be obtained without considerable delay. In the result the application was refused. The judge's note is :

Adjournment refused in absence of affidavit.

Later in the day the application was renewed, though there was still no supporting affidavit, and the judge again refused to grant it. I understand the judge's note to mean that, in all the circumstances, he was not prepared to accept the certificates as sufficient proof that the defendant was prevented by illness from being present. Counsel for the plaintiff had not objected to the reading of the certificates, but he had not admitted the truth of their contents, and in those circumstances it was for the judge to say what weight he would give to them.

Before the passing of the Evidence Act, 1938, a medical certificate not verified by affidavit was not in strictness admissible at all, though it was often received without objection when there were no grounds for suspecting the good faith of the party producing it. The legislature has, however, intervened and by the Evidence Act, 1938, s. 1 (5), it is provided as follows :

... the court may ... in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner ...

It should be added that sect. 2 of the same Act leaves it to the judge to estimate :

... the weight, if any, to be attached to a statement rendered admissible as evidence by this Act ...

There is nothing to show whether these provisions were present to the judge's mind, except that apparently counsel did not draw his attention to them. The judge may very well have had the Act in mind, and deliberately exercised the discretion which it allowed him by refusing to act on the certificates. On that view, it is plainly impossible to say that the judge erred in law. If, on the other hand, it is to be supposed that the judge was unmindful of the Act, it is not open to the defendant to found any complaint on this, as his counsel did not take the point before the judge that the certificates were admissible under the Act. The omission is, I think, hardly blameworthy. The judge had in fact read the certificates without objection by the plaintiff, and refused to act on them. There can be no doubt, in my opinion, that a judge is free to reject evidence of this character when it is only admitted by favour of the other party, who, while admitting it for what, in the estimation of the court, it may be worth, makes no admission as to the truth of its contents. Counsel could hardly have expected that the judge would have changed his view as to "the weight, if any," to be given to the certificates if he had had the Evidence Act, 1938, open before him. I will assume that, if the judge had been satisfied that the defendant was prevented by illness from attending, his decision to proceed with the hearing would have been an error in point of law. As he was not so satisfied, there was no ground for an adjournment, and we are not concerned with the question whether, assuming the truth of the certificates to have been proved, it would have been proper for the judge to grant an adjournment in the exercise of his powers under C.C.R., Ord. 13, r. 4.

For the reasons which I have given, I find it impossible to hold that the judge erred in law when he held that the allegation that the defendant was ill and, therefore, unable to attend, was not proved. This is a question of fact, and nothing else. If it be true to say that there was "a miscarriage of justice" (and as to this I express no opinion) an error in fact and not in point of law was the cause of the miscarriage.

It was suggested, alternatively, that the judge had come to a wrong determination "upon the admission or rejection of evidence." If this suggestion means that he wrongly rejected the medical certificates, I have already dealt sufficiently with the point. If it means that he rejected or refused to admit the evidence of the defendant, I find it difficult to understand. A judge does not reject evidence which is not tendered. If a witness is absent without good

cause nobody can complain that his evidence has not been heard. In this case the judge was not satisfied that the excuse put forward for the defendant's absence was a true one.

These reasons lead me to the conclusion that this court has no power to interfere with the decision of the county court judge. It is necessary, however, that I should refer to two decisions upon which much of the argument of the defendant's counsel was founded. The first is *Evans v. Bartlam* (8), a decision of the House of Lords in which the power of the Court of Appeal to interfere with the exercise of a judge's discretion was the subject of debate. This case, in my opinion, has no bearing on the present appeal. It is plain from a consideration of the speeches in that case that the House was dealing, and dealing only, with appeals from judges of the High Court. Thus LORD ATKIN said, at pp. 480, 481 ([1937] 2 All E.R., at p. 650) :

Appellate jurisdiction is always statutory : there is in the statute no restriction upon the jurisdiction of the Court of Appeal ; and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of a judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it.

These observations (on which, strangely enough, counsel for the defendant was disposed to rely) are plainly inapplicable to appeals from the county court, since in such appeals there is a restriction upon the jurisdiction of the Court of Appeal, and the appellate court has neither the power nor the duty to interfere with the judge's discretion except on grounds of law, even if it sees that the decision may result in injustice. The second case to which I must refer is *Jones v. S.R. Anthracite Collieries, Ltd.* (2), a decision of this court upon which the defendant's counsel strongly relied. In that case a county court judge, exercising his jurisdiction under the Workmen's Compensation Act, 1906, had refused to allow an adjournment. This court came to the conclusion that the judge had, or possibly might have, acted on wrong grounds. There is no report of the argument, but LORD STERNDALÉ, M.R., in his judgment, said, at p. 462 :

The respondents say that any question of adjournment is a matter which is within the discretion of the county court judge. So it is, and this court would not interfere if it appeared to them that such discretion had been exercised in a way which showed that all necessary matters have been taken into consideration, although they might not agree with the learned county court judge's decision.

LORD STERNDALÉ, M.R., added that his impression was that this court had interfered with the decision of "even High Court judges" with regard to adjournments, and SCRUTTON, L.J., was under a similar impression. Under the Workmen's Compensation Act, 1906 (as under the 1925 Act), there is no provision for an appeal to the Court of Appeal except where a question of law is involved, and, therefore, one of two assumptions must be made, either (i) counsel omitted to argue, and the court failed to observe, that the powers of the court were thus limited, or (ii) the court was satisfied on the facts of the case that a question of law was raised by the judge's decision. It is difficult to believe that the point was overlooked by the court and by the experienced counsel who appeared at the Bar. On the other hand, I find it difficult to discover what the question of law was, especially as LORD STERNDALÉ, M.R., seems to have thought it possible that the judge had refused the application on "quite reasonable grounds." It may be that some distinction, which I am not at present able to discern, can be drawn for the present purpose between appeals under the Workmen's Compensation Act and appeals which are regulated by the County Courts Act, 1934, s. 105. I am disposed, however, to regard the case as deciding that the particular facts there shown to exist (which apparently were not in dispute) so clearly justified the application for an adjournment, that the judge must be taken to have misapplied the law when he refused that application. So regarded, it has no relevance to the present appeal. Whatever else it may decide, it cannot be an authority for the proposition that an appeal will lie from a county court judge's decision on a question of fact, and cannot justify this court in ignoring a statutory limitation upon its powers, which it is an elementary duty to observe. In my opinion, the only order which this court has power to make is that the appeal should be dismissed, and I think that the usual consequences should result.

CROOM-JOHNSON, J. [read by DU PARCQ, L.J.]: On July 17, 1942, the plaintiff issued a plaint against the defendant in the Epsom County Court claiming according to his particulars the sum of £60 on a dishonoured cheque and, alternatively, £51 8s. 1d. for work and labour done and payments due. The plaintiff is a racehorse trainer, and the claim arose out of oral arrangements made between the parties in connection with certain racehorses belonging to the defendant's daughter. The defendant is a Netherlands subject. The claim on the cheque was not persisted in. To the alternative claim the defendant pleaded, first, that some of the items in it were not in accordance with the oral agreements either as not being payable at all or else as being excessive in amount so that at most the defendant owed only £30 13s. 7d.; secondly, that the defendant was entitled to set-off certain overcharges on former accounts which the defendant in effect sought to surcharge and falsify to a total of £22 17s. 4d.; and, thirdly, that a sum of £8 1s. 7d. which he paid into court with an admission of liability representing the difference between the claim and the sum of the two figures of admission and set-off I have mentioned was enough to satisfy the plaintiff's claim.

The action was originally fixed to be heard in court on Sept. 16, 1942. The plaintiff, however, on Sept. 10, made an application to the registrar for an adjournment of the hearing on the ground that he had to be in Scotland on the day fixed. That application was refused. Accordingly, the case came on for hearing on Sept. 16, 1942, when the defendant's counsel applied to the judge for an adjournment on the grounds that the defendant had been called to Scotland the previous Monday on urgent business and that his evidence was vital to his defence, and offered to pay the costs thrown away. The application was opposed on behalf of the plaintiff. It was not suggested before us that the reason given for that application was untrue. The judge ordered that the plaintiff's case should continue and he stated that he would "consider about adjourning later for defence." The hearing accordingly proceeded, but the plaintiff's case was not concluded on that day, and the further hearing was then adjourned for want of time to Oct. 28, 1942, the judge ordering that, if the defendant were not there on Oct. 28, "the case would be decided in his absence." The reason for that order does not appear. The hearing was not resumed on Oct. 28, 1942, the parties agreeing for the convenience of their respective counsel to postponement to two other dates; and ultimately on Nov. 25, the defendant being ill with bronchitis, by consent without any application to the court, the parties agreed to a further postponement to Dec. 9, 1942, a doctor's certificate as to the defendant's state of health being filed with the consent. On Dec. 2, 1942, the defendant's doctor gave a certificate in writing to the effect that the defendant, by reason of ill health, was unable to follow his occupation. On the next day the defendant's solicitors by letter informed the plaintiff's solicitors of that fact, sent them a copy of the certificate in question and asked them to sign a consent to a further adjournment enclosed with the letter. The plaintiff's solicitors refused to consent by letter of Dec. 5, 1942, and on Dec. 7, 1942, the defendant's solicitors wrote again. Those letters have already been read. On the same day, Dec. 7, 1942, the defendant's doctor gave the further certificate already read. It was not contested before us, although not accepted, that the statements in the medical certificates were otherwise than true and accurate.

The action thus came on for further hearing on Dec. 9, 1942. The defendant's counsel at once asked the judge for an adjournment, produced the two medical certificates and stated that he could get an affidavit from the doctor, if required, during the day. To that application the plaintiff's counsel appears to have made two objections, and two only, according to the judge's note: (i) "lengthy history of applications for adjournment" (a note which, if it refers to applications on behalf of the defendant, it is difficult to understand), (ii) "defendant has had opportunity after opportunity to attend court" (a statement which is also difficult to understand). There is no note of any objection on behalf of the plaintiff to the admission of the certificates as evidence without an affidavit, nor any contention that the certificates were in any respect untrue or even inaccurate, or that the defendant's evidence was not relevant and material to his defence. Such certificates, unless objected to for want of an affidavit, are, in my experience, commonly accepted as evidence on applications for postponements on the ground of ill health of a party or of a witness. The judge

then refused the application. In his note he has written in the words "in absence of affidavit." There is no note to show that he had considered the offer of the defendant's counsel to get an affidavit by the doctor during the day. The result was that the hearing again proceeded in the absence of the defendant, this time through illness. The plaintiff's case was resumed and concluded. At the end of the plaintiff's case the defendant's counsel renewed his application for an adjournment. This was in its turn refused by the judge. On this occasion no question of the absence of an affidavit by the doctor was raised by anyone. The defendant's counsel called his one witness, a stable boy, and was then obliged to close his case. The judge, as the result in part of the cross-examination of the plaintiff and in part of some admission made on behalf of the plaintiff, reduced the plaintiff's claim and gave judgment against the defendant for the sum of £44 3s. 10d. with costs. The defendant now appeals by notice of appeal dated Dec. 29, 1942, on the following grounds :

That the judge gave judgment without hearing the evidence of the defendant relevant to the matters in issue between the parties. On the date when the defendant was required to attend to give evidence, to wit, Dec. 9, 1942, he was indisposed and unable to travel to the court. Medical certificates to this effect were produced to the judge on the said day, and he was informed by counsel on behalf of the defendant that the said certificates would, if necessary, be verified upon oath, either orally or upon affidavit, by the doctor who had signed the said certificates. The judge nevertheless ordered the trial to proceed forthwith. And in the premises there was a miscarriage of justice.

In answer to the appeal it was contended on behalf of the plaintiff (i) that the question was one of discretion with which this court cannot and ought not to interfere ; (ii) that, having regard to the County Courts Act, 1934, s. 105, the matter raised is one which this court cannot entertain since it is not a determination or direction of the judge in point of law or equity raised and determined at the trial, or upon the admission or rejection of any evidence. An attempt was also made to convince us that the defendant's evidence was not necessary to the proper presentation of the defendant's case. Speaking for myself, having examined the whole of the pleadings and particulars delivered and the full and careful notes of the judge of the cross-examination of the plaintiff, I can only express my surprise that the point should even have been attempted to be argued. I have no doubt whatever, not only that the defendant's evidence was relevant, but essential to the proper presentation of the defence and vital to be considered if justice was to be done or to appear to be done. It has to be remembered in particular that the defendant was seeking by counterclaim to re-open past transactions in which he alleged that overcharges had been made, and was setting up that he himself had paid out of his own pocket some of the items sought to be recovered by the plaintiff as having been paid by him.

On the question whether there has been a wrong exercise of discretion, a number of authorities were cited to us. In view of the passages from the judge's notes, to which I have already referred, I feel sure that the judge must have taken into consideration statements which, on fuller examination, turn out to be inaccurate. He had apparently made up his mind on Sept. 16, long before any question of illness arose, to proceed with the trial in the absence of the defendant at the adjourned hearing, even if the defendant were absent. I cannot believe that the judge applied his mind to the possibility of an injustice resulting from the case being decided without the defendant's evidence. Had he done so he must, I think, have come to one conclusion only. He would then have had to consider whether a miscarriage of justice might arise to the plaintiff if an adjournment were granted. I can find no trace in the judge's notes of these points being considered or even being discussed, or whether an award of costs would not meet the case.

I turn to the authorities. The question whether there shall be an adjournment of the proceedings in cases arising under the Workmen's Compensation Act, 1906, is one which is within the discretion of the county court judge before whom such proceedings are pending. Although this court has power to interfere with the judge's decision in regard to the granting of an adjournment, it will refrain from doing so unless it appears that such discretion has been exercised in a way which shows that all necessary matters have not been taken into consideration : *Jones v. S.R. Anthracite Collieries, Ltd.* (2). In that case, in the absence of any reason being stated for refusing to allow an adjournment and

there being no evidence upon which a refusal could properly be based, this court allowed an appeal. LORD STERNDALE, M.R., at p. 462, says :

... this court would not interfere if it appeared to them that such discretion had been exercised in a way which showed that all necessary matters have been taken into consideration although they might not agree with the learned county court judge's decision.

In the same case SCRUTTON, L.J., at p. 463, says :

A I should like to say in regard to the point as to whether this court has ever interfered with the decision of a county court judge in regard to an adjournment that my impression ... is that this court has frequently interfered with the decisions of County Court and High Court judges in regard to the question of "adjournment," because the whole object of this court and every court should be to do justice between the parties without dealing with technical objections.

B So far as regards such questions in ordinary county court actions, apart from the Workmen's Compensation Acts, the observation is *obiter dictum*, but I find it difficult to believe that SCRUTTON, L.J., overlooked the specific provisions of the County Courts Act as to appeals. As I read the decision in the case last cited, there being no appeal on fact, this court must have dealt with the matter as one of law. On the question of interference generally with the exercise of discretion by a High Court judge, ATKIN, L.J., in *Maxwell v. Keun* (1), is reported, at p. 653, as having said :

C The other point that was made by the defendants was that this was a discretionary order, and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so ; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so.

D *Campbell & Co. v. Pollak* (9), was an appeal relating to costs only, where there was no appeal at all. I refer without quoting them to the remarks of LORD ATKIN in *Evans v. Bartlam* (8), at p. 480 ([1937] 2 All E.R., at p. 650) ; to the statement of the law by this court in *Sackville-West v. A.-G.* (10) ; and of LUSH, J., in *Ord v. Ord* (11), at p. 439. In an appeal from a county court in *Hammond Brothers and Champness, Ltd. v. Jackson* (12), a divisional court to which such an appeal then went heard without objection an appeal against the exercise of discretion postponing a trial. BRAY, J., was a party to that decision, and I find it difficult to believe that that learned judge could have overlooked the point if it is a good one. It has, I think, always been maintained that an exercise of judicial discretion on a wrong principle is appealable. To exercise it on wrong considerations or on wrong grounds, or to ignore some of the right considerations, is, in my judgment, to decide on wrong principles.

F The effect of the judge's order was to reject in advance the defendant's evidence altogether. Why ? Apparently, if we are to accept the addendum to his note, on the ground that there was no affidavit in support of the certificates or verifying them. No doubt an affidavit in support of such applications is usual in cases where the facts stated in the certificates are disputed ; but I should be sorry to think that it is necessary to incur the expense of an affidavit to prove facts which are not in dispute. The certificate of Dec. 7, 1942, was, in my opinion, sufficient *prima facie* evidence of the facts stated in it. That evidence has been rejected and, in my view, wrongly, as to which there is an express right of appeal given by the County Courts Act, 1934, s. 105.

G For all these reasons I have come to the conclusion that this appeal is competent, that the judge's discretion was wrongly exercised and his order wrong. It follows that I think this appeal should be allowed, the judgment appealed from be set aside, and a new trial be ordered.

H *Appeal allowed with costs.*

Solicitors : A. W. Rhodes & Co. (for the appellant) ; Tuck & Mann (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

[KING'S BENCH DIVISION (Macnaghten, J.), January 8, 1943.]

*Revenue—Excess profits duty—Contract extending beyond accounting period—
 Pooling agreement between builders and building society—Finance (No. 2)
 Act, 1939 (c. 109), Sched. VII, Pt. I, para. 11.*

The appellants had built a number of houses which had been sold to purchasers who borrowed the purchase price from a building society. The amounts borrowed being more than would usually be advanced by the society upon such security, the excess was guaranteed by the appellants and a deposit made with the society in pursuance of a pooling agreement in the usual form. In the standard period for the purposes of excess profits duty such deposit amounted to £1,000 and the appellants contended that, although that deposit was excluded from their profits for the purposes of income tax, it should be brought in for the purposes of ascertaining the profit in the standard period for excess profits duty as being a contract extending beyond the accounting period within the meaning of Finance (No. 2) Act, 1939, Sched. VII, Pt. 1, para. 11 :—

HELD : there was no contract extending beyond the accounting period, and the deposit ought not to be brought into account in ascertaining the profit in the standard period.

[EDITORIAL NOTE.] The general features of a pooling agreement between builders and a building society are well-known. Such an agreement usually extends beyond the grant of loans in consideration of a deposit to provisions for the release of the deposit as and when the purchasers of houses pay off the excess amount advanced to them. As such the agreement would extend over some years. It is said, however, that the contract between the appellants and the society was completed in the accounting period in question although it seems that the deposit was not repaid until 1939.

FOR THE FINANCE (No. 2) ACT, 1939, SCHED. VII, PT. I, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1218-1221.]

Case referred to :

- (1) *Harrison v. Cronk & Sons, Ltd.*, [1937] A.C. 185 ; [1936] 3 All E.R. 747 ; Digest Supp. ; 106 L.J.K.B. 70 ; 156 L.T. 20 ; *sub nom. Cronk & Sons, Ltd. v. Harrison*, 20 Tax Cas. 612.

APPEAL by the company against an assessment in respect of excess profits duty for the chargeable accounting period from Apr. 1, 1939, to Dec. 31, 1939, in the sum of £3,928 12s.

Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and *Reginald P. Hills* for the respondents.

MACNAGHTEN, J. : The appellants carry on a business as building contractors. During the years 1936 and 1937, which constituted the standard period for the purpose of computing the standard profits of the business, the company sold 18 houses which they had erected on a building estate at Southgate, Middlesex. The houses were sold to purchasers who had obtained advances from the Hearts of Oak Permanent Building Society to enable them to complete their purchases. These advances, which were secured by mortgages on the houses, were made by the society pursuant to an agreement dated May 1, 1934, as varied by a supplemental agreement, dated Nov. 4, 1936, whereby the appellants agreed, in cases where the amount advanced by the society to the purchaser exceeded 75 per cent. of the purchase price of the house, to guarantee repayment of the excess advances, and also to deposit a sum of money with the society by way of security for the performance of their obligation, such deposit to be repaid by the society in due course in accordance with the terms and provisions of the agreement. For the 2 years 1936 and 1937, being the standard period, the deposits so made by the appellants with the society amounted in all to £1,000.

The House of Lords in *John Cronk & Sons, Ltd. v. Harrison* (1), decided that, in cases such as this, in the event of the commissioners finding an actuarial valuation of the deposits impracticable, the sums deposited with the building society [at p. 751] :

... should not be treated as receipts of the company's trade except in so far as such sums, or any part thereof, were released to the company during the trading periods in question.

In accordance with that decision, in the assessments made upon the appellants for the purpose of income tax for the years 1936 and 1937, the sums so deposited by them were deducted from the purchase price of the houses ; and, accordingly, their profits for those years were diminished by those amounts.

The company contend that, although these deposits were correctly excluded in the computation of the profits in the standard period on income tax principles, the Finance (No. 2) Act, 1939, Sched. VII, Pt. I, para. 11, requires that such proportion of the profit resulting or estimated to result from the sale of the houses in the standard period which was properly attributable to that period should, in the absence of any direction by the commissioners to the contrary, be attributed to that period having regard to the extent to which the contracts were respectively performed.

Para. 11 begins as follows :

Where the performance of a contract extends beyond the accounting period . . . The initial difficulty in the way of the appellant company is to find in this case any such contract. The contracts between the company and the purchasers were all duly completed in the years 1936 and 1937. The purchasers paid the full purchase price and the houses were in fact conveyed to them and duly registered in the Land Registry as their houses. The contract between the purchaser and the building society was also duly completed by advances by agreement, the purchasers giving their mortgages on the houses. The contract made between the company and the building society also was duly completed in the years in question.

It is said that the decision of the House of Lords in *Cronk's* case (1) really amounts to this : that there was a tripartite agreement between the company, the purchaser, and the building society. It is true it was not reduced into writing : it is not to be found in any document ; but it is said if you put the transactions between the several parties together, you can make up such a contract. I am unable to find it. It may be assumed that the building society would not have advanced all the money that was required to provide the purchase price unless the company had entered into an arrangement to secure the repayment of the excess advances ; but there was no contract remaining to be performed. Therefore, I do not think that the initial provision of Sched. VII, Pt. I, para. 11, has been complied with. There was no contract which extended beyond the accounting period.

Even if it would be proper, in view of the decision in *Cronk's* case (1) to postulate or imagine such a contract, this further point would arise : Would such a contract be a contract of the character referred to in para. 11 ? In the case of a trade or business of a building contractor, I find it difficult to imagine that para. 11 can have any reference to any contract other than a building contract extending over a period of years. On that ground also, I think, the Special Commissioners were right in rejecting the claim put forward by the appellant company that, although in computing the profits of the company for the purpose of income tax for the years 1936 and 1937 these deposits were rightly excluded from the trading receipts, nevertheless they ought to be included in the computation of the profits for the purposes of excess profits tax.

Even if it could be established that there was such a contract as is contemplated in Sched. VII, Pt. 1, para. 11, it would then be the duty of the Special Commissioners to attribute so much of the profit made on the supposed contract as was in their view properly attributable to the accounting period—meaning the chargeable accounting period in this case, the period from Apr. 1, 1939, to Dec. 31, 1939—as it seems to me it would be their duty, if this supposed contract existed and was a contract within the meaning of Sched. VII, to attribute the profits to the year in which the deposit was repaid.

I, therefore, think that the appeal fails, and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *H. E. Girling* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

COCKHILL v. DAVIES.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Lewis, J.),
April 8, 16, 1943.]

Justices—Practice—Jurisdiction—Appeal—Court of summary jurisdiction — Recognisance forfeited—Right of appeal to quarter sessions—Metropolitan Police Courts Act, 1839 (c. 71), s. 50—Public Health Act, 1875 (c. 55), s. 269—Summary Jurisdiction Act, 1879 (c. 49), ss. 9 (1), 13, 19—Criminal Justice Administration Act, 1914 (c. 58), s. 37—Criminal Justice Act, 1925 (c. 86), s. 25.

The appellant entered into a recognisance of £750 for the appearance of one Harris before the police court on a day named. Harris failed to appear and the magistrate ordered that the appellant should forfeit the sum of £750. The appellant gave notice of appeal, but the chairman of the quarter sessions decided that he had no jurisdiction to hear the appeal but stated a case for the consideration of the High Court:—

HELD: the appellant was entitled under the Metropolitan Police Courts Act, 1839, s. 50, to appeal to the quarter sessions.

[EDITORIAL NOTE.] This is purely a question whether there is a right of appeal against the order of a metropolitan magistrate estreating a recognisance. After a consideration of the Acts giving a right of appeal from a metropolitan magistrate, it is held that this question must be decided on the construction of the Metropolitan Police Courts Act, 1839, s. 50. One point was whether the words "the sum or penalty to be paid" could refer to the estreating of a recognisance. It is held that these words are appropriate for that, and that, therefore, a right of appeal exists. It is to be noted that such a right exists in the metropolis but does not exist in the case of the estreating of recognisances by country justices.

AS TO APPEALS FROM COURTS OF SUMMARY JURISDICTION TO QUARTER SESSIONS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 705-722, paras. 1225-1250; and FOR CASES, see DIGEST, Vol. 33, pp. 390-407, Nos. 1011-1168.]

Cases referred to:

** (1) Moseley v. Director of Public Prosecutions*, [1920] 1 K.B. 16; 33 Digest 391, 1022; 88 L.J.K.B. 1166; 121 L.T. 581.

** (2) Mittelmann v. Denman*, [1920] 1 K.B. 519; 33 Digest 391, 1023; 89 L.J.K.B. 310; 122 L.T. 426.

(3) Haynes v. Hayton (1827), 7 B. & C. 293; Digest Supp.; 5 L.J.O.S.M.C. 136.

APPEAL by way of case stated from a decision of the chairman of the county of London sessions that he had no jurisdiction to hear an appeal. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

H. V. Lloyd-Jones for the appellant.

Geoffrey Howard for the respondent.

VISCOUNT CALDECOTE, L.C.J.: This case, which falls to be decided by LEWIS, J., and myself, in accordance with a consent given by the parties, is a case stated by the chairman of the county of London sessions. The chairman held that he had no jurisdiction to hear an appeal: and the question is whether he came to a right determination in law upon the point.

The facts may be shortly stated as they are set out in the case. The appellant had entered into a recognisance, and the condition of the recognisance was that a man named Harris should appear before the North London police court on a day named. Subsequently, it was proved to the court of summary jurisdiction, sitting at the North London police court, that Harris did not appear. Thereupon the magistrate ordered that the appellant should forfeit the sum of £750; and that he should pay it in a manner provided by the magistrate. He was given time to pay with regard to half, or about half, the payment he was ordered to make.

That order was made upon a summons which was issued to the appellant, calling upon him to show cause why the recognisance of £750 whereby he was bound to pay the sum of £750 should not be adjudged to be forfeited. By the document which is exhibited to the case the magistrate on the returnable day recited that it was proved that Harris did not appear at the said court and that was a breach of the condition. Then the document to which I am referring goes on to say:

It is therefore adjudged that the said recognisance is forfeited and that the defendant do pay to the clerk of this court the sum of £750; [and in default of payment] it is

ordered that the sum due from the said defendant under this adjudication be levied by distress and sale of his goods.

Upon this order being made, notice of which was given to the appellant by another document which is exhibited to the case, the appellant gave notice of appeal. The general grounds of his appeal, according to the notice, were that, having regard to all the circumstances, "the said order was excessive," and that "the court should have reasonably exercised its discretion by remitting the whole or part of the said recognisance." It was upon that appeal coming on for determination that the chairman of the county of London sessions held that he had no jurisdiction.

The case for the appellant before us was first of all put upon the ground that under the Criminal Justice Administration Act, 1914, s. 37, a right of appeal was given. Sect. 37 (1) is as follows :

Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions.

Those words seem to me to be quite inappropriate to fit the facts of this case. There was no conviction here of the surety. A person who is bound in such circumstances as exist in this case may be, and, indeed, generally is, a person of very good character; and his character appears to me to remain unsullied, even if his recognisance has been forfeited. At any rate, it appears to me that sect. 37 (1) is inapplicable in this case, and it is not necessary to say anything more upon that contention.

Now I come to the second ground upon which the appellant based his contention that the chairman had jurisdiction. That depends upon the Metropolitan Police Courts Act, 1839, s. 50, which provides :

In every case of summary order or conviction before any of the said magistrates, in which the sum or penalty adjudged to be paid shall be more than £3, or in which the penalty adjudged shall be imprisonment for any time more than 1 calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to the justices of the peace at the next general or quarter sessions of the peace . . .

That is an enactment which was passed in 1839 : and, since it became law, there has been a good deal of legislation with regard to appeals, orders or convictions made by courts of summary jurisdiction.

The Public Health Act, 1875, long after this Act of 1839, gave a very extensive right of appeal ; but that was repealed by the 1884 Act. It only requires notice because it was the law from 1875 until the 1884 Act. Between those dates other Acts had been passed, giving the right of appeal in certain circumstances.

The Summary Jurisdiction Act, 1879, s. 19, provides as follows :

Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a court of general or quarter sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a court of general or quarter sessions against such conviction or order.

That is a limited right of appeal. It is only given where the person concerned did not plead guilty or admit the truth of the information or complaint. It is to be observed that that section says that the right exists only where in such cases :

. . . such person is not otherwise authorised to appeal to a court of general or quarter sessions . . .

Therefore, the section is a limited one and is nothing like so wide as the then existing power of appeal conferred by the Public Health Act, 1875, s. 269.

Another section similarly dealing with the right of appeal is to be found in the Criminal Justice Administration Act, 1914, s. 37 (1), with which I have already dealt. That is a right of appeal from a decision of courts of summary jurisdiction ; but again, that is where the person concerned, the appellant, did not plead guilty or admit the truth of the information.

By a still later Act, the Criminal Justice Act, 1925, s. 25, a right of appeal was given against sentence under certain conditions.

The question we have to decide really comes back to the consideration, not of these various provisions, but of the provisions to be found in the Metropolitan Police Courts Act, 1839, s. 50. That Act has been considered in two cases in which LORD READING, L.C.J., gave the leading judgment. The first of them is *Moseley v. Director of Public Prosecutions* (1). The only passage which I think it is necessary to read is where LORD READING, L.C.J., says, at p. 24 :

The opinion I have formed is that the right of appeal of a person charged before a metropolitan police magistrate with an indictable offence which is dealt with under the Summary Jurisdiction Act, 1879, s. 13, by such person pleading guilty and being sentenced to a term of imprisonment, is limited to the right of appeal given by sect. 19 of the 1879 Act, and that sect. 50 of the 1839 Act does not apply in that case. Once that conclusion is arrived at it follows that there is no right of appeal in this case and that the order of the court of quarter sessions dismissing the appeal was right and must be affirmed.

The facts in that case were that a person had been charged with an indictable offence. He had pleaded guilty and he had received a sentence of imprisonment with the option of a fine. Then LORD READING, L.C.J., goes on to add this :

It is unnecessary for me to say anything further with regard to sect. 50 of the 1839 Act. I only desire to add that nothing that I have said is intended to take away the right of appeal which may be given under that statute save in the case of a person charged with an indictable offence before a court of summary jurisdiction and dealt with under the Summary Jurisdiction Act, 1879, s. 13.

Sect. 50 of the 1839 Act came under review in a later case of *Mittelman v. Denman* (2). In that case the defendant had also pleaded guilty. I think, if I read a passage from the judgment of LORD READING, L.C.J., at p. 526, sufficient will appear to show the effect of it :

The question for the decision of this court is whether the appellants have a right of appeal to quarter sessions under sect. 50 of the 1839 Act. It has been contended before us that the right of appeal under that section has been entirely taken away either by the Summary Jurisdiction Act, 1879, or by the Criminal Justice Administration Act, 1914. In support of that contention reliance has been placed upon *Moseley v. Director of Public Prosecutions* (1). I am satisfied that that case does not govern the present case. There the offence with which the appellant had been charged was an indictable offence. Until the passing of the 1879 Act an indictable offence had to be sent for trial as such, and it only became triable as a summary offence by virtue of that Act. The offence was dealt with as a summary offence under that Act, and the appellant was convicted and appealed. The court applied the principle that where a statute creates the jurisdiction to try an offence and gives a right of appeal from the order made at the trial, it ought to be inferred that the only right of appeal is that which is given by the statute conferring the jurisdiction.

That last sentence which I have read explains the judgment and the decision given in *Moseley v. Director of Public Prosecutions* (1). In *Mittelman v. Denman* (2) there is nothing which has the same result as the earlier case of *Moseley v. Director of Public Prosecutions* (1), namely, to limit the generality of the right to appeal apparently given by the Metropolitan Police Courts Act, 1839, s. 50.

Therefore, it becomes necessary to look at that section again. The words "summary order or conviction" have first of all to be considered. This, for the reasons I have mentioned, is not a case where there was a conviction : but I am unable, subject to a point to be mentioned in a moment, to read the words "summary order," more narrowly than I think their primary meaning requires. To my mind there is no doubt that the decision of the magistrate that the recognisances should be forfeited and the appellant should be required to pay them, was an order. Whether the word used be "adjudged" or "ordered," seems to me to make no difference. It was plainly an order which the magistrate made. Although the condition of the recognisance which required to be satisfied was that the person in question, Harris, should attend the court, none the less I think it was necessary for the magistrate to adjudge upon the forfeiture and to make an order ; otherwise, although the recognisance was forfeited, the appellant would not be liable to pay anything. In other words, the powers given to the magistrate by the Summary Jurisdiction Act, 1879, s. 9 (1), have to be exercised. That subsection provides as follows :

Where a recognisance is conditioned for the appearance of a person before a court of summary jurisdiction, or for his doing some other matter or thing to be done in, to, or before a court of summary jurisdiction, or in a proceeding in a court of summary

jurisdiction, such court, if the said recognisance appears to the court to be forfeited, may declare the recognisance to be forfeited, and enforce payment of the sum due under such recognisance in the same manner as if the sum were a fine . . .

That subsection seems to me to be machinery ; but, none the less, it would seem to require a declaration by the court and an order enforcing payment of the sum due under the recognisance.

A We have been referred to a proviso which permits a person in certain cases to go from court to court, as it were, with an application to cancel or mitigate the forfeiture. I, myself, am very doubtful indeed whether the proviso applies to any other cases than those in which a warrant for distress for the sum has been issued. I might, perhaps, repeat with reference to this proviso what BAYLEY, J., said in *Haynes v. Hayton* (3), that the proviso to the section is ill-drawn. I express no positive opinion upon that question of construction, because I do not think that, even if the proviso is to be more widely construed than I think is probably right, it would be an answer to the point with which I am dealing, that an order of the magistrate is necessary before the recognisance can be forfeited.

C Therefore, I have now to deal only with the point as to whether it can be said that these words "summary order," on the face of them wide enough to include an order made by the magistrate in general, can apply to a case of a forfeiture of recognisances. I see no reason for taking the order or adjudication which a magistrate makes in such cases out of the range of orders dealt with by sect. 50. The words are wide and general and used, I think, in a natural sense as applying to any order which the court may make. Even though the proviso does give a right to go from court to court, I see no reason why full effect should not be given to the words of sect. 50, so as to hold that in the case of forfeiture of recognisances it is a case of summary order in which there is a right of appeal.

D Lastly, we were asked to limit those words by reference to the following words to this effect :

. . . in which the sum or penalty adjudged to be paid shall be more than £3, or in which the penalty adjudged shall be imprisonment for any time more than 1 calendar month.

E It was said that those words are not applicable to forfeiture of recognisances : but it seems to me that an order for payment of forfeited recognisances is an order for payment of a sum ; and the words of the section are :

. . . in which the sum or penalty adjudged to be paid shall be more than £3.

Therefore, I think that, as a matter of interpretation, sect. 50 gives the right of appeal in this particular case.

F I can only add a similar observation to that which LORD READING, L.C.J., made in one, if not both, of the cases to which I have referred : I should be reluctant to cut down any right of appeal. It is a large sum which is involved in this case. Large sums very often are involved, and necessarily involved, in the recognisances into which people enter in perfect good faith. I am happy to think that in this case I am able, and able without any difficulty, to come to a conclusion which gives a right of appeal to a man who, it may be for no real fault of his own, is subjected to an order to pay so considerable a sum as £750.

G In my judgment, the chairman of the county of London sessions came to a wrong decision in point of law and the case must go back to him upon the footing that he had jurisdiction to deal with it and to hear the appeal. Whether or no he thinks there are any circumstances which really justify this appeal upon the merits is a matter entirely for him. The only decision to which I think we should come is that he was wrong in saying that he had no jurisdiction at all to entertain the appeal.

H LEWIS, J. : I agree. I only want to add this. In the course of the arguments it was pointed out that, in deciding this case in the way in which LORD CALDECOTE, L.C.J., has decided it (and with which I entirely agree), we should be saying that, in the case of the metropolitan area, there is an appeal in such a case as this, whereas there is no such appeal from a bench of country magistrates. That point was argued with great force in *Mittelman v. Denman* (2), to which LORD CALDECOTE, L.C.J., has referred, and I associate myself, if I may do so respectfully, with what LORD READING, L.C.J., said in that case, at p. 528 :

It may be that it is undesirable that there should be a difference in practice in London and the rest of the country as regards the right of appeal from courts of summary jurisdiction; but if uniformity of practice is to be secured in this respect it must be by the action of Parliament.

I agree with the judgment which has been delivered.

Appeal allowed with costs. Case remitted to quarter sessions for hearing.

Solicitors: *James H. Fellowes* (for the appellant); *Solicitor for the Metropolitan Police* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. HUDSON.

[COURT OF CRIMINAL APPEAL (Charles, Tucker and Croom-Johnson, JJ.),
April 14, 1943.]

Criminal Law—Larceny—Taking—Accepting delivery in ignorance of mistake—Subsequent appropriation—Whether there was animus furandi at time of taking.

The Ministry of Food, in error, drew and posted a cheque to the appellant, who then wrote and asked them to insert his initials on the cheque. This was done and the cheque returned to him. The appellant, aware of the mistake, paid the cheque into a bank, opening an account for the purpose, and subsequently drew upon it. It was contended on behalf of the appellant that, since he was ignorant of the mistake when he received the letter, he had no *animus furandi* at the time of the taking, and that, therefore, he had not committed larceny:—

HELD: the process of taking the cheque and deciding to appropriate it to his own use must be regarded as one transaction, the appellant, therefore, who had an *animus furandi* at the moment of his decision to appropriate, also had an *animus furandi* at the moment of taking and was guilty of larceny.

[EDITORIAL NOTE. The court being equally divided in *R. v. Ashwell* (3), it has been uncertain whether an innocent acceptance of property followed by a fraudulent appropriation constitutes larceny. In the present case it is held that, as soon as the accused became aware of the mistake, he determined to appropriate the property and that in such a case there is an *animus furandi* and the offence of larceny is complete.

AS TO PROPERTY DELIVERED BY MISTAKE, see HALSBURY, Hailsham Edn., Vol. 9, p. 506, para. 865; and FOR CASES, see DIGEST, Vol. 15, p. 876, Nos. 9624-9630.]

Cases referred to:

- (1) *R. v. Mucklow* (1827), 1 Mood. C.C. 160; 15 Digest 876, 9624.
- (2) *R. v. Davies (alias Rush) and Davies* (1856), Dears. C.C. 640; 15 Digest 877, 9626; 25 L.J.M.C. 91; 7 Cox C.C. 104; *sub nom. R. v. Rush (alias Davies)*, 27 L.T.O.S. 142.
- *(3) *R. v. Ashwell* (1885), 16 Q.B.D. 190; 15 Digest 877, 9627; 55 L.J.M.C. 65; 53 L.T. 773; 16 Cox C.C. 1.
- *(4) *R. v. Middleton* (1873), L.R. 2 C.C.R. 38; 15 Digest 873, 9585; 42 L.J.M.C. 73; 28 L.T. 777; 12 Cox C.C. 417.
- (5) *Cartwright v. Green* (1803), 2 Leach 952; 15 Digest 877, 9631; 8 Ves. 405.
- (6) *Merry v. Green* (1841), 7 M. & W. 623; 15 Digest 876, 9625; 10 L.J.M.C. 154.

APPEAL by leave against a conviction at the Lincolnshire Assizes for larceny, forgery, uttering false documents and obtaining money by false pretences. The facts are fully set out in the judgment.

S. L. Elborne for the appellant.

T. R. Fitzwalter Butler for the Crown.

CHARLES, J. [delivering the judgment of the court]; In this case the appellant, James Hudson, was convicted at the Lincolnshire Assizes of larceny, forgery, uttering false documents and obtaining money by false pretences. He was sentenced to 3 months' hard labour concurrently upon each count. LEWIS, J. gave leave to the appellant to appeal upon a particular point of law, namely, whether or not, upon the facts disclosed at the trial, he had committed larceny.

The circumstances were unusual. A gentleman called Lewis Hutson had been engaging himself as a seller to the Ministry of Food of certain livestock; and he had sold them £23 2s. 7d. worth of livestock. On July 4, the Ministry of Food drew a cheque in favour of Mr. Hudson, without any initial, for £23 2s. 7d., being an order cheque which was signed. That cheque was headed in large letters: "Ministry of Food, Meat and Livestock," and was signed "Ministry of Food, chairman of auctioneers, No. 28 county meat account." That cheque was received by the appellant and kept by him. On July 11, he wrote a letter to the Ministry of Food in the following terms. It was headed "Mr. J. Hudson, Scotter Road, Scunthorpe":

Dear Sir, Just a line to tell you that I received a cheque from the Ministry of Food and there was no initials on it, so I have sent it back to you. My name is Mr. J. Hudson.

Receiving that letter from the appellant, an official at the Ministry of Food, imagining that all was well, wrote a letter on July 14 to "Mr. J. Hudson, Scotter Road, Scunthorpe," to this effect:

I return herewith the above cheque, value £23 2s. 7d.; with your initial duly inserted, with apologies for any trouble caused you.

When one looks at the cheque, one perceives that "J" is inserted; and the alteration is duly initialled.

On July 16 the appellant paid this cheque into a bank and opened an account there. There was ample evidence by comparison that it was his signature on the back of that order cheque and his signature over a 2d. stamp on the receipt for the sum mentioned in that cheque. Therefore, there is the indorsement of the cheque itself and the receipt; the receipt being "Received from the Ministry of Food, Meat and Livestock Branch, the sum shown on the face hereof in settlement of fat stock purchased."

The point of law argued on behalf of the appellant was that there was no evidence of larceny to go to the jury. LEWIS, J., came to the conclusion that there was and left it to the jury; and the jury convicted. So it falls to this court to decide whether or not, in the circumstances of this case, it has been established in law that larceny was committed by the appellant.

The appellant relied on two cases in particular: *R. v. Mucklow* (1) and *R. v. Davies* (2). In the first of those two cases it was decided—upon what ground it is not quite clear, for the report is very scanty—that the conviction of a man was wrong in the following circumstances. A man took a letter supposing it to belong to him. He then found it did not belong to him and appropriated to himself certain property that it contained. It was held that, there being no *animus furandi* when he first received the letter, there was no larceny. In *R. v. Davies* (2) the court came, in the circumstances of the case, to the same conclusion. Those are old cases, one being in 1827 and the other in 1856. However, the matter was exhaustively considered in 1885, by the Court for Crown Cases Reserved, in *R. v. Ashwell* (3). That case was considered by 14 judges. In the circumstances of that case 7 of them said there was larceny and 7 said there was no larceny. As the jury had convicted of larceny, and as there was an equal division in the court, the conviction stood. The circumstances of that case were as follows. The prisoner asked the prosecutor for the loan of 1s. The prosecutor gave him a sovereign believing it to be 1s., and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign and then and there fraudulently appropriated it to his own use. There are certain observations in the judgment in *R. v. Ashwell* (3), which, I think, give useful guidance to the attitude we ought to adopt in the present appeal. CAVE, J., said, at pp. 202, 203:

In *R. v. Middleton* (4), in which it was held by 11 judges against 4 that, where there was a delivery of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, there occurs a passage in the judgment of some of the judges who formed the majority which is as follows: "We admit that the case is indistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for 1s.; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*. For my part I am quite unable to reconcile the cases of *R. v. Mucklow* (1) and *R. v. Davies* (2) and the passage I have

cited from *R. v. Middleton* (4) with those of *Cartwright v. Green* (5), and *Merry v. Green* (6); and, being compelled to choose between them, I am of opinion that the law is correctly laid down in *Merry v. Green* (6) for the following reasons. The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in *Merry v. Green* (6) was not in possession of the purse and money until he knew of their existence."

There are other important passages in some of the other judgments, particularly that of STEPHEN, J., at p. 216:

If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking the prisoner intended to keep what he had found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of taking the goods he had the means of knowing the owner.

I think those words really go to the heart of the matter. This man received an envelope. What he did with it for some days I do not know—it is not disclosed in the evidence. He opened it, and when he opened it he discovered a cheque in it that was palpably valuable and equally palpably belonged to somebody else. At that moment he could for the first time allow his intelligence to operate. He could then form his intent. Before he could not. His intelligence began to operate at once; and he said then and there: "I am going to appropriate and take away from the rightful owner property that he has not consented to give me and which I do not intend to return to him. I intend permanently to deprive him of his property." That is what he did in this case. It appears to me to come within the words of LORD COLERIDGE, L.C.J., in *R. v. Ashwell* (3), at p. 225:

In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it.

That is what this man did in this case. As soon as he saw what he had got, he made up his mind to steal it and he did steal it. He did all that was necessary to cause him to complete the offence of larceny.

The other points were not so strenuously taken. They were not taken before LEWIS, J. It was suggested to us that there was no forgery, because there was no evidence that it was his handwriting. There was ample evidence for the jury to consider whether or not it was his handwriting; and they came to the conclusion that it was. What did he do? By indorsing the cheque he brought into existence a false document and committed forgery. It is said that he did not commit a false pretence upon the bank. We have considered that point; and we do not think that there is really anything in that at all. The question is, when was the false pretence committed? It was committed, not at the moment of his going to the bank, but as part of the whole scheme whereby he obtained under false representations the sum of £20, intending to deceive, and in fact deceiving, the bank. There seems to us to have been ample evidence for the jury to consider on all those points, including the point to which I have addressed myself at the greatest length, the point of larceny. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by C. ST. J. NICHOLSON, Esq., *Barrister-at-Law*.]

J. & J. MAKIN, LTD. v. LONDON AND NORTH EASTERN RAILWAY CO.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.J.J.),
April 15, 16, 1943.]*Statutes—Interpretation—Construction of general provisions—Act of God—Peak Forest Canal Act, 1794, s. 15.*

A The appellants are the owners of a canal which crosses a valley at the top of a high embankment. On June 22, 1941, as the result of a violent storm, the embankment collapsed, and a great quantity of water escaped from the canal into the stream below and was carried down to the respondents' mill where it was deposited together with a large number of stones.

B The canal was constructed in pursuance of powers conferred on the proprietors by the Peak Forest Canal Act, 1794, and sect. 15 of the Act imposes liability for injury caused by water flowing from the canal or "from any other accident." The respondents, in claiming damages, said that the Act imposed an absolute liability on the appellants, irrespective of negligence. The appellants contended that the construction of the earlier words in sect. 15 of the Act must be governed by the succeeding phrase "or from any other accident," and that liability was, therefore, limited to an escape due to accident and that an escape of water due to an act of God was not within the section:—

C

HELD: the Act of 1794 imposed a liability for damage on the appellants even if such damage was caused by an act of God.

Decision of ATKINSON, J., ([1943] 1 All E.R. 362) affirmed.

D [EDITORIAL NOTE. The Act under which the canal here in question was constructed provided that the proprietors should be liable in damages for any injury caused by any breach of the canal works or by water flowing therefrom or from any other accident. The contention most strongly relied upon here is that the whole passage in the Act is controlled by the words "any accident" and that liability is restricted to injury caused by accidents. Then it is said that an act of God is not an accident. The Court of Appeal have rejected these contentions and affirmed the judgment of ATKINSON, J. The Court of Appeal, taking the same view of the section as was taken below, consider that, upon its proper construction, it places an absolute liability upon the proprietors for damage caused by the escape of water from the canal. It is emphasised that a section such as this must be construed in its context and in relation to the particular subject-matter dealt with by the Act. It was also argued that, since the proprietors were acting under statutory powers, they would not, apart from this section, be liable for having brought this water to a potentially dangerous place provided they had acted without negligence and that the effect of the section was to place them in the same position as a person not acting under statutory powers.

E In other words, the effect of the section was to place upon them the strict liability under the doctrine in *Rylands v. Fletcher* (1), under which they could not plead that they had acted without negligence, but could plead that the damage was caused by an act of God. This argument obtained some support by quotations from *North-western Utilities, Ltd. v. London Guarantee and Accident Co.* (5), but it is held that the circumstances of the two cases are not sufficiently in point to make these quotations relevant. Moreover, it seems a little difficult to suggest that the legislature in passing an Act in 1794, had in mind doctrines which were developed only in the latter half

F

G of the last century.

AS TO INTERPRETATION OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 470-510, paras. 581-660; and FOR CASES, see DIGEST, Vol. 42, p. 674, Nos. 849-859.]

Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220.
- H** * (2) *Hammond v. St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 38 Digest 25, 135; 43 L.J.C.P. 157; 30 L.T. 296.
- * (3) *Stretton's Derby Brewery Co. v. Derby Corpn.*, [1894] 1 Ch. 431; 38 Digest 26, 140; 63 L.J.Ch. 135; 69 L.T. 791.
- (4) *Great Western Ry. Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 41 Digest 974, 8646; 97 L.J.P. 8; 138 L.T. 403.
- * (5) *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A.C. 108; Digest Supp.; 105 L.J.P.C. 18; 154 L.T. 89.
- * (6) *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 36 Digest 105, 705; 47 L.J.Q.B. 193; 37 L.T. 543; *affg.* (1876) 1 Q.B.D. 546.

- * (7) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 34 Digest 266, 2264; 72 L.J.K.B. 787; 89 L.T. 314; 5 W.C.C. 1.
- (8) *Roths (Countess) v. Kirkcaldy Waterworks Comrs.* (1882), 7 App. Cas. 694; 44 Digest 63, 450.
- (9) *Re Manchester and Milford Ry. Co.*, [1897] 1 Ch. 276; 38 Digest 379, 772; 66 L.J.Ch. 139; 75 L.T. 416.
- (10) *Nichols v. Marsland* (1875), L.R. 10 Exch. 255; 36 Digest 197, 376; 44 L.J.Ex. 134; 33 L.T. 265; *affd.* (1876), 2 Ex.D. 1.
- (11) *Richards v. Lothian*, [1913] A.C. 263; 17 Digest 118, 279; 82 L.J.P.C. 42; 108 L.T. 225.
- (12) *Evans v. Manchester, Sheffield & Lincolnshire Ry. Co.* (1887), 36 Ch.D. 626; 38 Digest 415, 1034; 57 L.J.Ch. 153; 57 L.T. 194.

APPEAL by the defendants from an order of ATKINSON, J., dated Jan. 18, 1943, on a special case stated under R.S.C., Ord. 34, r. 2, for the opinion of the King's Bench Division of the High Court of Justice, reported [1943] 1 All E.R. 362. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. Millard Tucker, K.C., F. A. Sellers, K.C., and Ivan Horniman for the appellants.

H. Wynn Parry, K.C. and S. E. Pocock (with him *D. A. Scott Cairns* for *J. P. Ashworth* on war service) for the respondents.

Tucker, K.C.: The whole position apart from statute is summed up in *Richards v. Lothian* (11). If, however, there is statutory authority, one is not liable unless there is negligence or the statute has expressly imposed liability. The principle was considered in *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.* (5). It is a question of construction as to whether or not the statute has imposed absolute liability. In *Stretton's Derby Brewery Co. v. Derby Corpn.* (3), it was held that, in the absence of negligence, the corporation was not liable under the Public Health Act, 1875, s. 19. One has to find liability imposed in the clearest possible terms. If the section relied upon is equally capable of two constructions one leans towards the least onerous construction. If the canal had been constructed without statutory authority, the appellants would not have been liable for damage due to the act of God. If, however, there is statutory authority, they cannot, without the clearest words, be in a worse position than they would be without statutory authority. In the present case, all that sect. 15 of the Act has done is to restore the *Rylands v. Fletcher* (1) liability. The natural construction of that section requires one to limit the happenings to what may properly be called accidents. According to the section, the causes of damage will be the breach of a reservoir or of a lock or of works or from water flowing from the canal or any other accident. It would not be right to call such an occurrence as an earthquake an accident. The words "or any other accident" cast a light upon the words which go before. The canal must be constructed in such a manner that it will withstand the ordinary stresses of weather but not an extraordinary event which no one can reasonably be expected to foresee. An act of God is not an accident. [Counsel referred to *Hammond v. St. Pancras Vestry* (2), *River Wear Comrs. v. Adamson* (6), *Great Western Ry. Co. v. Mostyn (Owners)* (4), *Nichols v. Marsland* (10), and *Evans v. Manchester, Sheffield & Lincolnshire Ry. Co.* (12).]

Wynn Parry, K.C.: The words "or from any other accident" in sect. 15 follow words each of which is linked up by the disjunctive conjunction "or." They cannot be a limitation of the preceding words because they are in terms an amplification. There may be discussion as to what is included in those words but they cannot be used to cut down what has been already said. If the words "or from any other accident" can be used to cut down what goes before, it can only be done by inserting the word "accidentally" before each of the matters previously mentioned. In what precedes, a number of specific events are defined. In the words "or from any other accident," however, there is a general statement. It is not possible to put one quality upon the first words and another quality upon the words "or from any other accident." There is nothing in any other part of the Act which tends to show that the language of sect. 15 is less than absolute. There is nothing in the Act which can affect or cut down the liability. So far from qualifying what has gone before, it is the words "or from any other accident" which are themselves to be qualified and construed in the light of what has gone before. They add to what has gone before and emphasise the absolute liability imposed by the section. One must

not by reason of the presence of the word "other" read into the earlier phrases the word "accidental." The word "accident" in this context includes an act of God. [Counsel referred to *River Wear Comrs. v. Adamson* (6), and *Great Western Ry. Co. v. Mostyn (Owners)* (4).]

Tucker, K.C., in reply.

LORD GREENE, M.R. : The present controversy turns upon the construction of language in an Act of Parliament known as the Peak Forest Canal Act, 1794.

A By the common clause that was declared to be a public Act, but in all its characteristics it was a private Act empowering a company of proprietors to construct and maintain a canal. The question which is submitted to the court by the special case is as follows :

Does the said Act of 1794 impose a liability on the defendants in respect of the escape of water causing damage to the plaintiffs' property notwithstanding such escape of water be caused by an act of God or *vis major* ?

B The last three words "or *vis major*" do not really arise for consideration ; ATKINSON, J., did not deal with them, and I do not propose to do so either.

The facts as stated in the special case are very few. The plaintiffs own a paper mill in the neighbourhood of the canal. At that point the canal crosses, by means of an embankment 60 feet high, a narrow valley known as Higgins Clough down which a stream flows. That stream is carried by means of a culvert

C under the embankment and afterwards passes the plaintiffs' premises. As the result of a storm on June 22, 1941, the embankment of the canal where it crosses Higgins Clough collapsed, and a great quantity of water, stones, sand, clay and other substances poured down on to the plaintiffs' premises, thus causing flooding and damage. The type of storm we are to assume for this purpose was such as to bring it within the category of an act of God, that is to say, it was so unprecedented and unexpected as to make it not reasonable to suppose that human

D appellants would anticipate it or be bound to take any steps to meet it. Two sections have been referred to in the argument as imposing upon the present appellants, who are the successors in title of the original company of proprietors, a liability for damage caused to the plaintiffs' property by this act of God. They are sects. 15 and 114. I do not propose to refer to the latter section. Its meaning is obscure, and counsel for the appellants may well be right in

E saying that its operation is limited to the type of matter dealt with in an earlier group of sections which provide for compensation under the name "damages" for such matters as what are nowadays called injurious affection or severance—matters of that kind. I express no opinion whatsoever as to whether he is right or wrong, or whether the section has the wider meaning which counsel for the respondents attributes to it, and which ATKINSON, J., attributed to it. I do not find it necessary to consider that section, because, in my opinion, the appeal

F fails by reason of sect. 15 standing by itself. That section, so far as relevant, is in the following terms :

And be it further enacted, that if any injury or damage shall happen to be done to the owner or occupier of any mill, edifice, lands, or hereditaments, by the breach of any reservoir to be made for the purpose of the said intended canal or cut, or any of the locks or works of the said navigation, or by the water flowing from the said canal or cut, or any such reservoir, or from any other accident, then, and in every such case,

G full compensation shall be made to the owner and occupier of, and all other persons interested in, any such mill, edifice, lands, or hereditaments, by the said company of proprietors, for all such injury and damage.

Then it directs how the damages are to be determined, that is to say, by a body of commissioners.

H Quite apart from this special section, the position of the proprietors in bringing upon their land an accumulation of water would, I apprehend, have been this : doing so, as they did, under statutory powers they could escape from the ordinary liability based on what is commonly called the rule in *Rylands v. Fletcher* (1), if they could show that water had escaped without negligence on their part. They would not, any more than a private individual, have been liable if water escaped through an act of God, the intentional act of some third party, or an act of the King's enemies. It is argued on behalf of the appellants, that the effect of this section is to deprive the proprietors of the right which, as statutory undertakers, they would otherwise have had, namely, to repel an action based on the principle of *Rylands v. Fletcher* (1) by proving that the escape of

the water had not taken place through any negligence of theirs ; in other words, the section puts the proprietors in precisely the same position as that in which a private individual would have been, subject to the full rigour of the principle in *Rylands v. Fletcher* (1), but entitled to rely on the exceptions to that rule which are to be found in the case of an act of God, an act of the King's enemies, or the deliberate act of some third party against which the landowner could not reasonably be expected to take precautions.

Counsel for the appellants cites in support of that general proposition several well-known cases. The first one is *Hammond v. Vestry of St. Pancras* (2). That was a case where the obligation upon which the action was based was an obligation upon the vestry to cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied. What had happened was that, without the knowledge of the vestry, an old drain, the existence of which was unknown to the vestry, had become choked. No negligence was charged by the plaintiff in the action and, without looking into the details of the decision, the question was debated whether the obligation to which I have referred was an absolute duty or obligation—I am quoting the language of BRETT, J.—“to guarantee that the sewers shall be at all times kept cleansed.” If that was what the section meant, that obligation had not been performed ; but the court, without any real difficulty, came to the conclusion that the obligation was not of that absolute character. BRETT, J., made observations of a general nature, such as this, at p. 322 :

It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate.

I call attention to the fact that the section which was there under consideration was a section imposing a duty to cleanse sewers, and, that being the context and that being the subject-matter, the question merely presented itself : is Parliament likely, when it imposes a duty of that kind, to have meant to impose an obligation in the form of an absolute guarantee ? Although I am prepared to be guided by the general observations there contained to this extent, that an absolute liability is a thing which is in some senses abhorrent and, therefore, one must look for clear language to find it imposed, I certainly cannot read those words in their context as imposing any impediment on the court if, on the true construction of the particular section before it, it finds that the obligation imposed is absolute. Another case in which the same type of point was discussed—I will not take up time reading it—is *Stretton's Derby Brewery Co. v. Corporation of Derby* (3). There is one other case to which I would like to refer, and that is the *Great Western Ry. Co. v. Owners of Mostyn* (4). There it is true the House of Lords did what it had done in a previous case under the same section, it struggled to find language in the section there relevant which would impose something less than an absolute liability ; but there again the section which was being dealt with was of a very special character. It was not a section imposing any obligation on the proprietors of the harbour, but it was a section imposing an obligation on third parties who might have been as innocent as anyone could be. If it was read as imposing an absolute liability on such third parties, then the unfortunate owner of a ship that was driven by weather out of control so that it drifted down upon the company's pier would have been liable to pay damages. The subject-matter of that section is as different from the subject-matter of the present section as anything can well be. Not merely was the subject-matter different, but the language again was different, and I cannot find there any assistance in the task which presents itself to this court. Before I leave the authorities I should say a word about the Privy Council case *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.* (5). That was a case where a main pipe carrying natural gas belonging to the appellants, who operated under a franchise, was broken and gas escaped owing to the operations of the local authority in the neighbourhood of the pipe. I need not refer any more to the facts of that case. Its relevance for present consideration lies in the circumstance that, in a general Act of the Province of Alberta which applied to the undertakers there, there were two sections upon which reliance was placed by the respondents to that appeal, the insurance company whose clients

had been injured by the explosion. The sections in question were sects. 11 and 13 which are as follows :

11. The company shall make satisfaction to the owners or proprietors of any building or other property or to the municipality or Minister of Public Works as the case may be for all damages caused in or by the execution of all or any of the said powers.

A 13. The company shall locate and construct its gas or water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety.

It was argued that sect. 13 covered not merely location and construction, but also maintenance. The two sections were dealt with by LORD WRIGHT, who delivered the judgment of the Board, in two passages. On p. 120 he said this :

B Where undertakers are acting under statutory powers it is a question of construction, depending on the language of the statute, whether they are only liable for negligence or whether they remain subject to the strict and unqualified rule of *Rylands v. Fletcher* (1).

It is clear that LORD WRIGHT cannot have meant those to have been the only two alternatives, because quite obviously a section may be so drafted as to apply a stricter rule than that in *Rylands v. Fletcher* (1), and to make the obligation quite unqualified by any exception. He then considered the two sections to which I have referred, and at pp. 121, 122, he said :

C But, in any case, the question is not eventually material in this case. For, even if the section [*scilicet* sect. 13] applies to maintenance, and is absolute in its terms, the duty it imposes is still no more than the duty under the rule in *Rylands v. Fletcher* (1) according to which the appellants would not be liable for damage caused, without default on their part, by the independent act of a third party. Then, whether or not sect. 13 applies to maintenance, and whether or not it imposes, where it does apply, a liability unqualified in terms, the position is the same for purposes of this case ; the appellants' real defence was that the damage was caused by the act of the city, for which they were not responsible and could not control, and that they were guilty of no negligence in the matter. That defence could be equally good on any view of the effect of sect. 13 ; and the same reasoning applies to sect. 11, if indeed that section is open at all to the respondents in this case.

His Lordship was not there considering, and he did not have to consider, the type of question which we have to consider here.

E The question which we have to consider depends entirely upon the language of this particular section of the Act of Parliament read, as, of course, all statutes must be read, against the background of the common law. Like ATKINSON, J., I find nothing to shock me in the idea that in the year 1794 Parliament would have shown towards landowners a very special tenderness which nowadays, perhaps, would not be found in quite the same measure. Parliament had to consider the public interest no doubt : it had to consider the fair interest of the proprietors and it had to consider the interests of those owning land in the neighbourhood of works, the very nature of which would contain a threat of danger and even of catastrophe. To maintain, especially in a country of this nature where viaducts of great height are required to carry water, a large body of water, the escape of which might produce a most disastrous flood, was a thing that Parliament would naturally very carefully consider before conferring statutory powers upon any company of proprietors who applied for them. This canal, as the Act recites, could not be built without the authority of Parliament, and it was open to Parliament to impose whatever terms it thought fit for the protection of landowners, and, indeed, this clause is nothing more nor less than a protective clause. As I have said, I can find nothing unusual or unlikely in the fact that in 1794 Parliament should decide, if it was going to grant these statutory powers the exercise of which would involve the possibility of very great damage to others, to impose as a condition of the franchise it was being asked to grant an absolute liability.

H So much for the general scope of this clause and the subject-matter in relation to which it was passed. Of course, the question in the last resort, or perhaps in the first resort, depends upon the actual language of the section construed in relation to the general context of the Act and the subject-matter with which it was dealing. When I come to look at the language of this section, I am unable to find any justification for reading into it the sort of qualification for which counsel for the appellants contends. The injury or damage which is referred to is injury or damage done by one or other of a series of named occurrences, first,

by the breach of any reservoir ; second, by the breach of any lock or work ; third, by the water flowing from the canal or reservoir ; fourth, from any other accident. Now the whole force of the argument of counsel for the appellants is based on those last words, " or from any other accident." Although I gather he concedes that, if it had not been for those words, it would not have been possible to read any qualification into this section in the matter of liability for injury caused by the breach of the reservoir or the flowing of the water, he says that those words do enable a qualification to be read in of this nature : he says that the words " other accident " indicate that the first three occurrences are regarded by the legislature as being limited to accidental occurrences, that is to say, that we must read this as meaning by the accidental breach of any reservoir, by the accidental breach of any locks or works, by the accidental flowing of water from the canal or reservoir, or from any other accident. That construction appears to me to do violence to the natural meaning of the language. The phrase " any other accident " does not appear to me to mean that the quality of being accidental must be imported into the previous incidents referred to. What it seems to me to mean is that the legislature indicates that the sort of thing it means by " accident " are things like a breach of the reservoir, breach of the locks, or the flowing of water, and, if that be right, there is no reason whatever for limiting the liability for damage caused by a breach to the case where the breach is accidental. Pursuing for a moment the argument of counsel for the appellants, and assuming that he had made good his position so far, he says " accidental breach " cannot include a breach due to an act of God. Act of God, he says, is a thing which stands in a category by itself and is not a thing which is included under the word " accidental." I am prepared to deal with that argument on the assumption that I am wrong in thinking that the word " accidental " ought not to be written in in the case of the three earlier sets of incidents, and on the footing that it is to be written in. I then have to ask myself, when Parliament in 1794 refers to an accidental flowing of water, did it intend to exclude from that category a flowing of water caused by an event which, to the ordinary person would be described as accidental, but which to the more technical mind of a lawyer might have to be put for certain purposes under the special label of act of God ? In my opinion, that is a refinement which is not justified by anything in this section. It seems to me that, if Parliament is meaning damage caused by the accidental flowing of water, or the accidental breach of the reservoir, those words are wide enough in their natural meaning to cover something caused by an act of God. It is to be observed that the language here does not deal with the cause of the breach, nor does it deal with the cause of the water flowing or the other matters ; it does not appear to go behind those occurrences. But in any event, in ordinary language the word " accident " seems to me without any doubt to cover the act of God. Supposing the bank of the canal is broken by an ordinary flood, or supposing it is broken by an extraordinary flood, so far as the sufferer is concerned he has suffered damage as the result of an accident, and any such sufferer, if asked whether he had suffered damage as the result of an accident, would scarcely reply in the latter case in the negative and say : " No, I have not suffered as the result of an accident. I have suffered as the result of an act of God, because this particular flood cannot properly be described as an accident." I do not see why a refinement of that kind should be introduced into clear and simple language of this sort.

I should point out, as ATKINSON, J., pointed out, that the word " accident " has been considered, and its natural meaning has been described by judicial authority on various occasions. It is not without interest to observe that in *River Wear Comrs. v. Adamson* (6), LORD HATHERLEY takes the very point which I have been endeavouring to explain, because he says, at p. 752 :

I cannot concur in the views expressed in the court below by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in law courts, the act of God, namely, a storm, the owner of the vessel would be excused.

I venture to cite that passage not in reference to the actual decision of that case, but as indicating what to the mind of LORD HATHERLEY was the meaning of the word " accident " in ordinary parlance. Taking again another citation

given by ATKINSON, J., a citation from the opinion of LORD MACNAGHTEN in *Fenton v. Thorley & Co., Ltd.* (7), at p. 448, where he said that accident was used in the statute which he was construing :—

... in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed . . .

That phraseology would quite clearly cover a breaking of a dam or the collapse of an embankment due to what is known to lawyers as an act of God.

- A I think ATKINSON, J., came to a perfectly right conclusion in this case, and I would end by repeating, if I may, the great importance of construing sections of this kind in their context and in relation to the particular subject-matter without allowing oneself to be unduly influenced by views which have been expressed on the construction of differently worded sections applicable to different subject-matters, save in so far as some general principle of construction is to be found in such authorities. I find no principle of construction which
- B prevents me from putting upon this language what appears to me to be its obvious meaning.

- MACKINNON, L.J. : I agree. In the express words of this sect. 15 the plaintiffs say : " Injury or damage has happened to us by the breach of the works of the said navigation and by water flowing from the said canal." I think those words mean what they say and cover any breach of any kind whatever. It is sought to limit the generality of those preceding words by reference
- C to the ensuing words " or from any other accident." This seems to me a novel form, if not a distortion of the old rule as to *ejusdem generis*. That rule might be relied upon to limit the generality of the words " or any other accident " by limiting them to the *genus* of the previously specified things or causes. In this novel or distorted form, the generality of the previously specified causes or things is sought to be limited by assimilating them to the added specified thing
- D or cause. This process, I think, is quite without justification. The added words " or from any other accident " are manifestly in amplification of the previous words and cannot be used by way of qualification or limitation of them. The truth of that last sentence may be still beyond doubt even if the previous words are incapable of amplification, for the added words may have been added from an excess of unnecessary caution. I agree that the appeal fails.

- E GODDARD, L.J. : I am of the same opinion. I think that ATKINSON, J., came to quite a right decision. Indeed, I think that, if authority is needed, this case is concluded for us by the decision in the House of Lords in *Countess of Rothes v. Kirkcaldy Waterworks Comrs.* (8), unless, indeed, that case can be distinguished from the present because of the words upon which counsel for the appellants has so relied " or from any other accident." On that part
- F of the case I entirely agree with what MACKINNON, L.J., has just said. Those words seem to me to amplify and not to cut down the preceding words. One would have to apply the ordinary rule of construction generally known as the rule *ejusdem generis* to those words, and that would no doubt limit, or might limit, those words to matters *ejusdem generis* with those which have gone before.

- As a matter of fact I find that a clause, more or less in this form or to the same effect, is quite common in matters relating to water. In MICHAEL AND WILL
- G ON THE LAW RELATING TO GAS AND WATER, Vol. 1, pp. 26-30, will be found many instances in which Parliament has imposed terms on the undertakers of waterworks to make compensation in the most unqualified manner in respect of the bursting of the banks of a reservoir. In fact, they are referred to as bursting clauses ; and I do notice exceptionally in the Bury Corporation Waterworks Act, 1889, which is quoted as remarkable on account of the proviso, there is a proviso " that no obligation or liability shall attach to the corporation
- H in respect of an injury occasioned by an *actus Dei* and not arising from any default of the corporation or any default in the works." From the other instances which they give it is quite clear that Parliament meant to give an unqualified right to persons who were affected by the bursting of dams or other protection to waterworks (and they do not differ in any way from a canal for this purpose) to be compensated by the undertakers if that happens. It is very natural that, when water is being carried at the high level at which this water has to be carried, there should be a clause of this sort. Then, too, it seems to me that we ought to construe a section of this sort in the way that LORD WATSON laid

down in *Countess of Rothes v. Kirkcaldy Waterworks Comrs.* (8) as if it were a contract. It is obviously a protective clause. It is a clause which is put in for the protection of landowners, and, for myself, I see no difference between a clause which is put in for the protection of a particular landowner—and there is an instance in this Act of a clause for the protection of all particular landowners, not in this respect but in others—and a clause for the protection of a body of persons. I see that STIRLING, J., in *Re Manchester and Milford Ry. Co.* (9), after referring to LORD WATSON'S speech in *Countess of Rothes'* case, said, at p. 283, the words mean :

... that for certain purposes (for example, the ascertaining the legal effect of such clauses and the nature of the rights conferred by them) enactments of this kind are to be treated as if they were contracts.

That would bring this case exactly within what MELLISH, L.J., said in *Nichols v. Marland* (10), at p. 4 :

... when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity.

The proprietors of the canal in this case, as one of the terms upon which they obtained permission to acquire by compulsory purchase, and so forth, lands and the right to construct their canal, contracted and agreed by this clause (which may have been forced upon them by Parliament or may have been offered by them ; I do not know and it matters not) to make good any damage which was caused by the bursting of the bank of the canal. Under those circumstances they must make it good notwithstanding any accident by inevitable necessity.

I agree also with what my Lord said with regard to the act of God. If a person were injured by an unprecedented storm he could fairly and properly be said to have met with an accident in the storm. Every act of God which causes injury, I think, may be called an accident, though not every accident, of course, is an act of God.

I think that ATKINSON, J., came to quite a right decision in this case, and that the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *W. H. Hanscombe* (for the appellants) ; *Hall, Brydon & Chapman*, agents for *Grundy, Kershaw, Farrar & Co.*, Manchester (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

IRVING v. PATTERSON.

[CHANCERY DIVISION (Uthwatt, J.), April 16, 1943.]

Emergency Legislation—Agricultural holding—Notice to quit—Consent by Minister—Whether judicial or administrative act—Defence (General) Regulations, reg. 62 (4A).

The plaintiff was the tenant in occupation of certain agricultural holdings which the owners agreed on Jan. 19, 1942, to sell to the defendant. On Jan. 30, 1942, the owners gave the plaintiff notice to quit on Feb. 2, 1943, and obtained a written consent to the notice from the Minister of Agriculture and Fisheries in accordance with the Defence (General) Regulations, reg. 62 (4A). On Apr. 30, 1942, the sale was completed. It was contended on behalf of the plaintiff that under the regulations the power of the Minister to give the consent was a judicial act and that, since the plaintiff was neither given an opportunity of putting forward his case nor notified of the consent, the consent had been improperly given :—

Held : under the regulation the act of the Minister was an administrative act. It was, therefore, immaterial that the plaintiff's case had not been heard and that he had not been notified of the decision.

[EDITORIAL NOTE.] Where the act of a Minister is purely administrative, the parties affected have no right to be heard. It is otherwise where the act is a judicial one. In this case, the tenant put forward the objection that he had a right to be heard, but it is decided upon the construction of the regulation that, so far as the tenant is concerned, the act is purely administrative. Normally a landlord had a right to possession upon giving a proper notice to quit and the regulation restricts this right where there is a sale of the property. The only persons concerned in this matter, it is held, are the vendor and the purchaser and the only question at issue is whether or not the purchaser's rights shall be released from the restriction. That being so, the tenant has no right to be heard and no right to receive notice of the consent.

AS TO DISTINCTION BETWEEN ADMINISTRATIVE AND JUDICIAL ACTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 284-288, paras. 604-606; and FOR CASES, see DIGEST, Vol. 38, pp. 96-98, Nos. 707-710.]

MOTION to determine the right of a tenant to be heard before a consent is given by the Minister of Agriculture and Fisheries to a notice to quit an agricultural holding.

W. E. P. Done for the plaintiff.

Raymond Jennings for the defendant.

A UTHWATT, J. : In this case on Jan. 19, 1942, the owners of certain agricultural holdings, then in the occupation of the plaintiff, agreed to sell them to the defendant. On Jan. 30, 1942, the landlords gave notice to quit on Feb. 2, 1943. On Apr. 30, 1942, that sale was completed. It is not suggested that the notice to quit was in any way affected by anything except the possible application of the Defence (General) Regulations, reg. 62 (4A). That regulation is in these terms :

B Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void. That, of course, applies both to a notice given by the original vendor at his own instance, or given by the original vendor at the instance of the proposed purchaser. Then it says :

C Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto.

D It is an admitted fact that the Minister of Agriculture and Fisheries consented in writing to the notice, and on Nov. 12, 1942, he communicated that consent to the landlords. However, it is in dispute as to whether or not a copy of the Minister's consent was received by the plaintiff in this action, which the Minister suggests in his letter was sent on Nov. 12, 1942. I find it unnecessary to decide the question of whether that consent was in fact received by the tenant or not. Before giving the notice the Minister caused certain inquiries to be made by the local agricultural executive committee, but it is not suggested in the evidence that the plaintiff was consulted in any way or that he had the opportunity of being heard by the agricultural executive committee. The Minister acted upon their report in exactly the same way as if he himself had conducted the inquiry.

E As a matter of law I think it is quite clear that the real question is whether, in this particular case, the act of the Minister was an administrative act or whether it was a judicial act. To establish the plaintiff's case he has to show that it is the duty of the Minister under the regulation to act judicially, and to act judicially as between him, the plaintiff, and somebody else. It would appear on the face of the regulation that the whole point of the regulation is that the Minister shall consider the matter from the point of view, not of the tenant in occupation at all, but from the point of view of the circumstances attending the transaction in question, namely, whether, in the events which happened, the purchaser from the landlord is to have the same right which the landlord himself would have had if there had been no sale. It does not seem to me that the position of the tenant is one which, under the regulation, the Minister is bound to take into account at all. While I am far from saying that under the regulation the Minister is bound to act judicially at all, it is necessary for me to decide only that he is not bound to act judicially as between the tenant and the landlord. Taking that view, it appears to me that the first ground of objection taken by the plaintiff fails.

F The second ground of objection is that it has not been established that a copy of the Minister's consent, or the fact of the Minister's consent, was notified to the plaintiff. It appears to me that it is not necessary to consider it for the reason I have given in the first part of my judgment; he has no duty to the tenant in any circumstances under this regulation.

G I am of opinion, therefore, that this motion fails and the costs will be costs in the action.

Motion dismissed. Costs of the motion costs of the action.

Solicitors : *Speechly, Mumford & Craig*, agents for *Saul & Lightfoot*, Carlisle (for the plaintiff); *Kinch & Richardson*, agents for *Bendle, Sibson & Davidson*, Carlisle (for the defendant).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

GREGORY v. CATTLE.

[KING'S BENCH DIVISION (Charles, Stable and Hallett, JJ.), **March 30, 31, 1943.**]

Magistrates—Appeal—Case stated—Case stated out of time—Case stated under Summary Jurisdiction Acts, 1857 and 1879—Whether 3 months' limitation applicable—Summary Jurisdiction Act, 1879 (c. 49), s. 33—Summary Jurisdiction Rules, 1915, r. 52.

In proceedings before a court of summary jurisdiction on May 2, 1942, the justices consented to state cases for the opinion of the High Court. The cases were not completed until Oct. 27, 1942, and were thus nearly 3 months out of time under the Summary Jurisdiction Rules, 1915, r. 52. The cases were, however, stated both under the Summary Jurisdiction Act, 1857, and the Summary Jurisdiction Act, 1879, and it was contended that in such a case there was no effective limitation of time:—

HELD [STABLE, J., *dissenting*]: (i) although the cases were stated under both Acts, the limitation of 3 months under Summary Jurisdiction Rules, 1915, r. 52, applied and the cases could not be proceeded with.

(ii) having regard to the long delay the court should not in the exercise of its discretion proceed with the cases.

[EDITORIAL NOTE.] It is clear that a case stated under the 1879 Act must be stated within 3 months. The question here is whether the proviso to sect. 33 of the 1879 Act, which enacted that nothing in that section should prejudice the statement of a case under the 1857 Act, saved the position where a case is stated both under the 1879 Act and the 1857 Act. It seems clear that it would save the position in a case stated solely under the earlier Act, but the court has decided by a majority that a case stated under both Acts must be stated within the time limited by the rule. The court has a discretion to allow a case to be stated out of time, but in this instance it refused to exercise it.

AS TO TIME LIMIT FOR CASE STATED, see HALSBURY, Hailsham Edn., Vol. 21, pp. 725, 726, para. 1256; and FOR CASE, see DIGEST, Vol. 33, p. 414, No. 1241.]

Cases referred to:

* (1) *Stokes v. Mitcheson*, [1902] 1 K.B. 857; 33 Digest 407, 1170; 71 L.J.K.B. 677; 86 L.T. 767.

* (2) *Atholl (Duke) v. Read*, [1934] 2 K.B. 92; Digest Supp.; 103 L.J.K.B. 417; 150 L.T. 499.

APPEAL by way of case stated from a decision of the justices of the county borough of Southport. Counsel for the respondent took the preliminary objection that the cases stated were out of time. The facts are fully stated in the judgment of CHARLES, J.

G. D. Squibb for the appellant.

Valentine Holmes for the respondent.

CHARLES, J.: These are special cases stated by the justices of the county borough of Southport, and, before we entered upon a consideration of the cases, a preliminary point was taken by counsel for the respondent that, in the circumstances, we had no power to entertain the consideration of these cases.

The hearing of the case concerning which the cases were stated was on May 2, 1942. It was not until Oct. 27, 1942, that the cases were stated—that is, 3 months after the expiration of the period laid down by the Summary Jurisdiction Rules, 1914, r. 52. The preliminary point was taken that they were not a day or two out of time (so that they might come to us and pray that that might be excused, for we have a discretion), but that it was no less than 3 months afterwards, and the appellant had had communicated to him in the very clearest terms that the point would be taken that the cases were stated too late and not in accordance with the rules made under the Summary Jurisdiction Act, 1879, s. 33.

It is not necessary for me to read the affidavit *in extenso*. It is sufficient to say that the 4 draft cases were prepared by the clerk to the justices and forwarded by him on May 26 to the Treasury Solicitor's branch department. Nothing having been heard at all, and it being well-known that under the Summary Jurisdiction Act, 1879, it was provided that a case should be stated within 3 calendar months after the date of the application for a case to be stated, and the 3 months in question having expired on Aug. 1, the Treasury Solicitor wrote to the clerk to the justices and asked him whether a case had been signed and

handed to the solicitors of the appellant since neither he nor the Ministry of Supply had heard anything further about the matter, and it seemed that the appellant had, therefore, decided not to prosecute his appeal.

A There were no further communications between the Treasury Solicitor and the clerk to the justices, and on Sept. 15 the solicitors of the appellant wrote to the Treasury Solicitor's branch at the Ministry of Supply enclosing 4 draft cases with amendments to them made by them, and asked whether the drafts could be agreed between the parties before they returned them to the clerk to the justices. That letter was received by the Treasury Solicitor's branch at the Ministry of Supply on Sept. 18. One must remember always that the time under the 1879 Act had run out on Aug. 1. Sept. 18 was approximately 7 weeks after the time in which the cases should have been stated had expired. So, not unnaturally, I think, on Sept. 19, the Treasury Solicitor wrote to the solicitors of the appellant pointing out that their clients were out of time for proceeding with their appeal, and returned the cases.

B On Oct. 28, the Treasury Solicitor received a letter dated Oct. 27 from the clerk to the justices in which he was informed that the 4 cases had that day been sent to the solicitors of the appellant, and enclosed were the copies of the 4 cases so sent. Those cases had been stated on Oct. 27, approximately 3 months beyond the date at which they should have been stated, and approximately 4 months after June 27, the date on which the solicitors of the appellant received the original drafts from the clerk to the justices.

C Those are the facts before us upon which we have to found a conclusion as to the validity or invalidity of the preliminary objection which is taken.

D It is argued by counsel for the respondent that, although the Act of 1857 did not itself apply a time limit within which a case must be stated, nevertheless since a time limit had been enacted by the 1879 Act and the rules made thereunder and since the two Acts had to be read together, the time limit under the latter Act was equally applicable in this case and, therefore, there was no jurisdiction to hear these appeals. *Stokes v. Mitcheson* (1) was prayed in aid of that preliminary objection, where, at p. 862, LORD ALVERSTONE, L.C.J., said as follows :

E It is not disputed that under that Act a person who has preferred an information is a party to the proceeding and can apply for a case. Then came the Summary Jurisdiction Act, 1879, s. 33, which purports to amend the procedure . . .

E Indeed it does, for if you look at the 1879 Act, and at Pt. II of the Act, that part is headed and described as : "Amendment of Procedure."

In the same case CHANNELL, J., at p. 865, said as follows :

F My opinion is that the powers as to stating a case, contained in the 1857 and 1879 Acts, are not separate powers, although there is a slightly different machinery, but that, in substance, the two Acts are to be read together.

F It appears to me that, upon those statements, it is quite clear that the submission made by counsel for the appellant that he is entitled to separate those two Acts and to say : "Inasmuch as there is a time limit made by the 1879 Act, I will disregard that and focus my attention on the 1857 Act where you find no limitation" is not well founded and cannot be supported. They must be read together, and the alteration is one of procedure only.

G It has further been said—and at first sight it might appear to be so—that the Summary Jurisdiction Act, 1879, s. 33, does, by its proviso, raise a difficulty, for it says :

Provided that nothing in this section shall prejudice the statement of any special case under that Act.

H For my own part I cannot see how the statement of the case is in any way prejudiced. The procedure is altered—or, as CHANNELL, J., says, the machinery is altered—but the statement of the case—that is to say, for example, as to the person aggrieved, as to whether the prosecutor can have a case stated, and so forth ; innumerable things that you may find in the statement of the case—is not prejudiced in the least. It is a definite alteration in procedure, and it is significant to observe that r. 52, which was made under the Summary Jurisdiction Act, 1879, s. 33, was made shortly after the decision of *Stokes v. Mitcheson* (1), to which I have referred.

For my part I feel no doubt at all that the two Acts must be read together ; that the alteration made by the 1879 Act is as to procedure only ; that it does

not prejudice the statement of the special case if one is made under the 1857 Act, and so does no violence to the proviso in sect. 33 of the 1879 Act.

For these reasons I have come to the conclusion—and I am bound to say for myself quite clearly and without hesitation—that the preliminary point that is raised is well made and must be sustained, and that I have no jurisdiction to hear these appeals.

STABLE, J. : I regret that I am unable to come to the same conclusion. Under the 1857 Act a party who was dissatisfied with the determination of a matter by the justices, if application were made in writing, had the right to have a case stated for the opinion of the High Court, and as regards that Act there is no time limit imposed within which the case had to be stated, with the result that if the Act stood alone, there is no doubt here that the appellant would have the right to have the matter heard and determined by this court.

In 1879 there was passed the Summary Jurisdiction Act of that date, and in Pt. II, which is headed "Amendment of Procedure," sect. 33 provides :

(1) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case . . .

(2) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by rules of court made in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same ; and subject as aforesaid, the Summary Jurisdiction Act, 1857, shall, so far as it is applicable, apply to any special case stated under this section, as if it were stated under that Act.

Provided that nothing in this section shall prejudice the statement of any special case under that Act.

It is clear that the effect of subsect. (2), so far as the case is stated under the 1879 Act, is that the machinery and procedure shall be as determined by rules, and, subject to the rules, the machinery and procedure applicable to cases stated under the 1857 Act shall apply.

I ought to have added that under the 1879 Act a rule was made. It is the Summary Jurisdiction Rules, 1915, r. 52, and it is interesting to notice that the rule reads as follows :

An application to a court of summary jurisdiction under the Summary Jurisdiction Act, 1879, s. 33, to state a special case shall be made in writing . . . The case shall be stated within 3 calendar months after the date of the application and after the recognition shall have been entered into.

The rule in terms deals with cases stated under the 1879 Act, and no mention is made of the 1857 Act. It is not suggested that the extension of the time limit in which application must be made to have a case stated—7 days—affects an application under the 1857 Act. The time limit under that Act remains 3 days, as it has always been. That rule, as I have said, though it well might refer to the 1857 Act, in terms applies—and, as I understand it, applies only—to cases stated under sect. 33 of the 1879 Act. The proviso to sect. 33 (2) of the 1879 Act says :

Provided that nothing in this section shall prejudice the statement of any special case under that Act.

If one accepts the view that the section is a section designed to amend procedure, what does the proviso mean except that the procedure under the 1857 Act shall be left intact ?

I am fortified in that conclusion, as I think, by a passage in *Stokes v. Mitchenon* (1) in the judgment of CHANNELL, J. It is contained in one sentence. He says, at p. 865 :

My opinion is that the powers as to stating a case, contained in the 1857 and 1879 Acts are not separate powers, although there is a slightly different machinery, but that, in substance, the two Acts are to be read together.

The point which the court had to decide in that case was whether an unsuccessful prosecutor in the court below was a "person aggrieved" under sect. 33 of the 1879 Act, or whether he came within the rather wider words in the 1857 Act, and the court in substance held that it did not matter whether he was a person aggrieved or not because, if he was outside those words, he fell within the words in the 1857 Act.

At p. 865, CHANNELL, J., says :

... although there is a slightly different machinery . . .

Now, what is machinery but procedure ? The words, in my view, are substantially interchangeable and he is holding that the procedure is different. The time within which the case must be stated is, in my view, procedure, and it is the existing procedure under the 1857 Act, among other things, which is safeguarded by the proviso to sect. 33.

In my judgment the point that the court has no jurisdiction to hear the case stated on the ground that it was not stated within the 3 months fails.

HALLETT, J. : In this case I have had, for my part, great difficulty in making up my mind as to the validity of the preliminary objection, and, despite the assistance which I have received, I am still far from certain that I have arrived at the correct conclusion.

The applications for cases were made, so we are told, in the common form which is No. 208 in the appendix of common forms to be found in STONE'S JUSTICES' MANUAL. By the applications the justices were requested, pursuant to the provisions of the Summary Jurisdiction Act, 1857, and the Summary Jurisdiction Act, 1879, to state and sign cases. I think the practice is to make the application under both Acts, although it is not invariable. Each case actually stated by the justices purported to be stated under both Acts. In so far as it was stated under the 1879 Act, a difficulty clearly presents itself because the case was not stated within 3 months, as required by the Summary Jurisdiction Rules, 1915, r. 52.

What counsel for the appellant seeks to say is that, having applied for a case to be stated under the provisions of both Acts, having obtained a case purporting to be stated under the provisions of both Acts, and having found that it was not stated within the time directed by the rule applicable to cases stated under the 1879 Act, he can now ignore the fact that his application was made and the case was stated under the 1879 Act and treat the matter as though the application had been made and the case stated solely under sect. 2 of the 1857 Act.

It seems to me that the real question here as regards the validity of the preliminary objection is whether counsel for the appellant can separate the case and the application in pursuance of which the case was made in that way so as to say that, in effect, he made two applications and obtained two cases : one case cannot be heard because it was stated out of time, and the other case can be heard because no limit as to time for stating it was imposed by the statute or any rules thereunder.

This is, as far as I am aware, a novel point, but that does not assist me very much in deciding whether it is a good one, and, in particular, I do not find myself assisted by *Duke of Atholl v. Read* (2) to which counsel for the respondent referred. In that case a preliminary objection was also taken. By the Summary Jurisdiction Act, 1857, s. 2, it is required that notice in writing of the appeal, with a copy of the case stated, shall be sent to the other party to the proceeding before the case is transmitted to the court. By an error, that requirement had not been fulfilled in *Duke of Atholl v. Read* (2), and, accordingly, objection was taken to the jurisdiction of the court to hear the case. Counsel for the respondent says : "Why, in those circumstances, did not counsel appearing for the appellant fall back upon the Act of 1879, just as counsel for the appellant here desires to fall back upon the Act of 1857 ?" Counsel for the respondent suggested that it appeared to be something in the nature of a converse case. Having regard to the names of the counsel in that case and the composition of the court, it would indeed have been a remarkable thing if a point which was there open to the appellant had been overlooked by all those concerned.

In truth I do not myself think that there is anything in that for this reason : If one looks at sect. 33 (2) of the 1879 Act, one finds the following :

The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by rules of court made in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same : and subject as aforesaid, the Summary Jurisdiction Act, 1857, shall, so far as it is applicable, apply to any special case stated under this section, as if it were stated under that Act.

The result seems to me to be that the requirement of the Summary Jurisdiction Act, 1857, s. 2, which had not been complied with by the appellant in *Duke of Atholl v. Read* (2), was equally applicable to any application under sect. 33 of the 1879 Act, and, therefore, it would have been no use for the appellant in that case to fall back upon the 1879 Act. Accordingly that case, and the failure of the counsel in that case to take a point similar to that taken by counsel for the appellant today does not seem to assist me in any way at all.

The other case to which we have been referred is *Stokes v. Mitcheson* (1), which has been noticed in the two judgments already delivered. In that case, again, I do not for my own part find as much assistance as do the other members of the court. There the case purported to be stated only under the Summary Jurisdiction Act, 1879, s. 33. That section gives a right to apply for a case to a person aggrieved, and the point was taken on behalf of the respondent that the appellant there—who was an inspector under the Coal Mines Act—was not upon a true view a “person aggrieved,” and that, therefore, he could not avail himself of the right to apply for a case conferred by sect. 33. In those circumstances, the appellant desired to avail himself of sect. 2 of the 1857 Act, because by sect. 2 a right to apply for a case to be stated is given to either party to the proceeding, and it could not be doubted that the appellant was a party to the proceeding.

What the court actually decided in *Stokes v. Mitcheson* (1) was that, although the case purported to be stated under the Summary Jurisdiction Act, 1879, s. 33, and although it was at least doubtful whether the appellant was a person entitled to apply for a case under that section, the two Acts, and the two sections of the two Acts, must be read together, and the appellant could fall back on sect. 2 of the earlier Act of 1857 and establish his right to apply for a case. I have reviewed in some detail what *Stokes v. Mitcheson* (1) actually decided with regard to the objection because I think it follows that it is not in any sense a decision which governs us in this case. None the less, I agree that some assistance can be derived from what was said in the judgment of LORD ALVERSTONE, L.C.J., and also what was said in the judgment of CHANNELL, J.

The difficulty, to my mind, as has been stated in more detail by STABLE, J., arises from the existence of the proviso to sect. 33 of the 1879 Act. That proviso has already been read and I need not repeat it.

Furthermore, I am troubled by the fact that the Summary Jurisdiction Rules, 1915, r. 52, in its terms appears to be dealing only with an application to a court of summary jurisdiction under the Summary Jurisdiction Act, 1879, s. 33. If that rule purported to deal with an application to the court under either Act—that is to say, under either the 1857 Act or the 1879 Act—then, subject to the question as to whether such a rule would be *ultra vires* having regard to the terms of sect. 33 of the 1879 Act, I should have felt no difficulty. As it is, I have felt attracted by the view that a provision directing a case to be stated within 3 calendar months after the date of the application is a provision prejudicing the statement of a special case under sect. 2 of the 1857 Act which contains no limitation of time.

However, in the end, having regard to the matters which have been referred to by CHARLES, J., I have come to the conclusion that this objection should succeed. The crucial matter in bringing me to that conclusion is as follows: Sect. 33 of the 1879 Act is contained in Pt. II of that Act which is headed: “Amendment of Procedure,” and, indeed, apart from any heading, it appears upon examination to be a portion of the Act which is reviewing and amending certain parts of the procedure of the courts of summary jurisdiction. I think that there is ample warrant for the statement by LORD ALVERSTONE, L.C.J., in *Stokes v. Mitcheson* (1) that the Summary Jurisdiction Act, 1879, s. 33, amongst other sections, purported to amend the procedure.

Furthermore, looking at the provisions as a whole, I think that CHANNELL, J., was right in saying, at p. 865:

... that the powers as to stating a case, contained in the Acts of 1857 and 1879, are not separate powers ... but that, in substance, the two Acts are to be read together.

What would have been the position if there had been an application for a case only under sect. 2 of the 1857 Act, and if the court had purported to state a case only under sect. 2 of the 1857 Act, I do not think it is necessary to decide.

The fact remains that here there was an application pursuant to the provisions of both Acts; there was a case stated, in response to that application, pursuant to the provisions of both Acts, and I do not think it is open to the appellant, now that difficulties occur in connection with the provisions of one of the Acts, to throw that Act overboard and to rely solely on what is contained in the other. That is a process of separation which on the facts of this case—whatever may be possible in other cases—I do not think that the appellant is, at this very late hour, entitled to adopt.

Accordingly, I agree with the first judgment that has been delivered in its result, although I regret that I have not been able to arrive at my conclusion with the same clarity and certainty.

Appeal struck out.

Solicitors: *Pritchard, Englefield & Co.* (for the appellant); *The Treasury Solicitor* (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

EASTHAM v. EASTHAM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), April 7, 1943.]

Divorce—Procedure—Adulterer's identity unknown—Whether order necessary for dispensing with naming adulterer as co-respondent—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49, s. 177 (1)—Matrimonial Causes (Amendment) (No. 1) Rules, 1943, r. 5.

A petitioner for divorce failed to name an alleged adulterer as a co-respondent, nor did he file evidence of attempts to trace and identify the unknown alleged adulterer. The registrar took the view that an order dispensing with the naming of a co-respondent was necessary before a certificate could be granted that the case was ready for trial. The petitioner maintained that such an order was no longer necessary by reason of the Matrimonial Causes (Amendment) (No. 1) Rules, 1943, r. 5:—

HELD: it was necessary under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 177 (1), to obtain such an order and the above rule had not altered the position.

[**EDITORIAL NOTE.** It was suggested that the 1943 rule had made an order dispensing with the naming of a co-respondent unnecessary. This is shown not to be so, since, though a statutory provision may be repealed by a rule of court, in this case there has been no such repeal. It is, therefore, still necessary either to name a male adulterer or to obtain the leave of the court to dispense with the naming of the co-respondent.

AS TO THE NAMING OF AN ALLEGED ADULTERER AS A CO-RESPONDENT, see HALSBURY, Hailsham Edn., Vol. 10, p. 700, para. 1040; and FOR CASES, see DIGEST, Vol. 27, pp. 385-387, Nos. 3779-3809.]

Case referred to:

(1) *Pitt v. Pitt* (1868), L.R. 1 P. & D. 464; 27 Digest 385, 3781; 37 L.J.P. & M. 24; 17 L.T. 671.

APPLICATION made *ex parte* by way of appeal from a decision of the registrar. The facts are fully set out in the judgment.

PILCHER, J.: This was an *ex parte* application made to me on behalf of the petitioner by way of appeal from the decision of the registrar, who took the view that, in the particular circumstances, an order dispensing with the naming of a co-respondent was necessary before a certificate could be granted that the case was ready for trial.

The solicitor who appeared before me on behalf of the petitioner submitted that the new r. 5 of the Matrimonial Causes Rules, which was substituted for the old r. 5 by the Matrimonial Causes (Amendment) (No. 1) Rules, 1943, made it unnecessary for the petitioner to file evidence of attempts made to trace and identify the alleged adulterer, and that consequently no order for leave to dispense with making the unknown adulterer a co-respondent was necessary. The argument presented on behalf of the petitioner depends, as I have said, upon a difference in wording between the old rule and the new rule. The terms of the old r. 5, so far as material, are as follows:

Unless otherwise directed, where a petition for divorce or a petition for judicial separation in which damages are claimed, alleges adultery every alleged adulterer, if

male, and living at the date of the filing of the petition, shall be made a co-respondent in the cause.

The old r. 5 thus requires every petitioner who alleges adultery by his wife with a co-respondent whose name and identity are unknown to make such alleged adulterer a co-respondent in the cause "unless otherwise directed." Before a direction dispensing with the necessity for making an unknown alleged male adulterer a co-respondent is made, it is the practice of the divorce registry to require the petitioner to file evidence of attempts to trace and identify such alleged adulterer in order that the registrar may be satisfied that proper efforts have been made in this respect.

The material words of the new r. 5 of the Matrimonial Causes Rules are as follows :

Unless otherwise directed, where an alleged male adulterer is named in a husband's petition for divorce, or in a husband's petition for judicial separation in which a claim for damages or costs is made against him, such alleged adulterer shall, if living at the date of the filing of the petition, be made a co-respondent in the cause. . .

It will be observed that unlike the old r. 5, the new r. 5 does not in terms deal with the position of an unnamed adulterer, and only requires the petitioner to make named adulterers co-respondents.

The petitioner in this case argues that the new r. 5 does not deal with unnamed adulterers, and that it is consequently unnecessary for him to file evidence of attempts to trace and identify an unnamed adulterer. The petitioner's argument, although attractively presented, is in my view fallacious. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 177 (1), is in the following terms :

On a petition for divorce presented by the husband or in the answer of the husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

There is no doubt that the words in this section—"alleged adulterer"—comprise an adulterer whose name and identity are unknown to the petitioner (see *Pitt v. Pitt* (1)). The section specifically enacts that in a husband's petition every alleged male adulterer shall be made a co-respondent unless the petitioner "is excused by the court on special grounds from so doing."

The Matrimonial Causes Rules, both old and new, are made under the powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99. The old r. 5 reproduces to some extent the effect of sect. 177 (1) in that it requires every alleged male adulterer to be named "unless otherwise directed." It is true that the new r. 5 only refers to named male adulterers, but the effect of sect. 177 (1) still remains unimpaired, and it is still necessary under this section, in spite of the altered wording of the new r. 5, for a male petitioner to make every alleged male adulterer, whether named or unnamed, a co-respondent, unless he is "excused by the court on special grounds from so doing."

In order to be excused from making every alleged male adulterer a co-respondent a petitioner still has to show special grounds, and it is for this reason that he is required to satisfy the registrar by affidavit that he has made proper attempts to trace and identify any alleged adulterer whose name and identity are said to be unknown. It is true that the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, (1) (g) provides that :

. . . enactments which relate to matters with respect to which rules are made under this section . . .

may be repealed by rule. Sect. 177 (1) of the 1925 Act is probably not such an enactment, and in any case it is not repealed.

In my view the necessity for obtaining an order dispensing with the naming of a co-respondent is and has been since Jan. 1, 1926, required by the terms of sect. 177 (1) of the 1925 Act. The alteration in the wording of r. 5 does not, therefore, in my view affect the practice which has obtained hitherto in the registry, and I think the registrar was right in this case in deciding that an order dispensing with the naming of a co-respondent was necessary.

Appeal dismissed.

Solicitors : *Cartwright, Cunningham & Co.*, agents for *H. J. Widdows & Son*, Leigh (for the petitioner).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

WINSTANLEY v. BAMPTON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J.), February 23, 1943.]

Libel—Privileged occasion—Allegation of refusal to pay rent except under compulsion—Communication to plaintiff's commanding officer—Express malice.

The plaintiff, an officer in the Royal Artillery, was the subtenant of the defendant, a captain in the Royal Navy. The tenancy agreement was not signed until after the plaintiff had gone into occupation of the house and he was at the start and continued to be in arrears with the rent which he had agreed to pay in advance. The defendant, who had left all arrangements in connection with the tenancy in the hands of his agent, gained from letters received from the agent a false impression of the position with regard to the plaintiff's failure to pay the rent punctually. In consequence, the defendant wrote to the plaintiff's commanding officer the letter complained of in which he said: "he [the plaintiff] persists in refusing payment. There seems to be no alternative to the very unpleasant one of taking the matter to court." The defendant pleaded justification and privilege:—

HELD: the words which were false and defamatory were written on a privileged occasion since the commanding officer had a common interest with the defendant in the payment of the plaintiff's debt, but the communication was taken out of the protection afforded by the privileged occasion by the express malice of the defendant.

[**EDITORIAL NOTE.** It will be noted that the defendant in this case was an officer in one of the Services and, therefore, had an interest in the upholding of the reputation of the Services. It is held that a commanding officer has an interest in seeing that junior officers do not incur liabilities which they are unable or unwilling to discharge, that he has an interest corresponding to that of the defendant in the payment of the debt, and the occasion is, therefore, a privileged one. A defence of privilege may, however, be defeated if it is shown that the defendant is actuated by express malice. The proof of express malice is largely a question of fact, but, since the matter is very carefully considered herein, and the leading authorities are considered, the case is important on this point also.

AS TO QUALIFIED PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 468-478, paras. 569-575; and FOR CASES, see DIGEST, Vol. 32, pp. 112-114, Nos. 1437-1459.]

Cases referred to:

(1) *Fairman v. Ives* (1822), 5 B. & Ald. 642; 32 Digest 133, 1639; 1 Dow. & Ry. K.B. 252.

(2) *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431; 32 Digest 128, 1592; 61 L.J.Q.B. 409; 66 L.T. 513.

* (3) *Adam v. Ward*, [1917] A.C. 309; 32 Digest 129, 1608; 86 L.J.K.B. 849; 117 L.T. 34.

(4) *Watt v. Longsdon*, [1930] 1 K.B. 130; Digest Supp.; 98 L.J.K.B. 711; 142 L.T. 4.

(5) *Pitt v. Donovan* (1813), 1 M. & S. 639; 32 Digest 206, 2574.

ACTION for damages for libel in respect of letter written to plaintiff's commanding officer.

The defendant, a captain in the Royal Navy, sublet his house to the plaintiff, an officer in the Royal Artillery, although he would have preferred an older and more responsible person as his sub-tenant. It was agreed that the tenancy should begin on Dec. 16, 1940, at a rent of £4 4s. per week, payable in advance every 4 weeks. The tenancy agreement was not drawn up or submitted to the plaintiff until early in March when it was presented together with an account charging him with more than was due. The plaintiff did not pay the whole sum, but drew a cheque for 8 weeks' rent and this left 4 weeks' rent still due and unpaid. He made further payments of rent on later occasions, but the rent was always at least 4 weeks in arrears. The defendant left all arrangements in the hands of his agent, Major Batten. After receiving letters from Major Batten which gave him an inaccurate picture of the position, the defendant wrote a letter to the plaintiff on Mar. 14 enclosing a formal notice terminating the tenancy on June 16, and on May 10 he wrote the letter complained of to the plaintiff's commanding officer.

G. O. Slade and W. A. L. Raeburn for the plaintiff,

Valentine Holmes for the defendant,

VISCOUNT CALDECOTE, L.C.J. : The plaintiff says that the letter meant that he had been guilty of conduct unbecoming to an officer and a gentleman. By the defence the defendant says that the words did not bear the meaning alleged and are not defamatory of the plaintiff, and that, if they are defamatory, they are true in substance and in fact. The defendant also says that the words complained of were published in good faith and without malice and in the honest belief that they were true and the occasion was privileged.

I have no doubt that the words were defamatory of the plaintiff, though I think the meaning put upon them by the plaintiff is one the words will not bear. The sting of the letter is contained in the sentence in which the defendant said :

He [the plaintiff] persists in refusing payment. There seems to be no alternative to the very unpleasant one of taking the matter to court.

A mere statement that the plaintiff was indebted to the defendant could not be held to be defamatory apart from some special circumstances, but the words which I have quoted seem to me to impute to the plaintiff a deliberate intention to avoid payment of his rent as long as possible, and to say that he was not likely to pay unless he was compelled by legal proceedings.

I can deal shortly with the defence of justification. Having stated the meaning which I attribute to the words, I do not find that they are true. I do not attach importance to the misstatement contained in the letter that the plaintiff was in arrears to the extent of £50 8s., though, in fact, he was only in arrears at that date to the amount of £16 16s. The fact was that the plaintiff had omitted to pay his rent punctually, but that is, in my opinion, a very different thing from a refusal to pay at all or only under compulsion.

The real contest in this case was on the defence of privilege. The defendant, who I thought gave his evidence with candour, as one would expect from a naval officer, told me that he had two motives in writing the letter, one was a desire to uphold the good name of the Services and a feeling that the non-payment of rent for a long period ought to be checked. He thought it was his duty, therefore, to communicate with the plaintiff's commanding officer as, in the event of the plaintiff's conduct becoming known, it would bring the Service into disrepute. His other motive in writing the letter was that he hoped it would have the effect of getting payment made of the overdue rent. The defendant said that these two reasons for writing were, as he put it, about fifty-fifty. I am disposed to think that he was more concerned with the collection of the money due to him than with the Services' reputation, but, even if this was the only real motive in writing the letter, I should hold, as I do in this case, that the occasion on which the letter was written to the commanding officer was privileged. The evidence of Brigadier-General Sir Thomas Jackson, and of the naval officers, Admiral Elliott and Captain Stokes, all of whom had had wide experience, satisfied me that a commanding officer in His Majesty's forces has an interest in seeing that officers, especially junior officers, serving under him do not incur debts which they are unable or unwilling to discharge. I think the commanding officer had a common, or a corresponding interest with the interest of the defendant in the payment of the plaintiff's debt. I observe that the commanding officer, Colonel Fisher, to whom the letter was written, did not in his reply suggest that there was any irregularity on the part of the defendant in communicating with him. The answer was confined to a statement of the facts as he found them, with an inquiry for further information. (See also *Fairman v. Ives* (1).)

The question then arises as to whether, to use the expression of LORD ESHER, M.R., in *Royal Aquarium v. Parkinson* (2), at p. 444, the defendant was abusing the occasion, or, as it was put by counsel for the plaintiff, whether the defendant was guilty of express malice.

The law relating to this question was discussed at great length in the House of Lords in *Adam v. Ward* (3). The opinion of LORD FINLAY, L.C., contains a concise statement of the parts to be played respectively by the judge and the jury. He said at p. 318 :

It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged . . . It is further for the judge to decide whether there is any evidence of express malice fit to be left to the jury—that is, whether there is any evidence on which a reasonable man could find malice. Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong,

or from any facts which show that the defendant in publishing the libel was actuated by spite or some indirect motive.

At p. 320, EARL LOREBURN said :

... the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion.

He then added, at p. 321, that language had been used in some cases which confused :

A ... the two separate points, namely, whether the defendant has gone beyond the privilege which the occasion creates, and whether the defendant had forfeited the privilege by malice.

The opinion of LORD DUNEDIN may, I think, be summarised in this way. He seems to have thought that, generally speaking, the proper inquiry was whether, when the occasion had been held privileged, there were in the document complained of parts which were not really necessary to the fulfilment of the duty or right which is the foundation of the privileged occasion. In such a case the parts in excess of the occasion might be used as evidence of express malice. As to the way in which the question was sometimes put, namely, that, if there was anything found in the publication not reasonably appropriate to the duty or right, then privilege could not extend to that, he thought this was only another way of expressing the same point. At p. 340 LORD ATKINSON asked :

C What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel ? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice ?

D In the absence of all guiding authority the latter would, in his opinion, Lord Atkinson said, be more consistent with justice and legal principle, and he thought it was in law the true result.

These various opinions contain a full discussion of the law relating to privileged occasions and communications on such occasions. I think there can be no doubt about the general result. Having held that the occasion was privileged I think the right question for me to consider is whether there is material upon which I can find that the defendant was actuated by express malice, and, if there is such material, whether in my judgment he was so actuated. It always has to be remembered in such a discussion as this that unless the words are defamatory no question arises. Therefore, it is not enough merely to show that on the privileged occasion the person making the communication complained of has said things which are defamatory of the plaintiff. It is only when defamatory statements have been made that the question arises as to whether they afford evidence in themselves that the occasion has been abused, so as to justify a finding that the defendant has spoken maliciously.

F The opinions in *Adam v. Ward* (3) are the latest and most authoritative discussion of the questions of privileged occasions and of communications protected by privilege. In *Watt v. Longsdon* (4) there is a very clear statement by SCRUTTON, L.J., as to the effect of *Adam v. Ward* (3). I cite one sentence only. He said at p. 142 :

G Communications made on these occasions may lose their privilege : (1) they may exceed the privilege of the occasion by going beyond the limits of the duty or interest, or (2) they may be published with express malice, so that the occasion is not being legitimately used but abused.

H Counsel for the plaintiff asked me to say that even though the occasion was privileged there was both intrinsic and extrinsic evidence of malice so as to take the words complained of out of the protection which otherwise would have been given by the privileged occasion. So far as extrinsic evidence of malice is concerned, counsel for the plaintiff's case mainly rested upon two statements of the defendant. One of them was the defendant's statement in the witness box that he would have preferred older and more responsible tenants than the plaintiff and his wife. I do not think that this statement is any evidence at all of malice, that is to say, of a wrong motive or of personal spite or ill-will. The defendant has a perfect right to prefer one tenant to another. As he said, it was his own responsibility that he took the plaintiff as his tenant. I do not find evidence of malice in this attitude or in his statement that he would

have preferred more responsible tenants. The other statement upon which counsel for the plaintiff chiefly relied as extrinsic evidence of malice was contained in a letter which the defendant wrote on Mar. 21 to Major Batten. This letter was written after the defendant had given notice to the plaintiff to terminate his tenancy as a result of which the plaintiff had written both to the defendant and to Messrs. Batten & Co. letters in which he said that he found the whole atmosphere very distasteful and would be only too glad to get out as soon as he could with the defendant's concurrence. In his letter of Mar. 21, the defendant wrote as follows: "We are a little anxious about Mrs. Ray at the shop and hope that she also has not had difficulty over money owing." This sentence refers to a shop in the village of East Coker. The plaintiff said that so far as he knew he had never entered the shop or had any dealings with Mrs. Ray, and I am satisfied that the defendant had no foundation at all for his suggestion that there was a risk of Mrs. Ray being badly treated by the plaintiff and losing her money. I think the defendant had worked himself up into a state of indignation which led him to make that aspersion on the plaintiff, and this has a material bearing on the sentence in the letter of May 10 in which the defendant suggested that the plaintiff deliberately persisted in refusing payment. If that sentence had been all that was relied upon as evidence of express malice I might have come to a different conclusion, but, after giving consideration to all the defendant's letters, although on the peculiar facts of this case he was not to blame, I have come to the conclusion that there was an abuse of the privileged occasion, or, to use the other expression, that there was express malice. Counsel for the defendant submitted that the defendant believed all he said to be true, and that that in itself was a sufficient answer to the plaintiff's case that the defendant had been guilty of express malice. I was referred by counsel for the defendant, to a passage from the judgment of LORD ELLENBOROUGH, C.J., in *Pitt v. Donovan* (5), where in a case relating to slander of title LORD ELLENBOROUGH, C.J., said, at p. 648:

A man of intemperate passions, or of weak understanding, or a man acting under an erroneous impression, may be carried further than a man of more mature judgment but still he would not be liable to an action of slander of this sort.

I do not regard this as an authority for the proposition that in a case of defamation of character a man who makes defamatory statements on a privileged occasion can be excused if he honestly believes the statements to be true. Counsel for the plaintiff, on the other hand, referred me to a passage in the opinion of GREER, L.J., in *Watt v. Longsdon* (4), at p. 154. I respectfully accept this as an authority for the view which I have formed that the evidence of the defendant's belief in the truth of his statements may afford material for consideration on the question of express malice but it is not in itself enough to absolve the defendant.

On the whole I have come to the conclusion that the communication complained of is taken out of the protection afforded by the privileged occasion by what I find to be the express malice of the defendant. I have not forgotten the warning of LORD DUNEDIN in *Adam v. Ward* (3) that when considering whether the actual expression used can be held as evidence of express malice no nice scales should be used, but I think that the defendant had got into a state of mind where he was actuated by ill will towards the plaintiff, and this seems to me to be evidence of malice which compels me to reach the decision I have expressed. The plaintiff's reputation has not been seriously damaged. His commanding officer took a very sensible line. The plaintiff, I was told by his counsel, was not asking for heavy damages. I assess the damages at the sum of £25, and there will be judgment for that amount on the claim.

No question now arises as to the counterclaim. Counsel for the plaintiff admits that there must be judgment for the defendant for the amount claimed. There will, therefore, be judgment on the counterclaim for £29 16s. 3d.

Judgment on the claim for plaintiff for £25 damages with costs, judgment on the counterclaim for defendant for £29 16s. 3d. with costs.

Solicitors: *Hays, Roughton & Dunn* (for the plaintiff); *W. F. Gillham*, agent for *Norton, Peskett & Forward*, Lowestoft (for the defendant).

[Reported by HUBERT B. Figg, Esq., Barrister-at-Law.]

R. v. HOOD-BARRS.

[COURT OF CRIMINAL APPEAL (Charles, Tucker and Croom-Johnson, JJ.).
April, 12, 13 14, 1943.]

Criminal Law—Perjury—Evidence given before two Special Commissioners on an appeal against assessment to sur-tax—Whether the two Special Commissioners constituted a judicial tribunal—Perjury Act, 1911 (c. 6), s. 1 (1)—Income Tax Act, 1918 (c. 40), ss. 137 (4), 230 (2)—Finance Act, 1936 (c. 34), s. 21 (1), (5), (9)—Finance Act, 1938 (c. 46), s. 38 (3).

The appellant appealed against a conviction for perjury, the indictment for which arose from two statements made on oath by the appellant at the hearing of an appeal against an assessment to sur-tax before two Special Commissioners. On behalf of the appellant it was contended (i) that, under the Income Tax Act, 1918, at least three Special Commissioners were necessary to form a judicial tribunal, and, therefore, the statements in question were made in proceedings which were a nullity; (ii) that the statements in question were contentions as to the legal effect of certain sections of the Finance Acts, and, as such, were true, and the judge ought to have directed the jury to that effect; (iii) that the statements in question were contentions of law and not statements of fact and that the judge had insufficiently directed the attention of the jury to this distinction:—

HELD: (i) an appeal to the Special Commissioners can be heard by two Special Commissioners and, upon the proper construction of the Income Tax Act, 1918, it is not necessary that three such commissioners at least should adjudicate upon such an appeal.

(ii) whether the statements in question were legal contentions or statements of fact was a question for the jury and the judge had properly directed the jury in this respect.

[EDITORIAL NOTE.] The first point taken in this appeal is the more important. It is shown that there are certain passages in the Income Tax Act, 1918, which refer to a majority of the commissioners, and upon this the appellant founded an argument that the tribunal must consist of at least three commissioners. It is well-known that the practice has been for two commissioners to hear appeals and the court has decided that the passages in question do not make it necessary for such appeals to be heard by at least three commissioners. Those who are familiar with the Finance Act, 1936, s. 21, and the Finance Act, 1938, s. 38, will be amused at the contention that the appellant was stating the legal effect of those sections which are among the most difficult to construe even in the Finance Acts. This part of the case appears to have been prejudiced by the fact that the appellant gave no evidence at the trial for perjury and the jury, as no doubt they were entitled to, seem to have taken the view that there was an arrangement between the appellant and Mrs. Rutland and that the appellant's answers were directed to the facts and not to the legal result of the involved sections in question.

AS TO INCOME TAX APPEALS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 353, 354, paras. 715-722; and FOR CASES, see DIGEST, Vol. 28, pp. 99, 100, Nos. 594-603].

APPEAL against a conviction for perjury at the Central Criminal Court before HUMPHREYS, J., on Dec. 10, 1942. The perjury was alleged to have been committed by the appellant at the hearing of an appeal against an assessment to sur-tax before the Special Commissioners for the purposes of the Income Tax Acts. The facts are fully set out in the judgment of the court delivered by CROOM-JOHNSON, J.

Serjeant Sullivan, K.C., Cyril King, K.C., and Phineas Quass for the appellant.
The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and L. A. Byrne for the Crown.

CROOM-JOHNSON, J. [delivering the judgment of the court]: The appellant was assessed to sur-tax in respect of the tax year 1938-39 in the sum of £4,200. Against that assessment he gave notice of appeal. His appeal was heard before two of the Special Commissioners of Income Tax on July 30, 1941, when the appellant gave evidence, after having been sworn. That appeal was then adjourned, and the hearing has not yet been resumed.

The point of that appeal was whether the income arising from certain shares in a company, which the appellant had transferred on July 25, 1938, to two of his daughters, both minors, was to be treated as his income for the purpose of the Income Tax Acts. The appellant's case was that he had transferred the shares, 60,000 to each of his said daughters, out and out for valuable consideration as

an ordinary sale, and that, in respect of one daughter, Heather, he had received the whole consideration money, £22,500, and in respect of the other one he had received £3,370 4s. 6d. The Revenue contended that the shares were a gift by the appellant to his daughters, respectively. The appellant was warned by his accountant that the word "settlement" had been judicially interpreted so as to include a gift. The appellant deposed that the money representing the purchase price of the shares had come from his sister, Mrs. Rutland, in 104,148 United States dollars and 30 cents, that he had received the money from her and was looking to her for the balance, and would get it immediately the war finished, and that his sale of the shares was at 6d. less than the ordinary market price ruling at that time. The suggestion was that the payment by Mrs. Rutland was a gift by her to or for the benefit of her two nieces. A

At the conclusion of his evidence in chief the appellant was asked the following three questions, to which he gave the following answers :

Now I want to ask you the same formal question that I asked Mrs. Hood-Barrs, because I want to be quite clear that this is in evidence : In transferring these shares did you make any arrangement with Mrs. Rutland undertaking to provide funds directly or indirectly for the purpose ?—No. B

Did you make any reciprocal arrangements with Mrs. Rutland, meaning, for instance, that, if she settled money on your children, you would settle money on her children ?—No. C

So far as you were personally concerned, had you any other interest—financial interest—in this transaction other than that you were selling a block of your own shares ?—No. D

The gift was challenged, and the appellant was cross-examined as to the financial ability of Mrs. Rutland to make a gift of so large an amount. At no time did the appellant disclose the source from which Mrs. Rutland obtained the money, except to say that she undoubtedly had funds in America, and that she and her husband had done remarkably well in gold transactions on the Los Angeles Stock Exchange. E

On Dec. 8, 1942, and following days, the appellant was indicted at the Central Criminal Court for perjury in respect of two of the said answers, as follows :

First count. Perjury contrary to the Perjury Act, 1911, s. 1 (1). On July 30, 1941, being a witness before the Special Commissioners of Income Tax in an appeal by him the said Henry Rupert Hood-Barrs against an additional assessment of £4,200 in respect of sur-tax for the year 1938-39 knowingly falsely swore that in transferring to his daughter Heather Pauline Hood-Barrs 60,000 shares in a company called the Steel Barrel Scammells & Associated Engineers, Ltd., in consideration of £22,500 he did not make any arrangement with one Dorothy Rutland by which he undertook to provide funds either directly or indirectly for the purpose. F

In a second count charging him with perjury contrary to the same section, he was charged with having sworn :

... that in transferring to his daughter Heather Pauline Hood-Barrs 60,000 shares in a company called the Steel Barrel Scammells & Associated Engineers, Ltd., in consideration of £22,500 he had no financial interest in the transaction other than that he was selling a block of his own shares. G

He now appeals to this court against conviction, on grounds of law, and applies for leave to appeal against sentence. H

As to the conviction, the first point taken is that the oath which he took and the evidence that he gave were not before a judicial tribunal. It is said that not less than three Special Commissioners are requisite to form such an appeal tribunal under the Income Tax Acts, and, there being only two, the proceedings were a nullity. I

By the Income Tax Act, 1918, s. 230 (2), it is provided as follows :

Anything required under this Act to be done by the general commissioners, the additional commissioners, the special commissioners, or any other commissioners may, save as otherwise expressly provided by this Act, be done by any two or more commissioners. J

It was admitted on behalf of the appellant that there was no express provision to the contrary, unless it is to be found in sect. 137 (4). That is as follows :

If, on an appeal, it appears to the majority of the commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every such assessment or surcharge shall stand good.

The argument is that there cannot be a majority out of two, and, accordingly, that, reading the two sections together, the express language of sect. 230, which reads: "Two or more commissioners" must be read as "not less than 3" in the case of an appeal. Sect. 137 (4) of the Act, in our opinion, is inserted for the benefit of the subject, to show that the determination of a majority of the commissioners in his favour, in cases where a majority is possible, will suffice. We find it impossible that the implication submitted can arise out of sect. 137 (4) as an express provision within the meaning of sect. 230. No authority was cited before us to that effect. It has been the routine practice for many years past, in our experience, for two Special Commissioners to constitute an income tax appeal tribunal. In view of the critical, and, indeed, meticulous, examination which the provisions of the Income Tax Acts have received at all hands at least since the year 1918, it is curious, to say the least of it, if the point is a good one, that no trace of the raising of any issue as to the legality of the practice can be found anywhere in the mass of authorities reported in the Tax Cases. The point has been universally overlooked, and yet, if the appellant is right, none of the hearings before, and none of the determinations upon cases stated by, a tribunal of two Special Commissioners were valid or effective for any purpose.

We can see nothing repugnant to sect. 230 in sect. 137, and nothing inconsistent in them. If there was anything inconsistent in them, it would be the earlier section which would be impliedly repealed or would have to give way to the later, and, in our judgment, that point fails.

The second point, or group of points, taken, is that the questions answered must be taken in their context, that is to say, that they are obviously framed upon the language, respectively, of the Finance Act, 1936, s. 21, and the Finance Act, 1938, s. 38, that, in that context, they were not untrue, that, had the Special Commissioners concluded the hearing, they would have answered the questions in the same way as the appellant, and that the trial judge ought to have ruled and to have directed the jury that the two answers were true.

We have listened to an elaborate and very full argument on this group of points, including an examination of the words "settlor" and "settlement" in the first of the two sections I have cited, and, to appreciate that argument, it is necessary to read the relevant parts of the two sections. The Finance Act, 1936, s. 21 (1), provides as follows:

Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person.

In subsect. (5) of that section there is a reference to the Finance Act, 1922, s. 20 (2) and (3), and it says that those subsections:

... shall have effect as if references to para. (c) of subsect. (1) of that section included references to the foregoing provisions of this section, as if references to a disposition included references to a settlement, and as if the reference to the making of a disposition included a reference to the making of or entering into a settlement ...

Subsect. (9) contains the following provisions:

(b) The expression "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets; (c) the expression "settlor," in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement.

The Finance Act, 1938, s. 38 (3), provides as follows:

If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person.

It will be observed that the wording of the subsection is "so long as the settlor has an interest"; it does not say "so long as the settlor has a financial interest."

We do not think it either necessary or desirable that we should lay down in this judgment what is the precise or exact meaning of those provisions. It is, we think, plain that the questions asked and answered, upon which the indictment rests, were relevant and material to the appeal before the commissioners, and, indeed, the contrary has not been argued, but the appellant had previously given a certificate in writing, dated Dec. 17, 1939, to the effect of at least the first answer, after his attention had been called to sect. 21 of the 1936 Act.

The question as to whether the appellant was asserting a fact or was merely advancing a contention in law that he had done nothing which brought the sections into operation in his case, was, in our opinion, a question for the jury. That question was repeatedly and clearly put before the jury by the judge in his summing up, and on more than one occasion. The appellant did not give evidence at his trial, and called no witnesses, so that the jury had no explanation, apart from argument, as to what his state of mind was in answering the two material questions. The trial judge also, in our opinion, fully and amply called attention to the question whether the answers made by the appellant were true or untrue, and directed them more than adequately on the onus of proof.

In order to appreciate the value of the rest of this group of points, it is necessary to refer briefly to the additional facts which were proved at the trial and which had not been disclosed to the Special Commissioners at the hearing before them. On Mar. 12, 1938, the appellant transferred £13,000 from a joint deposit account in the name of himself and his wife to the account of the Mann Steam & Motor Wagon Co., Ltd., in which the appellant held 3,550 out of 3,800 shares, and a Mr. England held 250. On July 25, 1938, the two blocks of shares were transferred to the two daughters, the stated consideration in the case of Heather being a sum of £22,500. On Mar. 31, 1939, £2,500 was transferred from the joint deposit account of the appellant and his wife to the Chalmers Property Investment Co., Ltd., a company in which the appellant held, jointly with his wife, 99 shares, and Mr. England the only other one; and on the same day this company transferred £2,426 1s. 4d. to the Chiltern Bus Co., Ltd., a company in which the appellant held 9,999 shares and Mr. England the only other one. On June 6, 1939, the appellant, as director of what I will call the Mann Co., asked his bank to grant an overdraft of £3,250 to the company on his guarantee, and enclosed a mail order draft from the company's funds to Mrs. Rutland in California of £18,550. On the same day he sent a similar draft of £3,300 on the Chiltern Company's funds, and another for £400 on the Chalmers Co. Two days later he transferred from the deposit account of the Mann Co. £15,000 which had been there for the last 18 months. The total drafts amounted to £22,250, that is to say, £250 less than the cost of Heather's shares. They were transferred on June 27, as 104,213 dollars 30 cents, by Mrs. Rutland, who wrote on June 28 to the appellant's bank enclosing a draft for that amount, asking that a separate account should be opened in her name and operated as the appellant directed. A cheque for this amount was drawn on the account in favour of the girl, Heather, who indorsed it and apparently paid it into the appellant's banking account.

In June, 1939, and not January, 1939, as deposed to by the appellant before the commissioners, and as stated in a certified copy letter from Barclays Bank to the appellant put in before the commissioners, that bank opened that account in dollars in the appellant's name. The dollars were offered to the Treasury on the outbreak of war, and they realised a profit on the exchange of £3,370, so that they more than met the cost of Heather's shares, instead of being £250 too little as at the time of the remittance in June. It is to be observed that all the transfers on this side of the water were done by banking accounts, and the transfers from the other side to this side were done by banking accounts, all of them in the same bank, and at the same branch of it.

We are quite unable, upon the uncontradicted evidence (and, we may add, uncontradictable evidence) of the transfers of money, to come to the conclusion that the judge was bound as a matter of law to direct the jury that the appellant's answers to the two questions were true.

Much was made in argument before us of the fact that Mr. Middleton, the accountant to the appellant and his company, expressed the view at the trial that the transactions were transactions of loan between the different companies and to Mrs. Rutland; but we do not think that the jury were in all the circum-

A stances bound to accept that answer. In our judgment, the question of what was the substance of the matter and the true effect of all these transfers of money was essentially a question for the jury, as were the inferences to be drawn from those facts. Whether loans or gifts, it still left the question: Had the appellant directly or indirectly provided the money, and had he done so pursuant to an arrangement between Mrs. Rutland and himself? What would have been the result of a finding that he had, on the determination by the Special Commissioners of the legal problems involved in the two sections, is, we think, neither here nor there. On the issues, did the appellant by his answers assert facts? Were those answers false, and false to the appellant's knowledge? It was said in argument that there was no proof of an arrangement between the appellant and Mrs. Rutland, but we think there were ample facts proved upon which the jury could find that there was an arrangement, contrary to the appellant's sworn statement that there was not.

B Finally, it was objected that the judge omitted to direct the jury as to the law applicable to the second count, and in particular, that he failed to direct them as to what interest it was which would make the appellant a settlor within the meaning of sect. 38 of the 1938 Act, or what the word "interest" meant in that section. In our opinion, there was no necessity so to direct them, apart from the general directions of law on the whole case on both counts, which were full and clear. If the jury found that the appellant was merely asserting a contention or opinion of law in answering the second question, then the direction to them to acquit was plain. If they thought that they were questions of fact, then it seems to us that there was no necessity to explain to a jury in the City of London what a financial interest is in a transaction which the appellant said was a transaction of sale and purchase. To pray in aid the possibly difficult questions of income tax law which might arise once the true facts had been ascertained by the commissioners, is to confuse the issue. Once the jury were satisfied that the appellant was purporting to depose to facts—and they must have been, in view of their verdict—the law applicable to the issues raised in that appeal did not affect the matter. They were plainly told that they had to be satisfied that he was deposing to facts before they could convict. By their verdict, they have obviously accepted that view of the appellant's answers. That being so, the general facts of the case applied evenly to both counts, and the judge's separate references to the second count were, in our opinion, more than sufficient to enable the jury to appreciate such differences as there were between the two counts.

E Taking the summing-up as a whole, there is, in our judgment, no fault to be found with the direction on the second count. In those circumstances, this second point or group of points equally fails, and, in our judgment, the appeal against conviction must be dismissed.

F As to the application for leave to appeal against sentence, that has been withdrawn, and we need say no more about it.

Appeal dismissed.

Solicitors: *Denton, Hall & Burgin* (for the appellant); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

HAYS v. HAYS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.),

April 15, 1943.]

Divorce—Decree absolute—Expediting—Practice—No order made on first application to expedite.

H Where in a divorce suit an application is made to expedite the decree absolute, the better procedure is, without making an order, to express an opinion that the case is a proper one for expedition, and to direct that the papers, if the case is proceeding in a district registry, be at once transferred to the Principal Registry in London. The solicitor in such a case should at once communicate with the King's Proctor, who, however, will not commence inquiries until he is assured that the petitioner is aware of his obligations to provide for his expenses in a proper case.

EDITORIAL NOTE. The practice with regard to the expedition of the decree

absolute has been long settled in the Divorce Division, but now that many cases are heard at assizes by judges who have had no opportunity of acquainting themselves with the details of this procedure it is convenient and proper that the practice with the reasons underlying it should be set out in an authoritative statement.

AS TO EXPEDITING DECREE ABSOLUTE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 828, 829, para. 1325; and FOR CASES, see DIGEST, Vol. 27, pp. 549, 550, Nos. 6014-6027.]

E. Holroyd Pearce for the King's Proctor.

Leslie Brooks for the petitioner.

LORD MERRIMAN, P.: This is an application by the King's Proctor for directions in connection with an application by a petitioner to expedite the decree absolute.

The circumstances are that, by a petition dated Nov. 2, 1942, a wife, suing as a poor person, charged her husband with cruelty, and sought a dissolution of her marriage. It is only right to say that the parties separated in 1937, and all the misconduct alleged had occurred before that date. On the other hand, although I have no certain information on this point, it is probable that, though her petition was only dated in Nov., 1942, the proceedings had been initiated so far as she was concerned, a good deal earlier, for it is, of course, the fact that the combination of war conditions with the notorious increase of work caused by the Matrimonial Causes Act, 1937, has led to unavoidable delay in the handling of these matters both by the Law Society in London and by the Provincial Law Societies. However that may be, the petition came on for hearing on Mar. 24 at Leeds Assizes. The case was proceeding as a poor person's case in the Sheffield District Registry. The week before the hearing the petitioner's solicitors notified the King's Proctor by letter that they intended to apply to the judge at the hearing for expedition of the decree absolute, to which the King's Proctor replied that it was, of course, open to the petitioner to make application to the court for the period for the decree absolute to be shortened, but he added that

... no inquiry will be made by this department unless and until you inform me that a decree *nisi* has been pronounced, when the matter will receive attention.

At the hearing the judge came to the conclusion—and it is a conclusion of which nobody can doubt the propriety—that the case was one in which it would be right to expedite the decree absolute. The petitioner, who was serving in the Land Army, was anxious to marry a serving soldier, of whom it was stated that he was likely to be going abroad shortly. The judge dealt with the matter in this way; he made an order reducing the usual 6 months to 1 month, but added the following proviso:

Provided that should the King's Proctor lodge an objection to such period within 14 days from the date of the hearing [which was Mar. 24] the question of abridgment be referred to a judge of the Probate, Divorce and Admiralty Division in London.

The King's Proctor has lodged such an objection, and is applying today for an extension of the time. Accordingly, in the very terms of the judge's order, the matter is now at large before me.

I think it may be helpful if I make some general observations upon the practice governing this matter in this Division, for it is a matter which depends upon practice and not upon any rule. As is well-known, it is quite impossible for the King's Proctor to make inquiry in every case in which a decree *nisi* is pronounced. There must be a certain element of guess-work—it may possibly be informed guess-work—in the selection of cases for inquiry. In any case in which special application is made for the shortening of the time, it is the invariable practice of the King's Proctor, and in my opinion it is his duty, to make special inquiries. I ought to add that, when the matter comes for decision on application to a judge, it is the practice to allow the King's Proctor's costs of the inquiries as against the petitioner. As a rule no costs are asked for or allowed in poor persons' cases. But the principle is the same in all cases, the King's Proctor is entitled to apply for the special costs of the inquiries. From this it follows that the King's Proctor may be put in a very grave difficulty if any encouragement is given to an undue number of such applications. In this Division, the judge is often asked at the trial to say that such an application should be encouraged, and if—and only if—it is thought that the case merits special consideration, is such encouragement given. But the decision is never made then and

A there. The most that is said is that the case seems to the judge to be "fit for expedition," and the party is advised to get into communication with the King's Proctor at once with a view to expediting the inquiries, and the matter is ultimately dealt with by summons before the judge who happens to be dealing with such matters. It is not practicable for the King's Proctor to begin his work in advance of the pronouncing of the decree *nisi*. He was perfectly correct, therefore, in this case in informing the solicitor who wrote to him before the trial about this point, and it is only right to say that had the solicitor taken the King's Proctor's advice, some days, at any rate, could have been saved in the starting of the King's Proctor's inquiries, which, I am told, have proceeded as expeditiously as possible. As is only to be expected, when one considers the volume of divorce work which there is at Leeds Assizes, the registrar would not necessarily be able to communicate with the King's Proctor on the very day upon which the decree *nisi* was pronounced, and in fact in this case he did not communicate with him for 5 days; but the solicitor, as he had been advised by the King's Proctor, could have communicated on the very day, and then the King's Proctor's inquiries could have been begun so many days earlier.

B Coming back to the general position, great difficulties are necessarily created for the King's Proctor if, as I am informed is sometimes done, an order is made for a definite shortening to some prescribed period by the judge of assize. The King's Proctor at that time has not been heard on the point, and he has had no opportunity of knowing where he stands—he does not know whether or not it is a case in which it will be necessary for him to intervene or to take any steps to bring any matters to the notice of the court. Moreover, the circumstances in these cases vary enormously. In some cases the inquiries may be very easy and very short, but in other cases they may necessarily be more prolonged.

C There is another aspect of the matter to which I should like to call attention, and it is this. The King's Proctor is not provided with an unlimited staff, and, if an order for a reduction of the period by a definite amount of time were made habitually at the hearing, it would necessarily operate so as to give an unfair advantage to the cases in which the order was made, and, for the reason I have already stated, it would create very great practical difficulties for the King's Proctor.

D In this particular case, the judge added the proviso to which I have already referred and has thus enabled the King's Proctor to make the present application. It is not for me to lay down any practice for His Majesty's judges of assize. But if I may venture to make a suggestion, it is this, that precisely the same result, which is the desired result, would be obtained if, instead of making an order for reduction of the period, or even an order for reduction of the period with a proviso such as this, they were to follow the same lines as are adopted in this division, and that is to express the opinion, without making an order, that the case is one for expedition, and direct that the papers, if the case is one proceeding in a district registry, be at once transferred to London for the purpose—because they must come here eventually—and if the case is already one proceeding in the principal registry, direct that the matter be put in train at once. In such cases the petitioner's solicitor will be well-advised, even if he has not already been so directed by the King's Proctor, to communicate with the King's Proctor at once, so that the King's Proctor may begin his inquiries at the earliest possible moment. But the King's Proctor will not begin his inquiries until he is assured in one way or another that the petitioner is aware of his obligations in the matter of providing for the King's Proctor's expenses in a proper case.

G I hope that those observations may be helpful both to practitioners in London and in the country, and to the King's Proctor's department. In this particular case I am very anxious that no injustice shall be done to the individual, merely because this case happens to have been selected to bring the matter forward. H I have no means of knowing whether the matter is really one of extreme urgency now or not. It may be that the soldier in question is no nearer going overseas now than he was when the matter was first brought forward in March. I propose, therefore, to deal with the matter in this way. I shall extend the King's Proctor's time indefinitely so as to enable him to complete his inquiries which, as I have already said, are being proceeded with as expeditiously as possible, and, as is the invariable practice, the King's Proctor will, I know, tell the petitioner's solicitors immediately he is ready so that the

application can be brought before a judge in the ordinary course. But having regard to the fact that the month has nearly elapsed and that a short vacation is approaching, I shall, having regard to the special circumstances of this case, give liberty to the petitioner to make an application, as a matter of urgency, if the circumstances warrant such an application, before the King's Proctor has intimated that his inquiries are complete.

Solicitors: *The King's Proctor; Pedley, May & Fletcher* (for the petitioner).
Liberty to petitioner to apply.

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

RACECOURSE BETTING CONTROL BOARD v. SECRETARY OF STATE FOR AIR. EPSOM GRAND STAND ASSOCIATION, LTD. v. SECRETARY OF STATE FOR WAR.

[CHANCERY DIVISION (Uthwatt, J.), April 21, 1943.]

Arbitration—General Claims Tribunal—Whether proceedings constitute arbitration—Arbitration Act, 1889 (c. 49), s. 24—Compensation (Defence) Act, 1939 (c. 75), s. 2 (1) (a), 9 (3), 17 (1).

In a motion to set aside an award of the General Claims Tribunal made in a dispute referred to that tribunal for determination pursuant to the Compensation (Defence) Act, 1939, the applicants contended that the rejection by the tribunal of the following contentions on the construction of sect. 2 (1) (a) of the Act was erroneous in law. The applicants' contentions were that the subsection contemplated (i) a tenancy determinable at any time at the tenant's option, (ii) a tenancy negotiated by a tenant in occupation, (iii) a tenancy for at least the duration of the emergency. A preliminary objection was taken by the respondents that the proceedings before the tribunal were not an arbitration and that the court had no jurisdiction to hear the motion:—

HELD: (i) the proceedings before the General Claims Tribunal were an arbitration within the meaning of the Arbitration Act, 1889, and the court had jurisdiction to hear the motion.

(ii) the applicant's contentions on the construction of the Compensation (Defence) Act, 1939, s. 2 (1) (a) were rightly rejected by the tribunal.

[EDITORIAL NOTE.] The first question here dealt with is whether the General Claims Tribunal is a court. If it is, an appeal will lie to the higher courts in the usual way. It was contended, however, and the contention has been upheld by the court, that the tribunal is not a court but a board of arbitrators, and that proceedings before it are an arbitration. The result is that the proper form of appeal is a motion to set aside the award which can be made only upon the grounds upon which the award of an ordinary arbitrator can be attacked.

AS TO NATURE OF COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 525, 526, para. 1166; and FOR CASES, see DIGEST, Vol. 16, pp. 98-100, Nos. 1-17.]

Cases referred to:

* (1) *Law v. Garrett* (1878), 8 Ch.D. 26; 2 Digest 363, 324; 38 L.T. 3.

* (2) *Austrian Lloyd S.S. Co. v. Gresham Life Assurance Society, Ltd.*, [1903] 1 K.B. 249; 2 Digest 364, 329; 72 L.J.K.B. 211; 88 L.T. 6.

* (3) *The Cap Blanco*, [1913] P. 130; 2 Digest 364, 331; 83 L.J.P. 23; 109 L.T. 672.

(4) *Bullfa and Merthyr Dare Steam Collieries* (1891), Ltd. v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; 11 Digest 129, 186; 72 L.J.K.B. 805; 89 L.T. 280.

MOTION for an order to set aside an award of the General Claims Tribunal, dated Sept. 28, 1942.

The applicants, the Racecourse Betting Control Board, were the owners of certain totalisator buildings on a racecourse which were requisitioned by the respondent, the Secretary of State for Air. By way of compensation the applicants claimed £6,602 per annum calculated on profits derived from use of the buildings. The respondent, on the ground that no such profits would have been made at the date of the requisition, contended that £610 per annum was a fair compensation for the use of the property. The dispute was referred to the General Claims Tribunal, which decided in favour of the respondent. The applicants applied for an order to set aside the award on the ground that the tribunal had rejected the following of their contentions put forward on the

construction of the Compensation (Defence) Act, 1939, s. 2 (1) (a), and that, therefore, the award was, on the face of it, erroneous in law: (i) that the subsection contemplates a hypothetical tenancy determinable at any time at the tenant's option, and, (ii) that it contemplates an hypothetical tenancy negotiated by a tenant already in occupation, (iii) alternatively, that the lease to be contemplated must be of such duration as is appropriate without reference to the emergency and at any rate not less than the duration of the emergency. On behalf of the respondent, the preliminary objection was raised that the proceedings before the tribunal were not an arbitration within the Arbitration Act, 1889, s. 24, and, therefore, the court had no jurisdiction to hear the motion. The motion of the second applicants was based on similar grounds to that of the first applicants.

A. S. Comyns Carr, K.C., and F. Grant for the Racecourse Betting Control Board.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), H. O. Danckwerts and Hon. H. L. Parker for the Secretary of State for Air.

A. S. Comyns Carr, K.C., and Valentine Holmes for the Epsom Grand Stand Association, Ltd.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) H. O. Danckwerts, and Hon. H. L. Parker for the Secretary of State for War.

C UTHWATT, J.: This is a motion by the Racecourse Betting Control Board: . . . for an order that the award of the General Claims Tribunal, dated Sept. 28, 1942 . . . made in a dispute between the said board and His Majesty's Secretary of State for Air, which was referred to the said tribunal for determination [pursuant to the Compensation (Defence) Act, 1939] may be set aside on the ground that the rejection by the tribunal of the contentions numbered (a), (b) and (c) in the said award is erroneous in law and there is, therefore, an error of law on the face of the said award.

D A preliminary objection was taken by the Attorney-General to the jurisdiction of the court. The first answer made by the Racecourse Betting Control Board was that the proceedings before the tribunal were "an arbitration under an Act" within the meaning of the Arbitration Act, 1889, s. 24. That is the contention which I propose first to consider.

E The Arbitration Act, 1889, does not contain any definition of an arbitration: but that the term "arbitration" has a wide meaning may be gathered from the decisions in *Law v. Garrett* (1), a case under the Common Law Procedure Act, 1854, and from *Austrian Lloyd S.S. Co. v. Gresham Life Assurance Society* (2) and *The Cap Blanco* (3), both cases under the Arbitration Act, 1889, where agreements to refer disputes to a foreign court were held to be submissions to arbitration.

F To my mind, the relegation by statute of the decision of a particular matter or matters of a particular class to a tribunal required to act on judicial lines—and clearly the tribunals set up by the 1939 Act are so required to act—makes the proceedings before the tribunal an arbitration under an Act, unless the tribunal is a court. There does not appear to me to be any other alternative. Whether the proceedings are an arbitration under an Act or proceedings before a court depends on the terms of the Act. To constitute an arbitration it is not necessary, in my view, that the word "arbitration" should in fact be used.

G Upon the Act several matters may be observed. First, the functions of the tribunal are limited to ascertaining the amount of compensation, a matter which falls peculiarly within the province of arbitration. Secondly, the tribunals have no power to enforce orders made by them. Where circumstances so require, an order can be obtained from the High Court, under sect. 9 (3) of the 1939 Act; and it will be disobedience to the order of the High Court which will be punished, not disobedience to the order of the tribunal. Thirdly, the Act does not require the tribunals to hear cases in public. Fourthly, the adjudicating bodies are called "tribunals," a term which, to my mind, unless controlled by any context, suggests something other than a court. There is no such context. Such guidance as can be obtained from the language of the Act points to arbitration, for the disputes are described as matters to be "referred," a phrase suggestive of arbitration proceedings. Fifthly, the jurisdiction of the tribunals extends as well to Scotland and Northern Ireland as to England and Wales, and the setting up of a single court with original jurisdiction for those 3 countries is, to say the least, unlikely. Lastly, if the tribunals were intended to be courts,

there is no reason why they should not have been so described ; or, following the precedent of the London Passenger Transport Act, 1933, s. 12 (5), expressly made " courts of record."

In my opinion, the result is that the tribunals are not courts and, that alternative being rejected, the proceedings before the tribunals are " an arbitration under an Act " within the meaning of the Arbitration Act, 1889.

On this basis it was conceded that there was jurisdiction to hear the motion, notwithstanding that the decision of the tribunals is expressed to be final.

I turn now to consider the question whether there is any error of law appearing on the face of the award. These errors of construction of sect. 2 (1) (a) of the Compensation (Defence) Act, 1939, are suggested as involved in the rejection, stated in the award, of three contentions which were put forward. The first contention rejected by the tribunal is :

That the Compensation (Defence) Act, 1939, s. 2 (1) (a), contemplates a hypothetical tenancy determinable at any time at the tenant's option.

The relevant sections are, first, sect. 1 (a), which provides that where, in the exercise of emergency powers during a certain period, possession of any land has been taken on behalf of His Majesty, compensation assessed in accordance with the provisions of the Act should be paid. Sect. 2 (1) provides as follows :

The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say (a) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook . . .

certain obligations. Then sect. 17 defines " emergency powers " as meaning powers conferred by any regulations made under the Emergency Powers (Defence) Act, 1939, the Telegraph Act, 1863, s. 52, or the Air Navigation Act, 1920, s. 7, as amended by any subsequent enactment or any power exercisable by virtue of the prerogative of the Crown.

The argument in favour of the first contention comes to this. There cannot in law be a lease except for a period which is fixed by the lease, or which is pursuant to some provision contained in the lease capable of being ascertained. Further, it was stated in argument that, in order to estimate the rent, it is necessary in the art of valuation to make some assumption as to the period of the duration of the lease. Therefore, some period for the lease must be implied in the section. That is the first proposition. The second proposition is that, where possession of land is taken under any of the emergency powers referred to in the Act, the Crown is at liberty to give up possession at any time without notice. The conclusion sought to be drawn is that the lease assumed by the section must, as a matter of construction of the section, be taken to be a lease determinable at any time at the tenant's option.

In my opinion, this argument should be rejected. I see no reason for thinking that there is implicit in the section as a matter of construction any suggestion as to the period of a hypothetical lease. It is the meaning of the phrase " tenant in occupation . . . under a lease," which has to be construed, not the word " lease." That phrase is, I think, completely satisfied if it is regarded as generally descriptive of the nature of the occupation without any implication as to the duration of that occupation ; and, in my opinion, this is the proper construction of the section. On this basis, the rule of law requiring a period to be set on a lease does not arise for consideration at all. So far as the needs of the valuers are concerned, due effect will, as incident to the art of valuation and not as a result of this construction of the section, be given to the circumstances attending the Crown's occupation in any particular case, namely, the right to determine occupation at will ; and, I may add, what is no less important, the probable length of the Crown's occupation, or the length in fact of that occupation (see *Bullfa* case (4)) in a case arising for adjudication after the Crown's occupation has ceased.

That is sufficient to dispose of the first contention. But two observations may be made on the second proposition embodied in the argument. As the regulations made under the Emergency Powers (Defence) Act, 1939, now stand, it is true that, in all cases to which the Compensation (Defence) Act, 1939, applies, possession may be given up by the Crown at will. That would cease to

be true if a regulation were made—and I see no reason why some such regulation could not be lawfully made—under which the Crown were required to give some reasonable notice to the owner before possession of his land were handed back to him. The second proposition assumes that no such regulation is possible. Unless the second proposition can properly take the form that in all possible cases the Crown can determine its possession at will, it finds no place in an argument for the conclusion sought to be drawn. Again, the second proposition takes into account only one of the circumstances attendant on the Crown's occupation, the right to determine at will, and excludes from consideration another equally material circumstance, namely, the probable length of the Crown's occupation; or, in a case arising for adjudication after possession has ceased, the actual length of the Crown's occupation. To my mind, there is no reason why the one circumstance rather than the other should hold the field in the argument.

Lastly, as I understood counsel for the Racecourse Betting Control Board, his argument upon the first contention ultimately took the form that the section should be read as if the words "under a lease" meant "under a lease for that period," that is to say, the period of the Crown's occupation. As regards this, it is sufficient to say it is not the contention rejected by the tribunal, with which alone I have to deal.

The third contention rejected by the tribunal is an alternative to the first contention, and runs as follows:

Alternatively, that the lease to be contemplated must be of such duration as is appropriate without reference to the emergency and at any rate not less than the duration of the emergency.

The construction which I have given to the section in dealing with the first contention disposes of this third contention; but there are other objections to it. First, the gloss involved in the construction contended for is vague and uncertain. "Appropriate," I was instructed, was intended by the author of the formula embodied in the contention to mean:

... appropriate having regard to the length of term usually created in leases of property of the class to which the property in issue in any particular case belonged.

I cannot assume—indeed, common knowledge rejects the assumption—that all properties—and subsect. (2) (a) is equally applicable to all lands—are capable of being classified and labelled in this way. I, therefore, see no reason for reading into the section a gloss which includes the word "appropriate" in the sense stated above; and I cannot attribute to it any other meaning which would get rid of the vice of uncertainty.

Secondly, the contention involves that the lease to be assumed is to be at least for the duration of the emergency. One may be inclined to assume that the emergency referred to in the formula is the emergency defined by the Act, namely, the emergency that was the occasion of its passing. But it is to be observed that the Act applies to cases where possession is taken under the Telegraph Act, 1852, s. 52. The reference to emergency in that section is an emergency making it expedient that the Government should assume control over messages by the telegraph companies therein referred to and, under that Act, possession is taken and retained of works by warrants which, though successive warrants may be issued, remain in force only for a week. Again, in the Air Navigation Act, 1920, s. 7, another emergency power, referred to in the Act as the power of taking possession, is exercisable in time of war, whether actual or imminent, or of great national emergency. The word "emergency," as used in the formula, may, therefore, require different meanings to be attributed to it, having regard to the power in right of which possession was taken. But however this may be, I see no reason why the duration of the occasion which gives rise to the exercise of the power should, as a matter of construction of the section, be imported into a hypothetical lease by reference to whose rent compensation is to be measured.

The second contention rejected by the tribunal is that sect. 2 (1) (a) contemplates a hypothetical tenancy negotiated by a tenant already in occupation. The argument put forward in favour of that contention was that sect. 2 (1) (c) provided that, where possession was taken of agricultural land, seeds and tillages were to be valued by reference to the amount which might reasonably be expected to be paid by an incoming tenant: that the express reference in

this particular case to the value to a person not in occupation justified the inference that, in sect. 1 (a), the rent was to be assessed by reference to the value to the person in occupation. To my mind, there is no substance in that argument.

An express provision that tillages and seeds are to be taken at their value to an incoming tenant—a provision which rules out their value to the owner—is no reason for inferring that, in the provision dealing with land—which applies to agricultural land as well as to other land—a contrary course is directed to be taken. Indeed, one who was obsessed with a desire for consistency might well draw an entirely different inference from the fact on which the argument is founded. I draw no inference.

In the result the motions are refused with costs.

Preliminary objection overruled. Motions refused with costs.

Solicitors: *Sharpe, Pritchard & Co.* (for the Racecourse Betting Control Board); *Treasury Solicitor* (for the Secretary of State for Air and the Secretary of State for War); *Roney & Co.* (for the Epsom Grand Stand Assoc., Ltd.)

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

In the Estate of RIPPON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), April 21 1943.]

Wills—Soldier's will—Actual military service—Will made before mobilisation and before declaration of war—Soldier called out for service to ensure preparedness for the defence of the realm against external danger.—Wills Act, 1837 (c. 26), s. 11.

The deceased was a major in the Territorial Army and, on Aug. 25, 1939, was called out and ordered by the Secretary of State for War to join his unit as it was considered that his services were required for the defence of the realm. After receiving this order and on the same day, the deceased made a testamentary document which was not a duly executed will within the Wills Act, 1837, s. 9. The Territorial Army was not embodied until Sept. 1, 1939, and war was not declared until Sept. 3, 1939. The deceased's widow applied for letters of administration with the will annexed of the estate of the deceased on the ground that the testamentary document was made by the deceased as a soldier whilst "in actual military service" and was, therefore, a privileged will under the Wills Act, 1837, s. 11:—

HELD: in the circumstances the deceased was "in actual military service" as from the time of his receiving his orders on Aug. 25, 1939. His will was, therefore, a privileged one and his widow was entitled to a grant of administration with the will annexed.

[EDITORIAL NOTE. It is said that the rule under which a soldier's will not in the statutory form may be admitted to probate is derived from the Roman law. The basis of the rule in that law was that the soldier was *in expeditione* and that he was *inops consilii*. The phrase *in expeditione* has been rendered in modern English by "in actual military service," and for some long time the invasion of England was so unlikely an event that "actual military service" became synonymous with foreign service. During the present war, however, the invasion of England has been at least a probability, and it is said, therefore, that soldiers on service in this country must be said to be *in expeditione*. This argument receives considerable support from the fact that both soldiers and civilians are subject to frequent bombardment from the air. PILCHER, J., has, however, gone farther than the decision in the recent case of *In the Estate of Spark*, [1941] 2 All E.R. 782, by deciding that a soldier may be, in certain circumstances, "in actual military service" even before a state of war has arisen. So far as the second reason for the rule, that the soldier was *inops consilii*, is concerned, it would appear that this is no longer regarded as the decisive factor in determining whether or not the will is entitled to be admitted to probate as having been made in actual military service.

AS TO ACTUAL MILITARY SERVICE, see HALSBURY, Hailsham Edn., Vol. 14, p. 198, para. 325; and FOR CASES, see DIGEST, Vol. 39, pp. 333-335, Nos. 193-219.]

Cases referred to:

* (1) *Drummond v. Parish* (1843), 3 Curt. 522; 39 Digest 333, 195; 1 L.T.O.S. 207.

* (2) *In the Goods of Hiscock*, [1901] P. 78; 39 Digest 334, 202; 70 L.J.P. 22; 84 L.T. 61.

* (3) *Gattward v. Knee*, [1902] P. 99; 39 Digest 334, 197; 71 L.J.P. 34; *sub nom. In the Goods of Knee, Gattward v. Knee*, 86 L.T. 119.

* (4) *Re Limond, Limond v. Cunliffe*, [1915] 2 Ch. 240; 39 Digest 335, 213; 84 L.J.Ch. 833; 113 L.T. 815.

(5) *In the Estate of Stanley*, [1916] P. 192; 39 Digest 336, 224; 85 L.J.P. 222; 114 L.T. 1182.

(6) *In the Goods of Hale*, [1915] 2 I.R. 362; 44 Digest 304, *case b*.

A MOTION by the widow for grant of administration with the will annexed of the estate of her deceased husband. The facts are fully set out in the judgment. *P. R. Hollins* for the applicant.

PILCHER, J.: This was a motion by Mrs. Jean May Rippon for a grant of letters of administration with the will annexed to the estate of her husband, Major James Noel Rippon.

B The applicant asks that a testamentary document not duly executed should be admitted to probate as a privileged will under the Wills Act, 1837, s. 11. The point for decision is whether the deceased was, at the time when he wrote the document in question, a soldier "in actual military service" within the meaning of the words in the Wills Act, 1837, s. 11.

C The facts can be shortly stated. Major Rippon was, in August, 1939, a major in the Territorial Army. On Aug. 25, 1939, he was at his home at Epsom when he received orders by telephone to rejoin the 258th Battery, Royal Artillery. Major Rippon was, apparently, the commanding officer of this battery and the battery was stationed at Lee, Kent. Having received orders to rejoin his battery, Major Rippon sat down and wrote the testamentary document which the appellant desires to be admitted to probate as a privileged will. The document in question was signed by Major Rippon and witnessed by his sister only and is, consequently, not a duly executed will. After writing this document, Major Rippon left his home on the same day and rejoined his battery at Lee. D After serving for a period in England, he proceeded to France with his battery. When the British Forces were evacuated from Dunkirk, Major Rippon was at first posted as missing but on Sept. 23, 1942, a certificate was received from the War Office stating that he had been killed in action in France on, or shortly after, May 30, 1940. His widow's professional advisers caused an inquiry to be addressed to the War Office in November, 1942. In reply to this inquiry a letter was received from the War Office dated Nov. 30, 1942, in which the following passage occurs:

I am directed to inform you that the deceased was an active Territorial Army officer prior to the outbreak of war, and was mobilised on Aug. 24, 1939 (the date of embodiment of the Territorial Army).

As will be seen hereafter, neither of these statements was strictly accurate, as the Territorial Army was not mobilised on Aug. 24, nor was it embodied on that day. F

When the motion first came before me, it was submitted on behalf of the applicant that Major Rippon was "in actual military service" at the time when he executed the testamentary document in question, although no state of war existed on the date when the document was actually written.

G A review of the cases dealing with privileged wills made it clear that there was some doubt as to whether any soldier could be said to be "in actual military service" unless this country was at war. The information at that time available as to the circumstances in which and the powers under which Major Rippon had been called up for service on Aug. 25, was somewhat meagre and I felt considerable doubt as to the precise meaning to be attached to the words "mobilised" and "embodiment" in the War Office letter of Nov. 30, 1942. I, accordingly, requested that further inquiry should be made of the War Office in order to clear up this and other doubtful points which had cropped up during the argument of the case. H On Feb. 24, 1943, a further letter was received by the applicant's solicitors from the War Office dealing with the queries raised by them on my suggestion. That letter is in the following terms:

With reference to your letter of Jan. 21, I am directed to inform you that Major J. N. Rippon was called out for service on Aug. 25, 1939, under directions given on Aug. 22, 1939, by the Secretary of State for War in pursuance of the powers vested in him under the provisions of the Reserve and Auxiliary Forces (Army) Order, 1939 (copy enclosed), in accordance with the Reserve and Auxiliary Forces Act, 1939, s. 1, the Secretary of State for War "being satisfied that the service of officers and men of the Territorial

Army . . . is urgently required for ensuring preparedness for the defence of the realm against external danger." His Majesty the King, having by Royal Proclamation made on Sept. 1, 1939, "been pleased to order the Army Council from time to time to give such directions as may seem necessary or proper for embodying all or any part of the Territorial Army," the Army Council on Sept. 1, 1939, by Army Order No. 158 (copy enclosed) directed "that the Territorial Army be embodied immediately and that all officers on the active list of the Territorial Army . . . shall attend immediately at their headquarters, except officers and men who have been called out for service under the Reserve and Auxiliary Forces Act, 1939, and whose service under that Act has been terminated at the date thereof, who are to attend at the place where they were serving when their service under the Reserve and Auxiliary Forces Act, 1939, was terminated . . ." Army Order No. 94 of 1940 states that "troops in commands at home and abroad are "on active service within the meaning of the Army Act, s. 189 (1) with effect from Sept. 3, 1939."

With the letter in question was enclosed a copy of the Reserve and Auxiliary Forces (Army) Order, 1939, and also a copy of Army Order, No. 158. It will be seen from this letter, and from the Orders therein referred to, that Major Rippon was directed to proceed from his home at Epsom to his battery at Lee under directions given by the Secretary of State for War on Aug. 22, 1939. The Reserve and Auxiliary Forces Act, 1939, s. 1, and the order in council made under that section, authorised the Secretary of State for War :

. . . to call out for service all or any of His Majesty's Reserve and Auxiliary Forces . . . if satisfied that their service is urgently required for ensuring preparedness for the defence of the realm against external danger.

Army Order No. 158, which is dated Sept. 1, 1939, is headed : "General mobilisation." It consists of directions given by the Secretary of State and the Army Council in pursuance of the Royal Proclamations made on the same date. The directions given have the effect of ordering the embodiment of the Territorial Army. They also deal with officers and men of the Territorial Army who, like Major Rippon, had already been "called out for service" under the Reserve and Auxiliary Forces Act, 1939, and whose service under that Act terminated on Sept. 1, 1939, by providing, in substance, that such officers and men should remain with the unit with which they were then serving.

The War Office letter of Feb. 24, 1943, and the various Orders therein referred to, seem to show (i) that Major Rippon was called out for service and ordered to join his unit on Aug. 25, 1939, because the Secretary of State for War was satisfied that his services were urgently required for ensuring preparedness for the defence of the realm against external danger ; (ii) that the Territorial Army was embodied on Sept. 1, 1939, and that it and the regular army were mobilised on Sept. 2, 1939, that is to say, one day before this country's declaration of war on Germany ; (iii) that Major Rippon, on Aug. 25, 1939, was not "on active service" within the meaning of the Army Act, s. 189 (1).

The Wills Act, 1837, s. 11, provides that :

. . . any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal property . . . without the formalities required by the Wills Act, 1837.

It is well-known that the principle which is embodied in this section was adopted from the Roman law which accorded a similar privilege in regard to the making of testamentary dispositions to Roman soldiers who were "*in expeditione*." The exemptive words "in actual military service" originally appeared in the same form in the Statute of Frauds, 1677, s. 22.

In *Drummond v. Parish* (1), a case in the Prerogative Court of Canterbury, it was sought to establish that every soldier on full pay was in actual military service and thus entitled to dispose of his personal property by a soldier's will not duly executed. In that case SIR HERBERT JENNER FUST, at p. 542, in an elaborate judgment, states his conclusion on this point as follows :

Being of opinion from the result of the investigation of the authorities, that the principle of the exemption, contained in sect. 11 of the Act, was adopted from the Roman law : I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words "actual military service," the privilege, as respects the British soldier, is confined to those who are "on an expedition."

The meaning to be attached to the words "in actual military service" has been considered in a number of later cases, the most important of which, for my present purpose, is *In the Goods of Hiscock* (2). The facts in that case were

A that during the South African War a private soldier in a volunteer battalion volunteered for service in South Africa, and, pursuant to an order, went into barracks, where he made a will, being at that time under the age of 21 years. Shortly after this he received orders to embark for South Africa, where he met his death. At the time he made his will the soldier was not on an expedition, but SIR F. H. JEUNE, P., none the less pronounced for the will on the ground that, at the time he made the will, the testator had taken a step toward joining the forces in the field. On p. 83 of the judgment there is the following passage :

B The step may be a small one, both as regards place and time. In case of invasion or civil war—both circumstances which were more present to the minds of the persons who framed the laws of this country in the time of Charles II than they are to the legislators of our own time—the step might be merely that a man was taken from his home to man the walls or defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defence, would have been within the meaning of the term “*in expeditione*” or “*actual military service*,” although the movement made or step taken by him would be small in point both of time and locality or distance.

C In the passage quoted above it will be observed that SIR F. H. JEUNE, P., seems to recognise that the idea of an expedition, upon which the exemption in the Wills Act, 1837, is admittedly founded, must not be applied too strictly. He was evidently prepared to contemplate that a soldier who takes a step under orders with the object of repelling an invasion is “*in actual military service*.”

D The matter was taken a little further by SIR F. H. JEUNE, P., himself, in *Gattward v. Knee* (3). In that case the deceased, a soldier stationed at Calcutta, wrote a letter to a friend in South Africa making certain testamentary dispositions. At the time he wrote this letter his battalion, which was stationed in India, had been warned for service and ordered to mobilise for active service in South Africa.

In the course of his judgment, after stating that, in his view, the document in question was a soldier's will, SIR F. H. JEUNE, P., said, at p. 102 :

E In so holding I am perhaps going a step further than in my recent decision—*In the Goods of Hiscock* (2)—but I have no doubt myself that mobilisation, giving to that word the effect which I understand it to carry, may be fairly taken as a commencement of that which in Roman law was expressed by the words *in expeditione*. These words meant something more than the English words “*on an expedition*,” because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be *in expeditione*. I thought, when deciding the case cited, and I still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything ; but I am of opinion that if the order for mobilisation has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione*. Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient ; but when a force is mobilised I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service. That is what happened in the present instance : within 9 days after the order to mobilise was given the force embarked for South Africa.

G The above-mentioned cases, in my view, make it reasonably clear that, if Major Rippon had received his orders to rejoin his battery and had made his will after 11 a.m. on Sept. 3, 1939, this document would be entitled to be treated as a privileged will. From the concluding words of the passage in the judgment of SIR F. H. JEUNE, P., in *Gattward v. Knee* (3), quoted above, it might well be argued that, if he had made his will on Sept. 2, 1939, which was the first day of mobilisation, the same would apply, although no state of war existed at that date.

H The point which I have to consider is whether, in all the circumstances of the present case, the fact that Major Rippon made his will 8 days before the official date of mobilisation, and 9 days before any state of war existed, alters the situation. It is clear that Major Rippon was not at the material time “*on active service*,” within the meaning to be attached to the words in the Army Act, s. 189 (1). It is, however, common knowledge that the international situation was, on Aug. 25, 1939, extremely critical. War was commonly believed then to be imminent and many instructed persons took the view, not perhaps unreasonably, that this country might be heavily bombarded from the air, and

possibly invaded, without any formal declaration of war. I have no means of knowing whether the fears which were commonly expressed on this point had any real justification and I only refer to the matter because I think it not irrelevant to a consideration of the facts of this case. There is no doubt that the situation which prevailed during the last week of August, 1939, was totally different from any which has existed in this country, at any rate since the Napoleonic wars. It was in these circumstances that the Secretary of State for War, in pursuance of powers conferred upon him, caused Major Rippon to be called out for service because the competent authorities considered that his services as a battery commander in Kent were urgently required for ensuring preparedness for the defence of the realm against external danger. The words "external danger" connote to my mind "invasion" or "aerial bombardment"—and Major Rippon, as an active Territorial officer and a battery commander, was no doubt called out before the date of general mobilisation in order that he might have his battery ready to take proper counter-measures at short notice should invasion or aerial bombardment take place in the neighbourhood of his station in Kent. A B

It is also not irrelevant that the order for general mobilisation, which came into force on Sept. 2, 1939, provided that Major Rippon, and other officers and men already called up for service, should remain where they were. So far as I am aware, the general mobilisation order did not in any way affect the activities in which Major Rippon had, for the last week, been engaged. C

The decision in *Drummond v. Parish* (1), to which I have already referred, and subsequent decisions in this court, have made it clear that some limitation must be placed upon what might otherwise have been considered to be the ordinary meaning of the words "in actual military service."

Attributing to the words under consideration their ordinary and natural meaning, I should have had little hesitation in saying that an officer in command of a battery who is ordered to rejoin his battery immediately, because the competent military authority considers that his presence with his battery is urgently required to ensure preparedness against aerial attack or invasion, is in actual military service. D

I am, moreover, of opinion that there is nothing in any case, in which the meaning of these words has been considered, which precludes me from so finding. It is true that, in the passage from his judgment in *Hiscock's* case (2), which I have quoted above, SIR F. H. JEUNE, P., in discussing the meaning of the words "in actual military service," said, at p. 82 : E

I think it must be assumed, in the first place, that a state of war exists, with which the soldier is, or may be connected.

It must be borne in mind that, in expressing this view, the President had, of course, in mind the facts of the case which he was considering. The opinion which he expresses was not strictly speaking necessary for the decision of that case. F

In this connection it is to be observed, moreover, that there is at least one case in which a will has been pronounced for as a privileged will when no state of war existed. I refer to *Re Limond, Limond v. Cunliffe* (4). The question as to whether the document under consideration was or was not a privileged will under the Wills Act, 1837, s. 11, came up for consideration by SARGANT, J., in the Chancery Division in rather unusual circumstances, to which it is unnecessary for me here to refer. The judge decided in that case that the will of an officer in the 6th Punjab Infantry, made after he had been mortally wounded by a fanatic and at a time when military operations in Waziristan had ceased, was a privileged will. The officer in question formed part of an escort supplied to a party engaged in the delimitation of the frontier. The will was made and the officer died some 2 months after the date when the operation in Waziristan, for the purposes of granting a war medal, were regarded as having ceased. I only refer to this case in order to show that the proposition laid down by SIR F. H. JEUNE, P., namely, that a state of war must exist before a soldier can make a privileged will, must not be construed too literally. There are also other cases in which privileged wills have been pronounced for when the testator has been engaged in operations which were more in the nature of punitive expeditions than wars preceded by any formal declaration. G H

There are, moreover, a number of cases dealing with the circumstances in which

sailors are entitled to make privileged wills, which go to show that the courts, in construing the relevant words of the Wills Act, 1837, s. 11, have inclined towards a liberal interpretation. I need only refer to *In the Estate of Stanley* (5), in which the Irish case of *In the Goods of Hale* (6) is quoted with approval.

In my opinion, whether or not a soldier is "in actual military service" so as to enable him to make a privileged will, must depend upon the facts of each case and the circumstances which exist at the time. In the present instance, I think that Major Rippon was ordered, on Aug. 25, 1939, to take up duties which constituted him, when performing such duties, "a soldier in actual military service," and, having made his will after he received such orders, he was, in my opinion, on the authority of the decisions of Sir F. H. JEUNE in *Hiscock's* case (2) and *Gatward v. Knee* (3), at the time he made his will "in actual military service." His will is, therefore, a privileged will; and the applicant is entitled to a grant of administration of his estate with the will annexed.

Letters of administration with will annexed granted.

Solicitors: *Emmett & Co.* (for the applicant).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

HODGE v. ULTRA ELECTRIC, LTD.

[KING'S BENCH DIVISION (Charles, Tucker and Croom-Johnson, JJ.),
April 15, 1943.]

Emergency Legislation—Essential work—Authorised dismissal of employee—Subsequent direction to reinstate—No work available—Employee paid wages but not given work—Defence (General) Regulations, reg. 58A, para. 4 (A) (a)—Essential Work (General Provisions) Order, 1942 (S.R. & O., 1942, No. 371) arts. 4 (1), 5 (3).

The respondents, a firm scheduled under the Essential Work (General Provisions) Order, 1942, applied to the national service officer for permission to terminate the employment of an unskilled worker on the ground that they had no work for her to do. The national service officer having given his consent, the employee requested him to submit the matter to the local appeal board. That board having decided that the employee was not redundant, the national service officer reversed his previous decision and on Aug. 1, 1942, issued a direction to the respondents that the employee should be reinstated in their employment as from Aug. 10, 1942, in accordance with the Essential Work (General Provisions) Order, 1942. The respondents accordingly took the employee back into their service and paid her at the same rate of wages, but gave her no work because, when she attended at the respondents' works on Aug. 10, and on several occasions thereafter, there was no work available for which she was suitable. It was contended that the employee was not reinstated unless she was provided with suitable work:—

HELD: the duty of reinstatement involved putting the employee back in the same position on the same terms as before and providing work if it was available. Since it was not proved that there was suitable work available, there was a sufficient compliance with the direction.

[EDITORIAL NOTE.] The employers, having dismissed the employee because they had no further work for her to do, were ordered by the national service officer, after an appeal to the local tribunal, to reinstate her. They paid her wages, but did not find her any work to do, for the reason that, as they alleged, they had no suitable work for her. The question thus arose whether the employers had reinstated the employee. It was argued that merely putting the employee back on the pay-roll was not reinstatement and that the employers were bound to find work for the employee. The allegation of the employers that there was no suitable employment and that the employee had become redundant does not seem to have been seriously attacked and this allegation, it seems, must be taken to have been proved. If it was proved that there was suitable employment available, the position might well be that reinstatement includes the provision of work as well as pay.

AS TO ESSENTIAL WORK (GENERAL PROVISIONS) ORDER, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION [14] 128.]

Cases referred to :

(1) *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653 ; 12 Digest 621, 5121 ; 70 L.J.K.B. 897 ; 85 L.T. 222.

* (2) *George v. Mitchell and King*, [1943] 1 All E.R. 233 ; Digest Supp.

CASE STATED by three justices of the peace for the county of Middlesex sitting at Acton, dismissing an information by the appellant, the national service officer, against the respondents alleging failure to comply with a direction to reinstate in their employment a specified person within the meaning of the Essential Work Order. The facts are fully set out in the judgment of CHARLES, J.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and Arthian Davies for the appellant.

Valentine Holmes for the respondents.

CHARLES, J. : This matter comes before the court by way of a case stated by three of the justices of the peace for the county of Middlesex sitting at Acton. It relates to the dismissal of an information which was made against a firm named Ultra Electric, Ltd., under the Defence (General) Regulations, reg. 58A, and the Essential Work (General Provisions) Order, 1942, which alleged :

... that they being a person carrying on an undertaking scheduled under the said Order did on or about Aug. 10, 1942, in the parish of Acton in the said county fail to comply with a direction given by a national service officer, namely, Arthur Thomas Spencer, to reinstate in their employment one Dorothy Birch, a specified person within the meaning of the said order, who had been dismissed, permission to dismiss the said Dorothy Birch having been cancelled by the national service officer.

The circumstances of the case as found among the facts proved or admitted show that, on Mar. 30, this lady, Mrs. Dorothy Birch, was employed as a viewer—that is, inspecting parts that come into the shop in their undertaking. Apparently it was not skilled work. On May 18 the respondents, that is, Ultra Electric, Ltd., applied, as they were entitled to apply by the regulations, to the national service officer for permission to terminate the employment of 7 persons on the ground of redundancy, that is to say, that the respondents had no work for them. On June 11, permission in writing was given by the national service officer to terminate that employment of those 7 people, one of the 7 being Mrs. Dorothy Birch. Then Mrs. Dorothy Birch availed herself of her undoubted rights, and on June 16 she, pursuant to art. 5 (1) of the said Order, that is, the Essential Work (General Provisions) Order, 1942, made a request in writing to the national service officer to submit the matter of the termination of her employment to a local appeal board. That the officer did, and on July 20 the board met and heard this appeal, and decided that Mrs. Dorothy Birch was not redundant. It is to be observed that the local appeal board is advisory only ; it has no powers of determination ; but it passed its advice, as it was in duty bound to do, to the national service officer, and he, on receiving that recommendation, reversed his previous decision and issued to Ultra Electric, Ltd., a direction in the following terms :

I, the undersigned, have considered the recommendation of the local appeal board which on July 20, 1942, heard the appeal made by the person whose particulars are given below against her dismissal from your employment as the result of permission granted by a national service officer on June 11, 1942. In the light of that recommendation I hereby direct in accordance with the Essential Work (General Provisions) Order, 1942, art. 5 (3), that the person named below should be reinstated in your employment as from and including Aug. 10, 1942, in accordance with the requirements of the Essential Work (General Provisions) Order, 1942.

Ultra Electric, Ltd., who do not exhibit in this case any desire to evade their responsibilities or in any way to flout or disregard the order lawfully made under the Essential Work Order, took Mrs. Birch back into their employ, that is to say, they put her again on the pay-roll at the same rate of wages, they paid her those wages, they insured her under the National Health Insurance Act, and treated her in every way as she was treated before, that is to say, as an employee in their service, save only that they gave her no work. We have to find why. The magistrates, having obviously listened very carefully to all this evidence, found as a fact that, when she attended on Aug. 10 at the respondents' premises in order to work, there was in fact no work available for her to do. Now, it appears to me that the word " reinstatement " in a case of this sort does connote the putting back of the person dismissed, so far as is humanly

possible, into the same position as he or she was in when he or she was dismissed from that service. I am unable to say that I can give accord to the submission that the idea of giving work is not to have any consideration in the matter. I think it has. Both work and wages under these regulations and under the Essential Work Order are very closely knit. When this firm was told to reinstate, they did everything save give work on Aug. 10, because, as the magistrates have found as a fact, there was no work to do. They did, therefore, in fact, A reinstate that employee, Mrs. Birch, and finding, as I do, upon the facts of the case, that that is the position, I have come to the conclusion that the magistrates were quite right in dismissing this information, and that this appeal must be dismissed with costs.

TUCKER, J. : The question which arises in this case is, in my view, what is the correct interpretation to be put upon the words "direct the reinstatement of any specified person who has been dismissed," which occur in the Essential B Work (General Provisions) Order, 1942, art. 5 (3). The Essential Work Order is, it is to be observed, made by the Minister pursuant to powers conferred upon him by the Defence (General) Regulations, reg. 58A, para. (4A) (a) of which provides that :

The Minister may by order make provision for securing that enough workers are available in undertakings engaged in essential work and may in particular provide by any such order (a) for securing that, except in circumstances and to the extent provided C by the order, persons employed in any such undertaking shall continue to be employed in that undertaking, and shall not be caused to give their services in any other undertaking.

Pursuant to those powers, he proceeded to make this order, which provides, by art. 4 (1) :

Subject as hereafter in this Order provided, where a person carries on a scheduled D undertaking the following provisions shall apply : (a) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person . . . except with the permission in writing of a national service officer.

Then there is provision made for appeal to a local appeal board and for reconsideration by the national service officer in the light of any recommendation that may be made by that appeal board. Then come the words to which I E have already referred, words which fall for decision in this case, in art. 5 (3), which runs as follows :

The national service officer, after considering any such recommendation as aforesaid, may cancel any permission already given, or grant or refuse to grant any permission, or direct any specified person who has left his employment to return to it, or direct the reinstatement of any specified person who has been dismissed . . .

F It appears to me that the words "direct the reinstatement of any person who has been dismissed" must be read in relation to the corresponding words in art. 4 (1) (a), which deal with the termination of the employment. Art. 4 (1) (a) says :

. . . the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person . . .

G It appears to me, therefore, that reinstatement involves putting the person in law and in fact back into the same position which that specified person occupied before the employer had terminated his employment in the undertaking within the meaning of art. 4 (1) (a). In this particular case, the national service officer, having first of all given his consent in writing to the termination of the employment, reconsidered the matter in the light of the recommendation of the local appeal board, and eventually by notice dated Aug. 1, 1942, issued a direction to H Ultra Electric, Ltd., which has already been read by my Lord. It is not disputed that that is a perfectly valid order which nobody can go behind, and that it had to be obeyed by the person named therein, namely, Ultra Electric, Ltd., when it called for the reinstatement of a specified person, namely, Mrs. Dorothy Birch.

The question in this case is whether on the facts stated in this particular case, there has been or has not been a compliance with that direction. It is to be observed that the information charges that an offence was committed on Aug. 10, 1942, and the direction that I have just read was dated Aug. 1, 1942. The

case finds that on Aug. 10, 1942, Dorothy Birch attended at the premises in order to work, that there was no work available for her to do on that day, and that she was so informed, and that she was told she would receive her wages. The case then proceeds to find that she attended at the respondents' works from time to time thereafter, but that there never was any work available for which she was suitable. In my view, on those findings the justices were perfectly entitled to come to the decision that it had not been proved to their satisfaction that there was failure to comply with this direction. I think that there was a duty, as I have already said, to put Mrs. Birch back into the same position in law and in fact that she occupied before, and I am unable to find on the facts stated in this case that that was not done. There is not much in this case from which we can ascertain precisely what her previous position was. All we know is that she was an unskilled person who had been engaged on Mar. 30, 1942, as a viewer. There is no finding with regard to the quantity and regularity of the work which she had previously been employed to perform, and I do not think, without these statements of fact in this case, that it is possible to say that Ultra Electric, Ltd., did anything which showed a repudiation of the relationship of employer and employee as between themselves and Mrs. Birch. If there had been anything in the nature of a refusal then or thereafter to provide her with work, if suitable work were available, then I think different considerations would arise. I think, for those reasons, that, on the particular facts in this particular case as stated, it is impossible for us to say that the justices came to an erroneous decision in point of law.

CROOM-JOHNSON, J. : I agree, and for the same reasons.

It seems to me that the duty to reinstate must be a duty to put her back where she was in the same job and under the same terms and conditions. I assume for the purposes of my judgment that there was an obligation to find some work, but I cannot think that there was an obligation to find work every day or to find what was described in one of the cases as continuous work. Without citing it, I may just give the reference to the observations of A. L. SMITH, M.R., in *Turner v. Sawdon* (1), at pp. 656 and 657. If it were otherwise, an action would lie at the suit of the servant for not being given enough work, or possibly what he regarded as a fair share of the work—in other words, the obligation is an obligation to give work if there is work and not an absolute obligation to give work when there is none in fact. In those circumstances, the word “reinstatement” not being a term of art and having no specialised meaning, but being a word which is to be used in its ordinary sense, I can see no trace whatever that the justices have proceeded on any wrong basis of law in coming to the conclusion that, with regard to this charge which is that of not obeying the direction, which they cannot go behind, they took into account wrong matters.

I desire only to add one other thing, which is, perhaps, a little outside my function, but I cannot pass from the case without calling attention to it. I notice some observations by MACKINNON, L.J., in *George v. Mitchell* (2), in which he calls attention to the effect of these regulations upon industry. The urgent need for labour at the present time leads me to think that, when applications are made by employers to discharge workpeople on the ground that they have no work for them to do, the employers, in the words of MACKINNON, L.J., at p. 238, “presumably know their own business.” I desire to emphasise those words, and I think that the most careful and cautious proceedings should be taken before employers are made to retain in their service people whom they think they cannot usefully employ in the national effort.

Appeal dismissed with costs.

Solicitors : *Solicitor to the Ministry of Labour* (for the appellant); *Herbert Baron & Co.* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

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